

University of Chicago Legal Forum

Volume 1994 | Issue 1

Article 18

Making the Crime Fit the Punishment: Pre-Arrest Sentence Manipulation by Investigators under the Sentencing Guidelines

Andrew G. Deiss

Andrew.Deiss@chicagounbound.edu

Follow this and additional works at: <http://chicagounbound.uchicago.edu/uclf>

Recommended Citation

Deiss, Andrew G. () "Making the Crime Fit the Punishment: Pre-Arrest Sentence Manipulation by Investigators under the Sentencing Guidelines," *University of Chicago Legal Forum*: Vol. 1994: Iss. 1, Article 18.
Available at: <http://chicagounbound.uchicago.edu/uclf/vol1994/iss1/18>

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Making the Crime Fit the Punishment: Pre-Arrest Sentence Manipulation by Investigators Under the Sentencing Guidelines

Andrew G. Deiss†

The Federal Sentencing Guidelines (the "Guidelines")¹ represent the culmination of a reform movement aimed primarily at curbing judicial discretion in sentencing.² Proponents argue that the Guidelines strongly deter would-be drug offenders by ensuring that criminals convicted of similar crimes receive similar sentences.³ Critics, however, argue that the Guidelines merely shift the locus of discretion from the courts to prosecutors.⁴ According to these critics, while inconsistency and injustice might

† B.A. 1986, Yale University; M.A. 1990, University of Chicago; J.D. Candidate 1995, University of Chicago.

¹ The Guidelines were promulgated by the United States Sentencing Commission pursuant to Title 28, Section 994(a) of the United States Code on April 13, 1987. The Guidelines did not take effect until November 1, 1987. See "Introduction," in United States Sentencing Commission, *Guidelines Manual* (Nov 1993) ("USSG").

² The reform process was initiated by the Sentencing Reform Act of 1984, which focused on three goals: (1) honesty in sentencing; (2) reasonable uniformity in sentencing; and (3) proportionality in sentencing. While honesty in sentencing was thought to be achieved through elimination of parole, the reformers believed that uniformity and proportionality could only be secured through the reduction of the sentencing discretion of judges. See USSG § 1A.3 (cited in note 1).

³ See Comprehensive Crime Control Act of 1983, S Rep No 98-225, 98th Cong, 1st Sess 37, 38-39, 65 (1983), which expressed the rationale in this way:

A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public.

S Rep No 98-225 at 45-46.

⁴ Prosecutors have extraordinary discretion at virtually every stage of the prosecution. A prosecutor has authority to decide whether or not to investigate a crime. See *Community for Creative Non-Violence v Pierce*, 786 F2d 1199, 1201 (DC Cir 1986). She may also determine whether, when and where to bring charges, and what charges to bring. See *United States v Batchelder*, 442 US 114, 123-25 (1979); *United States v Goodapple*, 958 F2d 1402, 1410-11 (7th Cir 1992); *Fields v Soloff*, 920 F2d 1114, 1118 (2d Cir 1990); *United States v Brock*, 782 F2d 1442, 1444 (7th Cir 1986). The courts have allowed prosecutors full authority to decide whether to plea bargain, to grant immunity, or, in cases falling within the Guidelines, to recommend a downward departure for cooperation. See *United States v Mohney*, 949 F2d 1397, 1401 (6th Cir 1991); *United States v Moody*, 778 F2d 1380, 1385-86 (9th Cir 1985).

diminish within the courtroom, they flourish behind the doors of the United States Attorney's Office.⁵

Since Congress first passed the Guidelines, numerous scholars have explored the effect of prosecutorial discretion under the Guidelines, confirming in large measure the abuses and dangers predicted by its critics.⁶ Far less attention, however, has been paid to the power of investigating agents to influence sentences through pre-arrest manipulation.⁷ Nevertheless, judging from case law and press accounts, pre-arrest sentence manipulation of drug quantities and types by investigative officers appears to be a growing problem.⁸

Consider the case of Michael Floyd Barth.⁹ On seven different occasions over a five-week period, Barth sold crack cocaine to a government undercover agent. After the seventh sale, Barth was arrested, charged, and convicted of distributing 50.4 grams of crack, the aggregate amount of six of the seven sales.¹⁰ Because Barth had sold over fifty grams of crack, he faced a ten-year mandatory minimum sentence. According to the district judge trying the case, it was "not at all fortuitous that the agent

⁵ See, for example, Albert W. Alschuler, *Departures and Plea Agreements under the Sentencing Guidelines*, 117 FRD 459 (1988).

⁶ See, for example, Bennett L. Gershman, *The New Prosecutors*, 53 U Pitt L Rev 393 (1992); Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U Chi L Rev 901, 925-928 (1991); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S Cal L Rev 501, 501-03, 515-57 (1992).

⁷ See, for example, Eric P. Berlin, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulation Before Arrest*, 1993 Wis L Rev 187, 205-14 (1993). While Berlin develops the problems of pre-arrest government manipulation nicely, his proposed solutions to those problems, namely the expansion of the defenses of sentencing entrapment and outrageous government conduct, are, as he recognizes, somewhat limited. *Id.* at 218-26.

⁸ A Lexis search of "sentencing entrapment" in the GENFED-OMNI file reveals no cases in which the term was used before 1991. A search covering cases after 1991 uncovers dozens. See, for example, *United States v Overstreet*, 5 F3d 295, 296-97 (8th Cir 1993); *United States v Shephard*, 4 F3d 647, 648-50 (8th Cir 1993); *United States v Barth*, 990 F2d 422, 424-25 (8th Cir 1993); *United States v Rogers*, 982 F2d 1241, 1245 (8th Cir 1993), cert denied sub nom, *Phillips v United States*, 113 S Ct 3017 (1993); *United States v Stuart*, 923 F2d 607, 609, 613-14 (8th Cir 1991); *Baughman v United States*, 1993 US App LEXIS 11646, *2-4 (10th Cir 1993); *United States v Monocchi* 836 F Supp 79, 87-88 (D Conn 1993); *United States v Franco*, 826 F Supp 1168, 1169-71 (N D Ill 1993). See also Robert L. Steinback, *Sentencing Rules Distort Logic of Court System*, Miami Herald 1B (July 16, 1993).

⁹ *United States v Barth*, 788 F Supp 1055 (D Minn 1992), rev'd, 990 F2d 422 (8th Cir 1993).

¹⁰ The jury acquitted Barth of the remaining charge. *Id.*

arrested [Barth] only after he had arranged enough successive buys to reach the magic number [fifty grams]."¹¹

In an attempt to avoid a high mandatory minimum sentence, Barth, like an increasing number of other criminal defendants charged with drug offenses, asserted the defense of "sentencing entrapment."¹² In *United States v. Barth*,¹³ the Eighth Circuit became the first and only federal circuit court to recognize explicitly the existence of this defense, defining sentencing entrapment as

outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities for the purpose of increasing the amount of drugs . . . and the resulting sentence of the entrapped defendant.¹⁴

The court acknowledged that the defense of sentencing entrapment had not been widely recognized, but it asserted that cases like Barth's "are causing courts nationwide to rethink the long-established rule of entrapment."¹⁵

Although sentencing entrapment, as defined by the Eighth Circuit, applies only in cases where agents have manipulated the drug amount, the defense could apply to other situations in which defendants are induced to commit a crime carrying a stiffer sentence than the crime they were predisposed to commit. For example, investigating agents can enhance a defendant's sentence by manipulating the type of drug bought or sold or by linking the transaction to an ancillary crime.

This Comment explores the problem of pre-arrest sentencing manipulation, examines the solutions that have been proposed by commentators and courts, and suggests that a court should afford defendants a partial defense in cases in which, through pre-arrest manipulation, investigating officers have acted in a particular manner for the purpose of enhancing a defendant's sentence. Part I provides a typology of the common forms of pre-arrest sentence manipulation. Part II examines the two primary approaches that defendants have pursued to seek redress for the

¹¹ *Barth*, 788 F Supp at 1057.

¹² The district court was persuaded by Barth's argument. See *id.* The Eighth Circuit, however, was not convinced that the facts in *Barth* constituted sentencing entrapment. See *Barth*, 990 F2d at 425.

¹³ 990 F2d 422 (8th Cir 1993).

¹⁴ *Id.* at 424, quoting *Rogers*, 982 F2d at 1245.

¹⁵ See *id.*

unjust consequences of pre-arrest sentence manipulation—specifically the defenses of outrageous government conduct and sentencing entrapment—and explores their shortcomings. Part III concludes that a court should recognize a partial defense in cases where the government has acted “for the purpose of” enhancing the defendant’s sentence through pre-arrest sentence manipulation.

I. A TYPOLOGY OF PRE-ARREST SENTENCING MANIPULATION

Undercover agents can strongly influence the sentence a drug offender receives by tailoring the circumstances of a crime to fit certain categories under the Guidelines. Rather than ensuring that the punishment fit the crime, agents can make the crime fit the punishment by manipulating the amount and kind of drugs exchanged and by involving ancillary crimes in the transaction. The following Section identifies the three most common strategies that agents have employed to accomplish this goal: (1) manipulation of drug amounts; (2) manipulation of drug type; and (3) addition of ancillary charges.

A. Manipulation of Drug Amounts

Under the Guidelines, the “grade” of a drug offense is largely determined by the quantity of drugs involved.¹⁶ Within the Guidelines regime, undercover investigators have extraordinary power to control the length of a criminal offender’s sentence through manipulation of the drug amounts bought or sold.

Judging from case law and press accounts, amount-based sentence manipulation is increasingly common,¹⁷ and patterns of Guidelines-driven sentence manipulation have begun to emerge. This development is not surprising, since police officers and federal agents are well aware of the Guidelines¹⁸ and their intricacies.¹⁹ In sting cases involving relatively small transactions,

¹⁶ See USSG §§ 2D1.1-2D3.5 (cited in note 1).

¹⁷ See note 7 and accompanying text.

¹⁸ See *United States v Cabrera*, 756 F Supp 134, 135-36 (S D NY 1991), vacated, *United States v Tejada*, 956 F2d 1256 (2d Cir 1992) (“The existence of sentencing guidelines are [sic] well-known to police officers and federal agents and the impact of specific evidence on the sentence a defendant will receive surely cannot have escaped their notice.”).

¹⁹ The Sentencing Commission actively trains investigators across the country on sentencing under the Guidelines. By 1991, the Sentencing Commission had trained over 4500 individuals on the workings of the Guidelines. See *United States Sentencing Commission, 1991 Annual Report* at 28 (1991). Under the Sentencing Reform Act of 1984, the

strikingly similar patterns of repeated buys and delayed arrests suggest an investigative *modus operandi*.

The most common pattern is exemplified by the facts in *Barth*.²⁰ For example, in 1992, 35-year-old Angela Diane Reese, a single mother and first-time drug offender, was arrested after selling fifty-nine grams of crack to an undercover officer in seven separate transactions.²¹ On May 5, 1993, she was sentenced to twelve years in federal prison. After sentencing, Reese observed, "there are people that murder, rape and kill who don't get that much time."²²

Pre-arrest amount-based manipulation, however, manifests itself in various ways. For example, in *United States v Rosen*,²³ the Drug Enforcement Administration ("DEA") intercepted a 10,000 pound shipment of marijuana smuggled from Columbia. Posing as smugglers, DEA agents delivered the shipment to drug importer Michael Goldin. Goldin notified his customers that the marijuana had arrived. He instructed them to drive to Maine and deliver their vehicles and keys to him. Goldin then gave the keys and the cars to "his" men who, unbeknownst to Goldin, were DEA agents. According to Goldin's plan, these men were to drive the customer's cars to a storage facility and load them with marijuana.²⁴

One customer, Jay Martin Rosen, "negotiated, paid for, and expected to receive" only thirty pounds of marijuana.²⁵ When the agents returned the car to Rosen, however, they informed him that they had filled his car with 150 pounds of marijuana, gratis. At sentencing, the full 150 pounds were used to calibrate Rosen's base-offense level.²⁶ Rosen's 150 pound "purchase" translated to a fifty-one month prison stay.²⁷ Had Rosen been convicted of possessing merely the thirty pounds he sought to buy, his sentence would have been between twenty-one and twenty-seven months.²⁸

Commission is authorized to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process." 28 USC § 995(a)(18) (1988).

²⁰ 990 F2d at 422.

²¹ See Steinback, Miami Herald at 1B (cited in note 8).

²² Id.

²³ 929 F2d 839 (1st Cir 1991).

²⁴ Id at 841.

²⁵ Id at 843.

²⁶ Id at 841, 843.

²⁷ *Rosen*, 929 F2d at 841, 843 n 7. See also USSG §§ 2D1.1(c)(11), 5A (cited in note 1).

²⁸ USSG §§ 2D1.1(c)(12), 5A (cited in note 1). See also *United States v Stuart*, 923 F2d 607, 610-11 (8th Cir 1991). In that case, the court rejected a sentencing entrapment defense where the government "fronted" a kilogram of cocaine to the defendant, who

B. Manipulation of Drug Type

Not only can investigators manipulate a defendant's sentence by manipulating the amount of drugs exchanged, but they can also enhance a defendant's sentence by selecting the type of drugs to be bought or sold. Drug-type manipulation is a powerful undercover weapon because, under the Guidelines, some drugs carry far harsher penalties than others.²⁹ For example, both Reese and Barth were convicted of dealing crack cocaine. Had they sold powder cocaine instead of crack, however, a five-kilogram sale would have been necessary to yield the same sentence as that they received for selling little more than fifty grams of crack.³⁰

While neither Reese nor Barth argued that they had been entrapped by the agent's choice of drug, other drug defendants, such as Donald K. Shephard, have advanced this very argument.³¹ For an eight-month period beginning in April 1988, Shephard was the target of a sting operation conducted by Kansas City undercover detective Mary Brown. Over that period, Brown made twelve purchases from Shephard. In the course of these transactions, she bought both powder cocaine and cocaine that she asked Shephard to "rock"—to transform into crack cocaine. At trial, the court rejected Shephard's argument that Brown's request that he "rock" the cocaine constituted sentencing entrapment.³²

C. Charge Manipulation

Undercover officers may also influence a defendant's ultimate sentence by linking the drug transaction to ancillary crimes. In *Shephard*, during the final stages of the investigation Brown persuaded Shephard to accept food stamps in payment for

would have otherwise purchased less cocaine because of a lack of money. The informant, who had pleaded guilty to a number of drug offenses, knew that he would not receive the government's recommendation for a sentence reduction if he failed to convince the defendant to purchase a full kilogram. *Id.* at 610.

²⁹ See, for example, USSG § 2D1.1(c) n 10 (cited in note 1).

³⁰ See *id.* See also 21 USC § 841(b)(1)(A) (1988).

³¹ *United States v Shephard*, 4 F3d 647, 650 (8th Cir 1993).

³² *Id.* The court held that the argument was "not properly [a] sentencing entrapment argument . . . , but rather [a] theor[y] of entrapment on the elements of the crimes," and this was an issue for the jury. *Id.* While the possibility for arbitrary application of the law is great in both drug-amount and drug-type based entrapment, the latter category additionally contains a troubling systemic component: 92 percent of all federal crack defendants are African-American; 72 percent of powdered cocaine defendants are not.

the cocaine. At trial, Shephard argued not only that he had been a victim of drug-type sentence manipulation, but also that undercover agent Brown had “[l]ured [him] into the [f]ood [s]tamp [t]rade [b]usiness in [o]rder to [i]ncrease [his] [p]unishment [u]nder the Sentencing Guidelines.”³³

By orchestrating sting operations to follow specific Guidelines provisions, agents can exert dramatic influence on the ultimate length of defendant’s sentence. For example, an agent can encourage a defendant to include a dangerous weapon in the transaction.³⁴ She can also try to induce a drug sale within a thousand feet of a schoolyard, thereby taking advantage of the enhanced penalties under the “schoolyard statute.”³⁵

Agents can also secure lengthy convictions by inducing defendants to enter into a conspiracy. Under the Guidelines, a drug conspirator who does not complete or only partially completes a planned transaction will be sentenced as if the object of conspiracy had been completed.³⁶ This rule potentially affords investigating agents significant power over the length of an individual defendant’s sentence³⁷ because an undercover agent has full dis-

³³ *Shephard*, 4 F3d at 649.

³⁴ In *United States v Overstreet*, 5 F3d 295 (8th Cir 1993), the court upheld the actions of two undercover agents who traded two semiautomatic weapons to the defendant in exchange for cocaine base, thereby utilizing the Guidelines’ two-level “dangerous weapon” enhancement. *Id.* at 296. See also USSG § 2D1.1(b)(1) (cited in note 1).

³⁵ See *United States v Noble*, 1993 US App LEXIS 27062 (4th Cir 1993).

³⁶ The Guidelines state:

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the negotiation offense. In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted transaction shall be used to calculate the applicable amount.

USSG § 2D1.1 n 12 (cited in note 1).

³⁷ In order to mitigate the potential for investigatory excess, Section 2D1.1 provides that

where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

USSG § 2D1.1 (cited in note 1). The courts have not interpreted this provision uniformly. First, the courts have disagreed over whether a sentencing judge must make specific findings that the defendant intended to produce and was reasonably capable of producing the negotiated amount. Second, the courts have divided on the issue of who bears the burden of proving a defendant’s intent and ability to produce the negotiated amount. See *United States v Christian*, 942 F2d 363, 368 (6th Cir 1991); *United States v Reyes*, 930 F2d 310, 315 (3d Cir 1991).

Within this uncertain legal framework, in some jurisdictions undercover agents have significant power to enhance a drug offender’s sentence by convincing her to agree to sell

cretion to request as little or as much of a drug from the dealer as she chooses.³⁸

II. THE LIMITATIONS OF THE DEFENSES OF SENTENCING ENTRAPMENT AND OUTRAGEOUS GOVERNMENT CONDUCT AS SOLUTIONS TO THE PROBLEM OF PRE-ARREST SENTENCE MANIPULATION

The crux of the problem of pre-arrest sentence manipulation is not the issue of individual responsibility but of unequal implementation of the laws. For every Barth who was arrested after his seventh sale of crack, several other defendants exist who were arrested after their first sale; for every Shephard, asked to "rock" powdered cocaine, others exist who were asked simply to produce cocaine powder; and for every defendant asked to accept food stamps as payment, thousands exist who were not. Unfortunately, this wide range of outcomes represents exactly the type of discretionary abuse that Congress hoped to eliminate with the Guidelines.

When agents exercise complete discretion over the sentences of defendants, the Guidelines' goal of uniform sentences is frustrated. Furthermore, even when agents are consistent in their pre-arrest strategies, the results can be irrational: if officers delay arrest long enough, every small dealer is a potential kingpin.³⁹

a large amount of drugs, even if the transaction never closes.

³⁸ *United States v Smiley*, 997 F2d 475 (8th Cir 1993), exemplifies this point. In October 1990, undercover officer Jon Ciarletti purchased heroin from Charles Smiley. *Id.* at 477. Over the course of the next few months, Ciarletta began negotiations with Smiley to purchase additional heroin. *Id.* During the course of those negotiations, Smiley explained that his source was "transcontinental"; shortly thereafter he travelled to Thailand, visiting a village known for its opium production. *Id.* at 478. Upon his return, Smiley contacted Ciarletta to find out how much heroin Ciarletta wished to purchase; Ciarletta responded that he could "handle half of a case or a whole case." *Smiley*, 997 F2d at 478. Smiley asked what Ciarletta meant by a case, and Ciarletta replied: "two point two." *Id.*

When a coup in Thailand made the delivery of the heroin impossible, Smiley was arrested, charged, and convicted of, among other things, conspiracy to import heroin. *Id.* He was sentenced at the base level established by the "two point two" language. *Id.* at 480-81.

³⁹ The District Court for the Southern District of New York recently recognized that strict application of the Guidelines could be irrational in situations in which the arrest of a small-time dealer is delayed for a long period of time. In *United States v Genao*, 831 F Supp 246 (S D NY 1993), the court held that the Sentencing Commission failed to consider that a defendant who deals in small quantities over a long period of time is less culpable than one who sells larger quantities; thus the court could depart from the Guidelines in fixing Genao's sentence.

The courts and commentators have only begun to wrestle with the problems presented by pre-arrest sentence manipulation.⁴⁰ Defendants viewing themselves as victims of such manipulation and hoping to avoid lengthy Guidelines-driven or mandatory minimum sentences have primarily relied on variations of two defenses: (1) the defense of entrapment, and (2) the defense of outrageous government conduct. This Part examines these defenses and their limitations in the context of pre-arrest investigative sentence manipulation.

A. Entrapment Generally

The Supreme Court first recognized the entrapment defense during prohibition in *Sorrells v United States*.⁴¹ In that case, an undercover government agent visited an individual with whom he had served in World War I and asked the defendant if he could obtain some liquor. Twice the defendant refused to supply the agent with liquor, but after conversation about shared wartime experiences and a third request, the defendant finally acquiesced. The defendant left his home and returned with a half-gallon of whiskey. He was then arrested, charged, and convicted of violating the National Prohibition Act.⁴²

The *Sorrells* Court split on the appropriate standard for determining whether the defendant had been entrapped. The majority favored the "subjective test," which focuses on the "predisposition" of the defendant.⁴³ Under this approach, in order to invoke successfully the entrapment defense, a defendant must show that he lacked the "criminal predisposition" to commit the crime. The subjective test remains the federal standard, favored by a majority of state courts.⁴⁴

The dissenters in *Sorrells* argued in favor of an "objective" test, which disregards the defendant's predisposition and focuses exclusively on the behavior of the law enforcement officers.⁴⁵ The objective test asks whether the police behavior would have been likely to induce a non-predisposed individual to commit the

⁴⁰ See Berlin, 1993 Wis L Rev at 205-06 (cited in note 7).

⁴¹ 287 US 435, 452 (1932).

⁴² Id at 438.

⁴³ See id at 444-45.

⁴⁴ See Fred Warren Bennett, *From Sorrells to Jacobsen: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 Wake Forest L Rev 829, 835 (1992).

⁴⁵ See *Sorrells v United States*, 287 US 435, 448-59 (Roberts concurring).

offense.⁴⁶ This approach has been adopted by some states,⁴⁷ not to mention several influential studies.⁴⁸

While courts applying the subjective test have at times cited numerous circumstances as relevant to predisposition,⁴⁹ they have generally determined predisposition on a case-by-case basis. This *ad hoc* approach to establishing predisposition, coupled with the deference generally shown to law enforcement by both judge and jury, has limited the success of defendants who invoke the entrapment defense.⁵⁰

Despite the rare success of the entrapment defense in federal courts, the defense has been a favorite of defendants seeking an avenue to escape mandatory minimums and Guidelines-determined sentences, as well as a favorite of commentators and courts concerned with investigative guideline manipulation.⁵¹ The weakness of the defense in traditional entrapment scenarios, however, is exacerbated in the cases of "sentencing entrapment."

B. The Defense of "Sentencing Entrapment"

Only two circuits have explicitly taken a position on sentencing entrapment.⁵² In *United States v Williams*,⁵³ the Eleventh Circuit held that sentencing entrapment is not a viable defense. According to the *Williams* court, sentencing entrapment did not "survive" the Supreme Court's ruling in *Hampton v United States*.⁵⁴ Though *Hampton* was not a sentencing entrapment case,⁵⁵ the Court nonetheless

⁴⁶ *Id.*

⁴⁷ These states include Arkansas, California, Colorado, Hawaii, Iowa, Kansas, Michigan, North Dakota, New Hampshire, New Mexico, New York, Pennsylvania, Texas, Utah, and Vermont. See Bennett, 27 Wake Forest L Rev at 835 n 37 (cited in note 44).

⁴⁸ See, for example, Model Penal Code § 2.13 (1985). See also *Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice*, S Rep No 97-682, 97th Cong, 2d Sess 362 (1982); *Final Report of the National Commission on Reform of Federal Criminal Laws: A Proposed New Federal Criminal Code* § 702(2) (1971).

⁴⁹ The courts have cited factors such as: (1) the character of the defendant; (2) whether the defendant herself suggested the criminal activity; (3) whether the defendant stood to profit by the crime; (4) whether the defendant appeared reluctant to commit the offense; (5) what inducement the government offered; and (6) the defendant's apparently professional manner (language, criminal skills). See Bennett, 27 Wake Forest L Rev at 835 (cited in note 44).

⁵⁰ See Bennett, 27 Wake Forest L Rev at 835 (cited in note 44).

⁵¹ See, for example, Berlin, 1993 Wis L Rev at 230 (cited in note 7).

⁵² See *United States v Barth*, 990 F2d 422, 424-25 (8th Cir 1993); *United States v Williams*, 954 F2d 668, 673 (11th Cir 1992).

⁵³ 954 F2d 668 (11th Cir 1992).

⁵⁴ 425 US 484 (1976).

⁵⁵ In *Hampton*, the defendant was convicted of selling heroin supplied by the govern-

ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.⁵⁶

The *Williams* court thus read *Hampton* as denying the entrapment defense to any defendant predisposed to commit a crime.

Only the Eighth Circuit has explicitly recognized the defense of sentencing entrapment. In *Barth*, the district court found that sentencing entrapment justified a downward departure from the Guidelines in cases such as *Barth*'s, where undercover agents have "orchestrate[d] a defendant's sentence,"⁵⁷ because the Sentencing Commission had not adequately considered "the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make an arrest."⁵⁸ According to the court, the arresting officer was "undoubtedly aware" of the Guidelines provision that doubled the defendant's sentence if the officer waited to arrest *Barth* until *Barth* had sold over fifty grams of crack cocaine.⁵⁹

On review, the Eighth Circuit held that sentencing entrapment can justify a Guidelines departure in cases of "outrageous governmental conduct."⁶⁰ The court concluded, however, that the facts of *Barth* did not support a finding of outrageous government conduct; unfortunately the court failed to specify what conduct would meet such a standard.⁶¹

C. The Failure of the Defense of Sentencing Entrapment

According to the Eighth Circuit, a defendant arguing that the sentencing judge should depart from the Guidelines due to sentencing entrapment must show that she was "predisposed only to dealing in small quantities" of drugs.⁶² This formulation gives rise to several problems.

ment. *Id.* at 485. The trial court rejected the defendant's entrapment instruction, and the Eighth Circuit affirmed the lower court's ruling applying the subjective standard, which requires an absence of predisposition on the part of the defendant. *Id.* at 485, 488-89.

⁵⁶ *Id.* at 489.

⁵⁷ See *United States v Barth*, 788 F Supp 1055, 1057 (D Minn 1992). See also 18 USC § 3553(b) (1988).

⁵⁸ 788 F Supp at 1057.

⁵⁹ *Id.*, citing 21 USC § 841(b)(1)(A) (1988).

⁶⁰ *Barth*, 990 F2d at 424-25, quoting *United States v Rogers*, 982 F2d 1241, 1245 (8th Cir 1993).

⁶¹ *Barth*, 990 F2d at 425.

⁶² *Id.* at 424, quoting *Rogers*, 982 F2d at 1245.

First, this standard requires a defendant to show that she was not predisposed to selling amounts of drugs larger than those involved in the transaction. Thus, as a matter of proof, many future defendants will feel compelled to demonstrate small-sale predisposition. A defendant in this position may need to rely on her past criminal record or to confess to past small sales that eluded criminal detection, thus raising serious self-incrimination concerns. Furthermore, as a practical matter, it is unclear how many previous transactions and of what size serve to establish a predisposition to deal in smaller quantities of illicit drugs.⁶³

Even where a defendant can demonstrate a predisposition to sell only smaller quantities of drugs, a court might be influenced by the reasons for this predisposition. For example, in *Franco v United States*,⁶⁴ the defendant contended that undercover officers delayed his arrest until he had completed enough small sales to elevate his sentence. The district court found that the defendant, who had no prior record of arrest, was a small-time dealer and addict who had suggested selling cocaine in small quantities to a government undercover agent; the agent had suggested the much larger sale.⁶⁵

Nevertheless, the district court rejected the defendant's contention that he had demonstrated "substantial reluctance" to sell the larger amount. Instead, the court found that the defendant had been unable to obtain larger quantities in the past: "This is not reluctance; this is inability, and it says nothing about whether Franco was predisposed to commit the crime for which he was convicted."⁶⁶

⁶³ *United States v Lewis*, 987 F2d 1349 (8th Cir 1993), illustrates how problematic the "predisposed to deal in lesser amounts" formulation may be. In *Lewis*, the defendant was charged with conspiring to distribute cocaine. Lewis argued that he was predisposed to distribute only smaller quantities of cocaine; in an effort to demonstrate this predisposition, he admitted to distributing one-pound quantities of cocaine on two occasions. In addition, some evidence suggested that Lewis had transported three kilograms of cocaine from Florida to Iowa. Nevertheless, the trial court ruled that Lewis was predisposed to conspire to distribute five kilograms. On appeal, the Eighth Circuit held that the trial court's finding was not clearly erroneous.

While the court's holding appears reasonable, this case reveals the difficulties of line-drawing raised by the standard. For example, would the court's holding have been clearly erroneous if the defendant had sold cocaine in one-, half-, or quarter-kilogram amounts in the past?

⁶⁴ 826 F Supp 1168 (N D Ill 1993).

⁶⁵ *Id* at 1170, quoting *United States v Franco*, 909 F2d 1042, 1045 (7th Cir 1990).

⁶⁶ 826 F Supp at 1170, quoting *Franco*, 909 F2d at 1045. In *Franco*, the court recognized that a defendant's history of exclusively small-scale transactions is not particularly probative of her predisposition toward engaging in future transactions. Small-scale sales may well provide the "seasoning" necessary to commit larger crimes, or, as the court

In addition, the Eighth Circuit's "predisposed to deal in lesser amounts" formulation perversely fails to protect the first-time offender. For example, in *United States v Martinez-Hernandez*,⁶⁷ the court rejected the defendants' sentencing entrapment claim on the grounds that "both [d]efendants presented defenses based on claims that the incident at issue was their first encounter with the narcotics trade,"⁶⁸ and thus the defendants could not establish predisposition for any amount other than the amount involved in the transaction. This holding suggests that defendants lacking criminal histories will be unable to establish a predisposition to deal in smaller amounts and therefore will not be able to invoke successfully the defense of sentencing entrapment.

With respect to drug-type sentence manipulation, the question of predisposition is even more problematic. While a dealer may enjoy well-developed contacts for one product and not for another, this "product loyalty" factor probably does not signify a dealer's lack of predisposition to sell other narcotics. More significantly, a defendant truly lacking predisposition to sell more "dangerous" drugs would encounter very difficult problems of proof. First, she would need to "prove a negative," such as the fact that she had never sold more dangerous drugs in the past. Second, she would need to proffer evidence that she was reluctant to engage in such sales. Only in the rarest of cases would a defendant be able to provide credible proof on this issue.

D. The Problem of Predisposition

Sentencing entrapment, to the extent that it relies on predisposition, is ill-fitted to the vast majority of pre-arrest sentence manipulation cases. First, defendants invoking the defense of sentencing entrapment are admittedly predisposed to commit drug crimes. Second, a defendant's claim that she was not predisposed to committing a particular drug crime, even if true, will be difficult to prove, especially given such a defendant's lack of credibility.

Furthermore, by focusing solely on predisposition, a court may overlook the important role that a government-afforded opportunity can play in pre-arrest sentence manipulation cases.

found in *Franco*, a defendant may not have had the opportunity to make a larger sale before contacting government officials. See id at 1171.

⁶⁷ 1993 US Dist LEXIS 1171 (N D Ill 1993).

⁶⁸ Id at *6.

In *United States v Hollingsworth*,⁶⁹ Judge Posner, writing for the majority, argued that entrapment exists when the government provides a criminally predisposed individual with a criminal opportunity she would otherwise never have had.⁷⁰ According to Judge Posner, “[a] person who had dreams of criminality . . . but no means of living them would be harmless and must be left alone.”⁷¹

Though the Seventh Circuit asserted that its holding had “no implications at all for the garden-variety drug cases in which the defense of entrapment is most frequently, but futilely, raised,”⁷² the logic of its holding directly applies to a defendant’s claim of sentencing entrapment. Surely hundreds of small-time drug dealers will never meet a large buyer. Thus, the Seventh Circuit’s rationale should apply equally to the defendant who, without a government-afforded opportunity, would never have gained the opportunity to consummate a large sale.

Finally, the concept of predisposition is not meaningful if drug crimes are viewed as rational, self-interested acts. Defendants asserting the defense of sentencing entrapment are, by admission, criminally predisposed. They have already demonstrated their willingness to break the law for personal advantage. They have thus balanced perceived risks and benefits on the basis of all available information.

This fact is the cornerstone of the sting scenario. Government agents expend an enormous amount of time and effort to “go undercover” and “get inside” through misrepresentation precisely for the purpose of gaining the dealer’s confidence. Agents know that once a criminal actor satisfies himself as to the criminal “integrity” of the agent, the dealer will complete the transaction. Indeed, given the dealer’s criminal predisposition, the dealer would be behaving irrationally if he chose not to complete the deal.

This argument asserts more than the mere fact that every small dealer would rather be a large one. It stresses that the government’s success in undercover operations probably stems more from a criminal’s gullibility than his culpability. In a sentencing entrapment scenario, it makes little sense for a court to inquire into the morality of the defendant; the defendant’s moral-

⁶⁹ 9 F3d 593 (7th Cir 1993).

⁷⁰ *Id* at 593.

⁷¹ *Id*.

⁷² *Id* at 601.

ity or lack thereof has already been established. In cases of pre-arrest manipulation, the inquiry should instead scrutinize the discretionary behavior of law enforcement officers.

Ultimately, the error of focusing on the issue of predisposition is that it bears little relevance to the problems associated with sentence manipulation, such as unwarranted investigative discretion. In the search for answers to the difficult problem of pre-arrest sentence manipulation, the concept of a defendant's predisposition should not be the key.

E. The Failure of the Outrageous Government Conduct Defense

As an alternative to the defense of sentencing entrapment, some commentators have argued that a court should recognize the "outrageous government conduct" defense in cases of pre-arrest sentence manipulation.⁷³ The Supreme Court first suggested the defense in *United States v Russell*.⁷⁴

While we may some day be presented with 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 process to obtain a conviction . . . the instant case is distinctly not of that breed The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.⁷⁵

The attractiveness of this defense for victims of pre-arrest sentencing manipulation is that, at least in theory, even defendants who are criminally predisposed can utilize the defense of outrageous government conduct. In *Hampton*, five Justices agreed with Justice Powell's suggestion that the outrageous government conduct defense could be utilized by predisposed defendants when police behavior has exhibited "a demonstrable level of outrageousness."⁷⁶

⁷³ See, for example, Berlin, 1993 Wis L Rev at 226 (cited in note 7).

⁷⁴ 411 US 423 (1973).

⁷⁵ Id at 431-32 (citations omitted).

⁷⁶ *Hampton*, 425 US at 495 n 7. However, Justice Powell wrote that it would be "especially difficult to show [outrageousness] with respect to the contraband offenses, which are so difficult to detect in the absence of undercover involvement." Id.

In developing a test for outrageousness, the Supreme Court invoked *Rochin v California*,⁷⁷ a case in which police officers pumped the stomach of a defendant who had swallowed morphine capsules in an effort to conceal evidence of his guilt. In *Rochin*, the Court reversed the defendant's conviction, stating that the officer's behavior did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."⁷⁸ Both Chief Justice Rehnquist, writing for the Court in *Russell*,⁷⁹ and Justice Powell in his concurrence in *Hampton*,⁸⁰ applied the *Rochin* "shock-the-conscience" standard to cases of governmental misconduct.

The defense of outrageous government conduct may exist only in theory. Only very rarely have the circuit courts found circumstances sufficiently outrageous to establish the defense.⁸¹ Thus, it is extremely unlikely that a court would extend the outrageous government conduct defense to the sentencing phase. It is equally unlikely that the typical pre-arrest sentence manipulation case would exceed the "shock-the-conscience" threshold. The majority of pre-arrest sentence manipulation cases have followed what have become standard sting scenarios,⁸² which do not shock the conscience. Thus, the defense of outrageous government conduct, like sentencing entrapment, ultimately fails to address the evils of pre-arrest sentence manipulation.

III. ALTERNATIVE APPROACHES TO THE PROBLEM OF PRE-ARREST SENTENCE MANIPULATION

A court could partially remedy the problem of pre-arrest sentence manipulation through liberal use of departure power. Under Title 18, Section 3553(b) of the United States Code, a sentencing court has the authority to depart from the Guidelines if it finds

⁷⁷ 342 US 165 (1952).

⁷⁸ *Id.* at 172.

⁷⁹ *Russell*, 411 US at 432. Chief Justice Rehnquist seems subsequently to have disavowed this idea in *Hampton*, 425 US at 488-89.

⁸⁰ *Hampton*, 425 US at 491.

⁸¹ In *United States v. Twigg*, 588 F2d 373 (3d Cir 1978), the Third Circuit allowed the defense in a case where, acting through an informant, the prosecution planned, financed, and established a drug manufacturing operation in order to draw in the defendant as part of the plan.

⁸² See Saul M. Pilchen, *The Underside of Undercover Operations*, Legal Times 39 (July 15, 1991).

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 result in a sentence different from that described.⁸³

Both the text of the Guidelines and its legislative history suggest that the Sentencing Commission did not adequately contemplate its applicability to government sting operations.⁸⁴ Moreover, in adopting the Guidelines, Congress expressly intended to address the problem of discretionary sentencing. By shifting discretion from judges to investigators, pre-arrest sentence manipulation directly contravenes congressional intent.

In light of these realities, sentencing judges could depart from the Guidelines when the government, through orchestration of events surrounding a defendant's arrest, has attempted to manipulate a defendant's sentence. On the other hand, liberal departure in such cases will not remedy pre-arrest manipulation that takes advantage of mandatory minimum sentences. Thus, a court should recognize a partial defense, thereby addressing both Guidelines and mandatory minimum sentence manipulation. A court must determine when the defense should apply. This Comment examines three possible standards: the "reasonable" agent or investigator standard; the "target" approach; and a test that evaluates the agent's intent.

A. The "Reasonable Investigator" Standard

A court could require that an investigating agent's pre-arrest behavior must be "reasonable." The principal strength of this approach is its flexibility. It affords a court the discretion to consider the totality of the circumstances surrounding the undercover operation. Unfortunately, this strength doubles as a weakness. The standard resurrects discretionary sentencing in the judiciary, which is precisely the problem that Congress sought to eliminate with the passage of the Guidelines.

Futhermore, such a test may not enhance the protection that is now available. A narrow definition of "reasonable" investigative behavior may be indistinguishable from the narrow fundamental fairness and outrageous government conduct defenses. Thus, a vague "reasonableness" standard would not represent an

⁸³ 18 USC 3553(b) (1988).

⁸⁴ See Pilchen, *Legal Times* at 39 (cited in note 82).

adequate judicial response to the problem of sentencing entrapment.

B. The Target Approach

In *Barth*, the undercover officer stated that after the fourth of seven buys, "his main purpose was to 'get to the source.'"⁸⁵ Based on this testimony, the district court found that "buys five through eight were for an investigatory purpose unrelated to the apprehension of this defendant," and thus the court excluded these transactions from the base offense level calculations.⁸⁶ The court considered only those drug amounts exchanged while the defendant was the "target" of the investigation.

This "target" approach works best when applied by a court scrutinizing large-scale undercover operations focused on exposing entire drug operations. The test does not compel investigators to damage network relationships prematurely in order to make arrests, and in some situations the standard limits the unjust sentencing effects of undercover operations.

Yet the target standard ultimately falls short because it fails to provide for adequate judicial review of investigative discretion: it does not inquire into how a target was chosen, how long a defendant can legitimately be targeted, or for what crimes a defendant may be targeted. Furthermore, the target approach does not provide a defense when an individual is singled out, not as part of a larger ring, but in order to test the parameters of the individual's criminality. Finally, the target approach only works in cases of drug-amount manipulation; it does not address the problems presented by drug-type or charge manipulation.

C. The Intent Standard

In *Barth*, the Eighth Circuit recognized sentencing entrapment when outrageous government conduct has overcome the will of a defendant "for the purpose of increasing . . . the resulting sentence."⁸⁷ This Comment advocates that a court should depart from the Guidelines whenever an agent has acted "for the purpose" of increasing a defendant's sentence under the Guidelines.

⁸⁵ *Barth*, 788 F Supp at 1058.

⁸⁶ *Id.*

⁸⁷ 990 F2d at 424, quoting *Rogers*, 982 F2d at 1245.

Had the district court in *Barth* employed a standard that tested the officer's intent to manipulate Barth's sentence, drug buys two through four would have been disallowed for sentencing purposes because the buys were made for the purpose of enhancing the defendant's sentence; by contrast, buys five through eight, made with another target in mind, would have been allowed. In short, the court would have reached the exact opposite result.

While this result may seem somewhat arbitrary, the "for the purpose of" test specifically prohibits agents from targeting an individual and intentionally enhancing her sentence. In such situations, the agent's intent is relevant more to the sentence a defendant receives than to the culpability of the defendant. Described in terms more in accordance with the focus of the Guidelines, in cases of pre-arrest sentence manipulation the government may have caused more harm to society than did the defendant.

At the same time that the intent standard prevents sentence manipulation for the purpose of punishment enhancement, it does not interfere with undercover operations, and it does not excuse a defendant for the harm she caused during the part of the undercover operation not designed to maximize her sentence. By focusing on the government actor rather than the criminal defendant, the intent test also avoids the difficulties of predisposition. Finally, it is equally applicable to amount-based, drug-type, and ancillary-charge-based forms of pre-arrest investigative sentence manipulation.

This standard may have already begun to develop in the district courts. The "for the purpose of" language has surfaced in some recent circuit court opinions. For example, the *Shepard* court stated that the Guidelines create potential "situations in which the government engages in undercover or sting transactions for the sole purpose of ratcheting up a sentence under the guidelines."⁸⁸

The "for the purpose of" approach is not without weaknesses. It does not fully eliminate the dangers posed by investigative discretion. Agents can still choose targets and, within broad limits, determine for which crimes those suspects are targeted. Nonetheless, defendants viewing themselves as victims of pre-arrest sentence manipulation would be able to question the undercover operative on the stand in the hope of showing that the officer

⁸⁸ *United States v Shepard*, 4 F3d 647, 649 (8th Cir 1993).

acted for the purpose of enhancing the defendant's sentence. Although in many cases defendants would encounter difficulty carrying the burden of persuading a court of an officer's illegitimate intent, the principle established by the test is sound. In any case, this approach affords a more practical and equitable remedy than that now available, and it limits investigative discretion without destroying undercover operations.

CONCLUSION

In the current war on drugs, investigating agents possess powerful weapons to combat drug crimes. In organizing undercover operations, law enforcement officers possess extraordinary power to control a criminal defendant's sentence by orchestrating the circumstances surrounding a crime, thereby taking advantage of the inflexible sentences established under the Guidelines and the mandatory minimums. The potential for discretionary excess is great. By comparison, those defendants who are victims of pre-arrest investigative sentence manipulation are poorly armed, having at their disposal two ill-suited defenses: the defense of sentencing entrapment and the defense of outrageous government conduct.

This Comment contends that a court should depart from the Guidelines when government agents conduct a sting operation "for the purpose of" increasing a defendant's criminal sentence. While this approach would not eliminate the dangers of unbridled investigative discretion, it would provide a versatile and meaningful check on the infantrymen of the War on Drugs.