

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

UNITED STATES OF AMERICA)	
)	
v.)	1:08-cr-23
)	JUDGE MATTICE/LEE
WILLIAM HORACE (BILLY) LONG)	

**UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR A DOWNWARD
DEPARTURE AND DOWNWARD VARIANCE**

Comes the United States of America, by and through James R. Dedrick, United States Attorney for the Eastern District of Tennessee, and Assistant United States Attorney Gary S. Humble, and responds to defendant's motion for a downward departure and a downward variance. Defendant has offered a plethora of theories in support of his motion and the United States will address them seriatim.

1. Defendant's Sentencing Guidelines Downward Departure Arguments

A. Risk in Prison

Defendant argues that he should receive a downward departure because he would be vulnerable to abuse in prison due to his having been sheriff. In *United States v. Wilke*, 156 F.3d. 749, 753 (7th Cir. 1998), a post-*Koon* case, the court stated that in order to obtain this relief the defendant must show that his "vulnerability is so extreme as to substantially affect the severity of confinement, such as where only solitary confinement can protect the defendant from abuse." "Mere membership in a particular class of offenders that may be susceptible to abuse in prison does not merit a departure for vulnerability to abuse in prison." *Id.* The defendant, however, offers no proof of potential abuse other than defendant's status as a former sheriff and deputy. He cites no other cases of the many involving law enforcement officers in this district, and indeed the Sixth Circuit, in which such a motion has been granted. None of the other sheriffs prosecuted in this state have

received a departure for this reason. Neither should Billy Long.

Moreover, it is safe to say that the Bureau of Prisons (“BOP”) has extensive experience in safely caring for former law enforcement officers. Indeed, the BOP has a wing in a facility devoted entirely to law enforcement prisoners so that they will neither be vulnerable to abuse, nor held in solitary confinement. Defendant has offered no factual proof of how defendant will be treated in prison and no evidence that any of the other law enforcement officers prosecuted in this court have in fact been abused in prison. The motion should be denied.

2. Location of Imprisonment

Defendant recognizes the BOP’s experience with former law enforcement officers by arguing that the defendant will be located more than five hundred miles away for his safety. Defendant then attempts to pluck the heartstrings of this Court by lamenting that he may receive less visits from family and friends. In support of this ground, he offers no case support, but only an assumption. This argument is reminiscent of the boy who murdered his parents and asks the court to have mercy on an orphan. This request is without merit and should be denied.

3. Solitary Confinement

Defendant next argues that he should receive a reduced sentence in the form of a downward departure because he has been in solitary confinement since February 2, 2008. He does not argue that he will be in solitary confinement once he is sent to a federal facility. To the extent that he is still confined at all at Silverdale, it has been at the request of his attorney who has sought several continuances of this matter and now seeks to benefit from this Court’s acceding to his requests. This motion should be denied.

4. Extraordinary Responsibility

The United States disagrees that the defendant has exhibited extraordinary responsibility. To the extent that the defendant seeks a reward for resigning as sheriff, he received that benefit when the government dismissed Count 28, charging him with possessing a firearm during and in relation to a drug trafficking offense, a crime with a minimum mandatory penalty of five years consecutive to any other sentence. Insofar as the defendant seeks to benefit from not seeking a detention hearing, in our view such a hearing would have been unsuccessful and it is hard to imagine that the defendant's very experienced and very aggressive counsel, Jerry Summers, would allow his client to remain in jail (in administrative segregation no less) if bond were a realistic possibility. Similarly, the defendant had no basis, and indeed not even an argument, for opposing forfeiture of the firearm he provided to a convicted felon.

With respect to the money, defendant has relinquished some of the money paid to him for his role in the illegal activity, but \$21,328 remains unpaid.

Finally, the United States submits the defendant has not accepted responsibility for this offense based upon his relentless, personal, and unnecessary attacks upon the cooperating witness in this case. From the time of his arrest and throughout the process leading up to sentencing, Mr. Long's agent, attorney Jerry Summers, has made numerous statements, both in court and extra-judicial, that are not consistent with acceptance of responsibility. *See* Fed. R. Evid. 801(d)(2)(D) ("a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" constitutes a party opponent admission); *United States v. McKeon*, 738 F.2d 26, 34 (2d Cir. 1986) (statements of counsel may be used in evidence against the client); *United States v. O'Jala*, 544 F.2d 940, 946 (1976). These statements

continued to be made even after Mr. Long entered into the plea agreement. These numerous statements are summed up in the defendant's *Second Memorandum in Support of Motion For Psychological Examination of the Government Witness*. (Court File No. 51, filed August 20, 2008)

As the Court will see in reviewing the exhibits from the hearing, the cooperating witness pressured the defendant, directed many of the defendant's actions, persisted in getting the defendant to make decisions, and pressured and harassed the defendant in ways that the defendant was unable to find a way out. The telephone calls and call log show that the cooperating witness called the defendant 140 times and that the defendant called the cooperating witness only 76 times, with 40 to 45 of those calls returning messages left by the cooperating witness.

Id. at 2. This statement was made more than three months after the defendant's guilty plea. It is clearly inconsistent with acceptance of responsibility.

It is well settled in the Sixth Circuit that the defendant bears the burden to "clearly demonstrate acceptance of responsibility." *United States v. Harper*, 246 F.3d 520, 525 (6th Cir. 2001); U.S.S.G. § 3E1.1(a). Even when a defendant pleads guilty, he is not entitled to the reduction as a matter of right. § 3E1.1, comment. (n. 3); *United States v. Mahaffey*, 53 F.3d 128, 134 (6th Cir. 1995). Although the government agreed that at time of his plea the defendant had accepted responsibility, the government did not agree to ignore acts and statements that are inconsistent with acceptance. The plea agreement provides:

The defendant agrees that the decision to file this motion is within the sole discretion of the United States. Should the defendant engage in any conduct or make statements that are inconsistent with accepting responsibility for the defendant's offense(s), including violations of conditions of release or the commission of additional offenses prior to sentencing, the United States will be free not to make such motion or to withdraw such motion if already made, and will be free to recommend to the Court that the defendant not receive any offense level reduction for acceptance of responsibility under Section 3E1.1 of the Sentencing Guidelines.

Plea Agreement, at ¶ 10.

The Sixth Circuit has frequently denied defendants an acceptance reduction when they have made statements that have tended to show an inability accept responsibility, including statements which have attempted to minimize their criminal conduct. See, e.g., *United States v. Surratt*, 87 F.3d 814, 821 (6th Cir. 1996) (persistent attempts to minimize and deny criminal conduct in statements to probation); *United States v. Wolfe*, 71 F.3d 611, 616(6th Cir. 1995) (defendant putting “spin” on conduct to minimize responsibility); *United States v. Greene*, 71 F.3d 232, 235 (6th Cir. 1995) (defendant falsely claimed motive to commit identity fraud because of fear wife’s ex-husband would find him and hurt him); *United States v. Jones*, 55 F.3d 289, 295 (6th Cir. 1995) (“grudging and incomplete admission, accompanied by an excuse to minimize his own culpability,” blaming his trafficking conviction on drug use); *United States v. Mahaffey*, 53 F.3d 128, 134 (6th Cir. 1995) (“defendant frivolously contested relevant conduct concerning the scope of his involvement in the plan to manufacture methcathinone”); *United States v. Bonds*, 48 F.3d 184, 189 (6th Cir. 1995) (defendant claimed he distributed drugs to help friends, not to make money); *United States v. Wallace*, 16 F.3d 1223 (Table), 1994 WL 43460, at *1-2 (6th Cir. 1994) (blaming tax fraud conviction on bad advice reflected defendant’s attempt to minimize culpability); *United States v. Jackson*, 25 F.3d 327, 332 (6th Cir. 1994) (attempts to minimize involvement in offense justifies denial of acceptance of responsibility); *United States v. Chalkias*, 971 F.2d 1206, 1216 (6th Cir. 1992) (same).

In short, acceptance of responsibility means “an acceptance without excuses.” *United States v. Wallace*, 16 F.3d 1223 (Table), 1994 WL 43460, at *1-2 (6th Cir. 1994). Even in his memorandum in support of the instant motion for a downward departure, the defendant

continues to aggressively maintain that it was the cooperator who “was calling the shots and pushing for the offenses to continue and to escalate.” (Doc. 75, at p.8) He further asserts that he was harassed into committing the offenses. *Id.*

It is unfortunate that the defendant in the instant case has attempted to minimize his own culpability by attacking the cooperating witness in this case. By the actions and statements of his counsel, the defendant has not accepted responsibility for his offense and should not receive a reduction pursuant to § 3E1. *A fortiori* the defendant should not receive a downward departure for extraordinary acceptance. On these facts, it is the defendant’s lack of acceptance of responsibility that is extraordinary.

5. Minor/Minimal Role

Sentencing Guidelines §3B1.2(b) allows a defendant to receive a two-point decrease in his offense level if he was “a minor participant in any criminal activity.” U.S.S.G. § 3B1.2(b). This is a “determination that is heavily dependent upon the facts of the particular case.” *Id.*, comment. (n.3(C)). A defendant bears the burden of proving by a preponderance of the evidence he played a mitigating or minor role. *United States v. Salgado*, 250 F.3d 438, 458 (6th Cir. 2001) (defendant has burden of proof on mitigating role reduction). The district court’s ruling on the issue is reviewed for clear error. *United States v. Campbell*, 279 F.3d 392, 396 (6th Cir. 2002).

As defendant concedes (Doc. 75, at 5), in order for the adjustment to apply, there must at least one other criminally responsible participant and undercover operatives are specifically excluded. *See* U.S.S.G. §3B1.2, comment. (n.2) and §3B1.1, comment. (n.1) (defining “participant”). He argues, however, that under these circumstances, the Court may depart by

analogy if the adjustment would otherwise apply. He does not cite any Sixth Circuit case to support that contention. Nevertheless, this Court does not have to decide the legal issue. Even if the Court has the authority to depart on that basis, the facts of this case clearly do not justify a departure. The defendant was neither a minimal, nor a minor participant.

Under the sentencing guidelines a minimal participant is “someone who played a single, limited role in the conspiracy.” *United States v. Williams*, 940 F.2d 176, 180 (6th Cir. 1991). *See* U.S.S.G. § 3B1.2, comment. (n.3); *United States v. Owusu*, 199 F.3d 329, 337-38 (6th Cir. 2000) (no error in refusing to apply mitigating role adjustment where although defendant was less culpable than the primary coconspirators he was not less culpable than other participants, nor less culpable than the average participant). A minor participant reduction applies to a defendant described in Application Note 3(A) as one whose role in the offense “makes him substantially less culpable than the average participant. . . but whose role could not be described as minimal.” *Id.*, comment. (n.5). The commentary regarding minimal participants states that the “defendant’s lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant.” *Id.*

In the instant case, even if the court were to apply this adjustment by analogy, the defendant has not and cannot meet his burden of showing that he was either a minimal or a minor participant on the facts of this case. The defendant was clearly not a minimal or even a minor participant because he was not substantially less culpable in this offense. Indeed, he is more culpable. As sheriff, he not only had the physical ability to shut down the whole operation, but the duty to shut it down. He could have and should have arrested the cooperator. Instead, he facilitated the offenses and proved ever willing to engage in whatever conduct presented itself to

him. He even went beyond his obvious role of protection to actually engaging in the physical transportation of the 10 kilograms of cocaine. He knew the scope and structure of the purported drug dealing and did not play a single, limited role in the offense.

Certainly his role was crucial to the success of the venture because the cooperator made it clear that he would not engage in the money laundering or drug dealing without the defendant's permission. The defendant was an equal partner in the venture and shared the proceeds equally. A downward departure is unwarranted "so long as that person's involvement in the crime was significant." *United States v. Staggs*, 205 F. 3d 1343 (Table), 2000 WL 191820 (6th Cir. 2000).

None of the proposed factual examples provided by the defendant support his argument that Long was not the "driving force behind these offenses." (Doc. 75, at p. 9.) Each of the examples shows only that the cooperator had a role in the offenses. It is an acceptable practice for law enforcement to use a cooperator as an erstwhile conspirator. In fact, that is a routine investigative tactic. None of the examples provided by the defendant undermines the essential truth in this case: the defendant had full knowledge of the illegal activity and he played a significant role in that illegal activity.

Defendant ignores all of the evidence that but for him, none of the offenses would have occurred. It was the defendant who initiated contact with the cooperator and wanted to go collect his promised campaign debt. It was the defendant who cornered the store owner in the owner's own store and threatened to use the power of the Sheriff's Department to close his business if he did not pay up. It was the defendant who eagerly agreed to tip off store owners in the event of a raid. It was the defendant who urged the cooperator to try to extort \$100,000 from the store owners. It was the defendant who eagerly wanted to be involved in laundering drug

money and who was excited at the prospect of becoming rich from drug trafficking. It was the defendant who suggested getting an ever-increasing percentage for laundering the drug money. All of the evidence proves beyond any shadow of a doubt that the defendant played a significant role in the offenses, fully understood the nature and scope of the criminal activity, and profited in equal measure. It is ridiculous to even consider that he was a minimal or minor player.

6. Drug Treatment

Defendant argues he should receive a reduced sentence because he cannot benefit from the drug treatment program at the BOP. This program, he argues, might result in a one year reduction in his sentence if he were eligible and successfully completed it.¹ The defendant argues that he would be penalized for having made the good choice of not developing a drug habit. At first blush, it is obvious that this argument assumes that this Court will violate its duty to impose a sentence that is sufficient, but not greater than necessary to achieve the goals of deterrence, just punishment, and rehabilitation. The defendant offers no case support for this argument. Instead, he once again ignores relevant Sixth Circuit law. *See United States v. Smith*, 474 F.3d 888 (6th Cir. 2007), in which the court upheld a denial of a downward departure motion due to the defendant's ineligibility to participate in the drug treatment program based upon his felon in possession of a firearm status. The court noted that the program involved inherent disparity and the court could not assume that the defendant would complete the program or that the BOP would reduce his sentence. *Id.* at 894-95.

Similarly, the Eight Circuit in *United States v. Lopez-Salas*, 266 F.3d 842 (8th Cir. 2001),

¹The statute provides that the BOP “may” reduce the period of custody for a non-violent offender for not “more than one year.” 18 U.S.C. § 3621(e)(2)(B).

has also held that where an illegal alien was eligible for participation in the drug treatment program, but ineligible for early release because of his status, that status was not grounds for a downward departure. The gist of the court's reasoning was that the defendant's situation was not atypical of many other defendants and therefore not outside the Guidelines' heartland. *Id.* at 847-48.

Long's situation creates no unwarranted disparity and is clearly not outside the heartland as his situation is the same as almost every white collar defendant sentenced in the federal system. If he merits a downward departure, then so would the other similarly situated defendants. This would result in the absurdity of more defendants being outside the heartland than are in it. The Court should reject this ground for a reduced sentence.

SENTENCING ENTRAPMENT AND SENTENCING MANIPULATION²

The Sixth Circuit has not adopted any of the doctrines proffered by the defendant, including sentencing entrapment, sentencing manipulation, or outrageous conduct. *See, e.g., United States v. Nanez*, 168 F. App'x 72 (6th Cir. 2006) (declined to adopt sentencing entrapment defense – no evidence defendant's will was overcome or that he was only inclined to deal in small quantities). Irrespective of which of the three theories the defendant relies upon, the Sixth Circuit has never adopted them and no case has been reversed or downward departure granted based upon them.

Irrespective of which of the three theories the defendant relies upon, the Sixth Circuit has

²This argument was prepared before the Court issued its memorandum and order denying defendant's motion for a psychological evaluation of the cooperating witness. That ruling, however, did not specifically address the defendant's instant motion. A more detailed discussion of the doctrines of sentencing entrapment, manipulation and outrageous conduct is contained in the United States' Brief on the Issue of Sentencing Entrapment, Doc. No. 71 (filed Oct. 1, 2008).

never adopted them and no case has been reversed or downward departure granted based upon them. The facts of this case are not unique. Reverse stings happen every day. The only thing unique about it is that the defendant was an elected public official who knew exactly what he was doing.

A. Sentencing Entrapment

In the instant case, the defendant has waived his right to contest the amount of cocaine up to ten kilograms because he pleaded guilty to an offense under 18 U.S.C. §841(b)(1)(A) that carries a mandatory minimum term of ten years. He pleaded guilty to possession of ten kilograms or more of cocaine. He did not reserve his right to challenge that amount of cocaine. However, to the extent that he is being held responsible for more than ten kilograms, then he has a right to make an argument about whether he was entrapped for sentencing purposes.

The Sixth Circuit has defined sentencing entrapment as occurring “where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs for the purpose of increasing the amount of drugs and the resulting sentence imposed against the defendant.” *Sosa v. Jones*, 389 F.2d 644, 649 (6th Cir. 2004) (quoting *United States v. Williams*, 109 F.3d 502, 512 (8th Cir. 1997); accord, *United States v. Brown*, 110 F.3d 65 (Table), 1997 WL 159372 at *2 (6th Cir. 1997); *United States v. Wright*, 48 F.3d 1220 (Table), 1995 WL 101300 at *2 (6th Cir. 1995); *United States v. Murphy*, 16 F.3d 1222 (Table), 1994 WL 18008, at *4 (6th Cir. 1994). This definition has both a subjective and an objective component. The former being the defendant’s predisposition and the latter focusing on whether the government’s conduct was outrageous. See generally Comment, Defending A Sentence: The Judicial Establishment of Sentencing Entrapment and Sentencing Manipulation

Defenses, 145 U.Pa. L. Rev. 1359, 1361 (1997). As will be seen below, it is not unusual for courts to mix the two doctrines in discussing the issue.

Very recently, the Sixth Circuit has again refused to adopt the sentencing entrapment theory. *United States v. Nanez*, 168 F. App'x 72 (6th Cir. 2006). As stated by the court:

Neal also claims sentencing entrapment, arguing that he was predisposed to deal only in small quantities of drugs and that the government induced him to deal in larger quantities to increase his sentence. Sentencing entrapment is a legal theory that has been recognized by neither this court nor the United States Supreme Court. *See generally Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932) (outlining two theories of entrapment, objective and subjective, neither of which applies to sentencing); *see also Sosa v. Jones* 389 F.3d 644, 649 (6th Cir. 2004) (“[T]he theory of ‘sentencing entrapment’ would have to be recognized and applied in this case.... [The defendant] has pointed to no Supreme Court precedent that [establishes] a federal prohibition of sentencing entrapment.”); *United States v. Jones*, 102 F.3d 804, 809 (6th Cir. 1996) (“While other circuits have recognized sentencing entrapment, this circuit has never acknowledged sentencing entrapment.... [W]e need not address whether this circuit should adopt the defense.”). We decline Neal's invitation to recognize sentencing entrapment. The record does not indicate that Neal's will was overcome or that he was inclined only to deal in small quantities. He certainly anticipated large profits, which correspond to dealing in large quantities. Thus, there is no occasion for us to consider adopting a doctrine of sentencing entrapment.

Id. at *5.

To establish entrapment, the defendant must prove that he had no predisposition to engage in the quantities involved. *See United States v. Murphy*, 16 F.3d 1222 (Table), 1994 WL 18008 (6th Cir. 1994); *United States v. Fears*, 991 F.3d 796 (Table), 1993 WL 94303 (6th Cir. 1993). *See, Defending A Sentence*, 145 U.Pa. L. Rev. at 1387. With respect to predisposition, the First Circuit has observed, “Having crossed the reasonably bright line between guilt and innocence, such a defendant’s criminal inclination has already been established, and the extent of the crime is more likely to be a matter of opportunity than of scruple.” *United States v. Montoya*, 62 F.3d 1, 4 (1st Cir. 1996). Indeed, the Sixth Circuit has stated that “[w]here a person

is ready and willing to break the law, the mere fact that government agents provide what appears to be a favorable opportunity or participate themselves in the offense itself is not entrapment.”

United States v. McLernon, 746 F.2d 1098, 1109 (6th Cir. 1984). The Supreme Court has similarly announced that there must be “[a] line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.” *Sherman v. United States*, 306 U.S. 369, 372 (1958).

Defendant claims that he was not predisposed to dealing in any drugs. Of course, any fair-minded review of the video tapes shows that the defendant immediately agreed to participate in whatever was suggested, despite his being the chief law enforcement officer in the county.

When first shown the cocaine and told it was bound for Hixson, he merely said, “I hope it makes it.”

The following is a good example of the defendant’s predisposition to violate the law.

For example, this conversation occurred after the defendant te source traveled to Rao’s convenience store.

Source: Ain't got a sign. It's a booty club, I mean naked. And if you come through there tonight, probably, cars like this, all lined up. And that boy making money like I don't know what. One boy. Now when everybody breaking the law, somebody got to pay.

Sheriff Long: Mm-hmm.

Source: I mean, you breaking the law, you making big money from breaking the law, you, you, you need to respect the law

Sheriff Long: Yeah.

Source: to cover your ass if that's what you're gonna do. That's the way I see it.

Sheriff Long: Yeah, I agree.

Source: You, you, you got to cover your ass, you just can't say, hell with everybody.

Sheriff Long: You know, that's the way it's always worked and that's the way it's going to continue to work.

Source: Of course! They know the rules.

Sheriff Long: Yeah, we didn't invent this, that's just the way it is.

Source: That's right. Found it that way, and when we leave it's going to be that way.

Sheriff Long: (Laughing) Yeah, that's exactly right, (UI) whoever takes this on

Source: There's gonna be the bad guy.

Sheriff Long: There's gonna be somebody else, that's right

Source: Exactly, and if you want your ass covered you got to pay for it.

Sheriff Long: Exactly right.

Source: It's just that simple, and people know that. I mean, people will try you though.

Sheriff Long: Yeah.

(March 29, 2007 audio tape)

It should also be noted that the defendant was in many ways very cagey about what he was doing, which further indicates that he was not entrapped. He did not want to have money handed directly to him. He always wanted it given to the cooperator first. He expressed reluctance to deal directly with the undercover FBI agents posing as extortion victims because he suspected they were in fact FBI agents trying to set him up. (See affidavit at ¶17)³ He also expressed concern after the first shakedown of the store owner on April 3 that someone who had been present in the public area of the store might have been an undercover agent and the meeting

³On July 17, 2007, the former sheriff said: "I can't take no money from them personally you know, because I'm afraid they're going to be feds. They'll have both you and me in jail."

might have been a setup. (Audio tape of April 3, 2007) On another occasion, the FBI had a hidden camera at the cooperator's business, but the defendant moved the meeting because he feared that he could be observed by passers by. (See affidavit at ¶10)

In addition, the defendant must show that the government's conduct was outrageous and done for the purpose of increasing the defendant's sentence. *United States v. Wright*, 48 F.3d 1220 (Table), 1995 WL 101300 (6th Cir. 1995); *United States v. Brown*, 1997 WL 159372, *3 (6th Cir. 1997). Whether the government's conduct in conducting the investigation will be discussed in more detail below.

B. Sentencing Manipulation

Sentencing manipulation is a species of the objective theory of entrapment because it focuses on the government's conduct, rather than the defendant's. *Id.* at 1373. In *United States v. Sivils*, 960 F.2d 587(6th cir. 1992), the Court in dicta stated that if the defendant could show "the government manipulated the dollar amount of cocaine to increase his sentence, such manipulation would certainly provide a fundamental fairness defense against a higher sentence." *Id.* at 598-99. The court cited in a footnote the Supreme Court's decision in *Hampton v. United States*, 425 U.S. 484 (1976) (plurality), in which that Court was unable to agree whether predisposition would negate any fundamental fairness defense. *Id.* In *Sivils*, however, the facts did not support manipulation because the government had not acted unreasonably in selling the defendant a kilo of cocaine at a bargain price of \$15,000. The court further found it significant that the defendant ratified the amount of cocaine purchased. *Id.*

In *United States v. Fears*, 991 F.3d 796 (Table), 1993 WL 94303 (6th Cir. 1993), the Sixth Circuit addressed defendant's argument that his due process rights had been violated in a

reverse sting. The defendant argued that he had been talked into buying more cocaine than he had intended. He claimed sentencing entrapment, alleging that “the government willfully manipulate[d] the quantity of drugs involved so as to artificially increase the sentence of the [defendant’s sentence].” *Id.* at *3 (quoting the defendant’s brief). The appellate court found no error. Although there was some hesitation on the defendant’s part to purchase a greater quantity of cocaine than originally discussed, there was no evidence he made the purchase because his will had been overborne. *Id.* The defendant “had plenty of time to think about what he was doing.” *Id.* The Sixth Circuit discussed whether there even was such a defense as sentencing entrapment, citing *United States v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir. 1991), in which that court did not recognize the defense, but suggested in dicta that “[w]here outrageous official conduct overcomes the will of an individual predisposed only to dealing in small quantities, this contention might bear fruit.” *Id. Fears, supra*, at 3. The Sixth Circuit found that it was not prepared to recognize such a defense. “However, if there is such an animal as ‘sentencing entrapment,’ it can only exist in a habitat where there is no predisposition to do something that results in the higher sentence.” *Fears*, at *3 n.3 (reiterated by the Sixth Circuit in *Murphy*, 1994 WL 18008, at *4). The Court then cited the Third Circuit in *United States v. Twigg*, 588 F.2d 373, 376 (3d Cir. 1978), in which that court observed in a non-sentencing context that “[t]he entrapment defense requires an absence of predisposition on the part of the defendant to commit the crime.” *Fears*, at *3.

The *Fears* Court followed *Sivils* and held that where the defendant had ratified the amount of drugs, it did not need to reach the predisposition issue. *Id.* at *3. The Court also found that it was clear that *Fears* was in fact predisposed to deal in larger quantities, as well as

ratified the larger sale. *Id.* at *4. “Fears was clearly predisposed to deal in quantities which, if not expandable without limit, at least amounted to five or more kilograms. The conduct of those conducting the sting was by no means outrageous, and it certainly did not overcome Mr. Fears’ will.” *Id.*

In short, to establish sentencing manipulation, the defendant would have to show that the government had no legitimate purpose in dealing in the chosen quantities. *See Brown*, 1997 WL 159372, at *2-3. *See Defending a Sentence* at 1387. As set forth below, the government had very legitimate reasons dealing in the chosen quantities, none of which involved choosing a quantity based upon its effect on sentencing. Of course, the defendant has the burden of establishing manipulation and he has not offered any facts to even make a prima facie case. He simply argues conclusions. He claims without any evidence that the FBI picked the amount of drugs “because that amount carried with it a mandatory minimum sentence.” (Doc. 75, at p. 19.) As set forth below, the government did not engage in sentencing manipulation.

C. Outrageous Government Conduct

As set forth above, it is clear that outrageous conduct is a component of sentencing entrapment which the defendant would have to prove, even if the defense were recognized in this circuit. Nevertheless, defendant also argues that this is a stand alone sentencing defense. He makes a number of claims, none of which has any merit.

He claims the government’s conduct was outrageous because agents could have arrested the defendant in April, 2007 when he first threatened the store owner. While the government could have arrested the defendant then, it was under no obligation to do so. *See United States v. Watkins*, 179 F.3d 489, 503 (6th Cir. 1999). Indeed, it should be obvious that when targeting an

elected public official the government must have a very strong case before initiating prosecution. Contrary to the defendant's suggestion, the government had a duty to the defendant and the community to ensure that it had a very strong case before taking action that would remove an elected official. Although the government had probable cause to arrest the defendant, this was only one episode. Certainly, the government had a duty to explore the extent and scope of a corrupt public official's criminal activities. Furthermore, it was important for the government to develop a strong prosecutable case and to remove frivolous defenses, such as the defendant was "running his own undercover investigation."

An obvious question during the course of the investigation was whether the defendant was involved in other criminal activities with other individuals, some of whom might also be corrupt public officials. Given defendant's statement "that this was the way things were done" and given defendant's readiness to participate in any illegal activity (no matter how reprehensible, especially for a law enforcement officer), the FBI had reason to believe that there was other illegal activity.

The defendant also talked about protecting other illegal activities, such as methamphetamine manufacturing (e.g., the sale of chemicals needed for the manufacturing process) and video poker machines. Additional criminal activity that supplied the defendant with allegedly "dirty money" was a very effective way to build his trust and gave the agents the potential to learn about other criminal activity. An expansion of the alleged criminal activity would also be strong proof of defendant's predisposition and to rebut any possible entrapment defense.

The crimes were also escalated to build a stronger case without anyone getting hurt and to see what limits the sheriff had, if any. The sheriff himself kept extending those limits. It was also hoped that the sheriff would ultimately be more willing to cooperate and reveal other criminal activity in which he was involved, which at the time seemed very likely.

The transition from extortion to money laundering was seamless. During casual conversation, the sheriff was told on one occasion about Mexicans moving into the area and dealing drugs. The sheriff said “look into it.” Then he was told the Mexicans had trouble getting their drug money out of the country and that the cooperator had a way to do it and make money for the both of them. The sheriff told the cooperator, “I’m proud of you.” (See Gov. Ex. 1, video tape of conversation on November 16, 2007)

After talking about the laundering scheme for the first time, the conversation concluded by noting that Long could make money without any exposure:

Source: And they don't need to know you at all

Long: Yeah

Source: You need to know what I'm doing

Long: Yeah

Source: And all I need to know is when I look back, you ain't too far

Long: I'm with you, go for it, I'm proud of you (laughs)

(Gov. Ex. 1, conversation of Dec. 7, 2007 at 4:43:20)

Ultimately, the sheriff was told that they would split four percent (4%) of the total amount of drug money laundered, which was the going rate for laundering drug money. The defendant, however, suggested that the amount be increased after a while so that their cut would

be ten percent (10%).

Source: They must be don't use meth or cocaine cuz shit, all the white parts that he, he say they just, Hixson and the white area

Long: Yeah

Source: I'm gonna find the blacks. Ain't nobody gonna do wrong and not pay the piper.

Long: (Laughs)

Source: I'm gonna sit right there and look at them...

Long: ...and say, "You got to pay."

Source: This is the "fifty", our cut ought to be 25, 2500, four percent, four and a half, five percent

Long: Yeah

Source: And uh, I'm gonna talk to him about upping the percentage.

Long: Yeah

Source: Now do you think we ought to, if you ain't got a couple of days to wait, tell them to send ours first, and then we send this or let it just go like it's going? Because I trust him, he...

Long: No, let it go like that. Talk to him about upping it a little

Source: Up that five percent?

Long: Yeah

Source: Ok. What you be comfortable with? You tell me. Cuz I'll call him tonight. Soon as I get to Jersey.

Long: Think we ought to wait, this is your second run?

Source: Second run

Long: Let's wait, probably ought to wait don't you think? Third or fourth or fifth run, something like that?

Source: And take it up to what?

Long: I don't know, 8 percent or something, at least 8

Source: Ok

Long: What do you think?

Source: It's worth it

Long: What do you think?

Source: I'm with you.

Long: We'll do it then. Later on we'll do 10 percent.

Source: I was thinking about going on to 10 now.

Long: Well, we'll go on to 10. But lets, you might oughta do maybe after the 3rd run.

Source: Okay, alright. I'm used to handling this kind of money.

Long: I'm proud of you.

(See Gov. Ex. 1, videotape of conversation of December 7, 2007 at 4:36:40)

In any event, the amount of drug money needed to be substantial in order to be a credible drug operation and generate a decent payoff for the sheriff. Thus, \$200,000 in drug money would generate a \$5000 payment to be split in two. (See affidavit at ¶25) Anything less than \$2,500 would be "small potatoes" and the investigators ran the risk of the defendant losing interest in the scheme, especially given the defendant's propensity for avarice. With cocaine selling for \$20,000 a kilogram, in order for the sheriff to receive his \$2500 "cut," the crime would necessarily have to involve 10 kilograms of cocaine. While the sheriff is getting his cut of the drug money, he gives the cooperator, a person known by him to be felon, a badge and then a gun, both of which were to be used to assist in the transportation of drug trafficking proceeds.

Based upon these actions, agents determined there were still no limits to his criminality.

After the sheriff showed an eagerness to participate in the drug money crimes, it was logical to see how far he was willing to go to violate the law for the purpose of establishing his criminal intent. If he was willing to be involved in protecting drug money, agents reckoned that he would be willing to become involved in the cocaine trafficking itself. The amount of cocaine involved had to be at least 10 kilograms because that was the amount of money being laundered to generate a \$2500 payment for the sheriff. A smaller amount would have been unreasonable and again ran the risk of signaling to the defendant that something was amiss. Nevertheless, on the first occasion when he was shown 10 kilograms of cocaine, he expressed no concerns other than his “hope” that the dope he knew was bound for Hixson, Tennessee, would make it there.

Long: God Almighty, I hope the guy gets it.

Source: Oh, they got a runner

Long: Yeah

Source: Already

Long: I'd still be worried about it. If the wrong person got a hold of it, my God Almighty.

(See Gov. Ex. 1, videotape of conversation Jan 24, 2008 at 3:15:42 pm)

The defendant's role in the scheme was to get money for protection. Of course, the proper action for the defendant to have taken was to seize the dope and arrest the cooperator. This he did not do.

As a legal matter, the defendant must fashion an argument that alleges outrageous conduct which does not stem from the inducement or significant government involvement in

creating the crime. The defendant must fashion such an argument because the Sixth Circuit has rejected outrageous conduct on these grounds as a defense to criminal conduct. *United States v. Blood*, 435 F.3d 612 (6th Cir. 2006); *United States v. Tucker*, 28 F.3d 1420, 1422 (6th Cir. 1994). Moreover, defendant relies on cases that have nothing to do with sentencing. His position is contradictory. He claims the government violated his rights, yet he did not seek to dismiss the indictment. He cites no Sixth Circuit authority applying the outrageous conduct objective theory (as opposed to the subjective theory that relies on the defendant's predisposition) in the sentencing context. There is no separate outrageous conduct doctrine in the sentencing context except under the doctrine of sentencing entrapment as discussed above and which the Sixth Circuit has not recognized in any case.

Nevertheless, even applying the factors articulated in *United States v. Barger*, 931 F.2d 359, 363-64 (6th Cir. 1991), a non-sentencing case, there is no objective outrageous conduct. First, there was clearly a need for the FBI to become involved based upon the defendant's predisposition and the fact that the defendant was already engaged in criminal activity when the government became involved. There was a legitimate concern that the store owners might have suffered a real injury, either economic or physical, if the government did not intervene. Second, the government did not instigate the original scheme. Third, the defendant had control of the schemes as demonstrated by the cooperator's constant request for permission. The defendant clearly had it within his power to say no. Fourth, it does not matter that the defendant did not create the plan as the government may clearly "use artifice and stratagem." *Barger*, 931 F.2d at 364, citing *United States v. Robinson*, 763 F.2d 778, 785 (6th Cir. 1985). Much like Hells Angel chief Sonny Barger, who expressed pleasure at the government's plan to retaliate against the

rival motorcycle gang the Outlaws, Sheriff Long expressed pleasure upon hearing the cooperator's plan to get money by laundering drug money when he said, "I'm proud of you."

D. Imperfect Entrapment

Defendant also seeks a downward departure based upon duress and coercion under U.S.S.G. §5K2.12. The defendant then cites half of the Policy Statement and ignores the half (underlined below) which shows that the section does not apply to the facts of this case. That section provides:

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, 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. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.

There is no evidence of coercion or duress in this investigation.

E. Percentage of Variance/Departure

It is the government's position that no downward departures are warranted. However, as the United States has previously stated, this Court has the authority and the duty to impose a sentence consistent with Congress' objectives in §3553(a). The government disputes the defendant's contention that the Court may vary below a statutory minimum. The only situations in which a district court can depart below a mandatory minimum is either upon motion of the United States for substantial assistance, pursuant to 18 U.S.C. § 3553(e), *United States v. Burke*,

237 F.3d 741, 743 (6th Cir. 2001) (“All courts addressing whether this represents the exclusive route to depart below statutory minimums have concluded that it is.”); *accord United States v. O'Dell*, 320 F.3d 674, 682 (6th Cir. 2003) (Nelson, J., concurring), or through application of the safety valve. There is no authority which would authorize such a departure in the absence of either application of the safety valve provision or a government motion for substantial assistance under 18 U.S.C. §3553(e).

CONCLUSION

The defendant does not deserve a downward departure. He should be treated just like any other defendant. Nor should he receive a downward departure or variance based upon any entrapment or outrageous government conduct. He was not entrapped and was in fact predisposed to engage in criminal conduct. The defendant’s arguments along these lines should be treated separately by the Court from other considerations that might justify a variance, such as the fact that this was a reverse sting and that the defendant himself was the only criminal involved in these purported illegal activities. These considerations, however, should not be dealt with under any theory that smacks of government misconduct. The government stayed within the rules of acceptable and necessary investigation.

Respectfully submitted,

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/s/ Gary S.Humble _____
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Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2008, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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