STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
E. FITZGERALD, P.J., R. BANDSTRA, AND H. GAGE., JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court
No.: 122696

DEON LAMONT CLAYPOOL,

Defendant-Appellee.
_____/

Court of Appeals No.: 238984
Circuit Court No.: 2001-177566-FH

BRIEF ON APPEAL--APPELLEE
ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER ESCALATION, SENTENCE MANIPULATION OR SENTENCE ENTRAPMENT ARE SUBSTANTIAL AND COMPELLING REASONS JUSTIFYING DEPARTURE FROM A STATUTORILY IMPOSED MANDATORY MINIMUM SENTENCE?

The Court of Appeals answered, **"Yes".**

Defendant-Appellee answers, **"Yes".**

Plaintiff-Appellant answers, **"No".**

II. WHETHER A SENTENCING JUDGE SHOULD BE PROHIBITED FROM USING THE LEGISLATIVE SENTENCING GUIDELINES TO ASSIST IN DETERMINING THE DEGREE OF DEPARTURE AFTER HAVING ALREADY DECIDED TO DEVIATE FROM A STATUTORILY MANDATED MINIMUM SENTENCE BASED UPON A SUBSTANTIAL AND COMPELLING REASON?

The Court of Appeals answered, **"No".**

Defendant-Appellee answers, **"No".**

Plaintiff-Appellant answers, **"No".**

SUMMARY OF ARGUMENT

I. THIS HONORABLE COURT SHOULD DETERMINE THAT SENTENCE ESCALATION, SENTENCE MANIPULATION, AND/OR SENTENCE ENTRAPMENT ARE SUBSTANTIAL AND COMPELLING REASONS JUSTIFYING A DEPARTURE FROM A STATUTORILY IMPOSED MANDATORY MINIMUM SENTENCE.....6

A. Escalation And/Or Sentence Manipulation Is An Accepted Objective And Verifiable Departure Factor.....7

1. As a Matter of Law, escalation and/or sentence manipulation has been accepted as an objective and verifiable factor in Michigan jurisprudence. 7

In Michigan jurisprudence, the interpretation and application of the statutory term "substantial and compelling reasons" for departure from a mandated minimum sentence, has included "escalation" as an objective and verifiable factor. From earlier cases including *People v. Killian,* 117 Mich App 220 (1982*),* to the present, there is substantial precedent which recognizes and supports the conclusion of the Trial Court Judge that "escalation" was a substantial and compelling reason for departure from a statutorily mandated minimum sentence.

2. As a matter of public policy, escalation and/or sentence manipulation should be accepted as an objective and verifiable factor for departure from a mandatory minimum sentence. 12

There are reasons exemplified in this case why "escalation" should be considered as a factor in mitigation of sentence, and the discretion of the sentencing Judge based upon the facts and circumstances of the individual case should not be restricted by a hard and fast rule prohibiting consideration of such a factor. As a matter of public policy, the Trial Court Judge should be able to retain discretion to consider escalation by the police as a check and balance between overzealous and appropriate conduct by police officers or as a determinant of the defendant's culpability in a given case. Such public policy objectives are recognized in the *Federal Sentencing Guidelines.*

B. Evidence On The Record Clearly Establishes Sentence Manipulation By The Police And/Or Escalation. 14

1. Distinguishing the terms "escalation", "sentence manipulation and "sentence entrapment". 14

In their Brief, the Prosecutor endeavors to distinguish between the terms sentence manipulation and sentence entrapment and concludes that this case should be viewed as one of sentence manipulation. Defendant disagrees and contends that the facts introduced during the plea and sentence proceedings contain indicia of both sentence entrapment and sentence manipulation. In any event, the Trial Court Judge did not distinguish between these terms in determining that there was "escalation" in this case as the result of the conduct of the police officers and the fact that, had the Defendant been charged earlier in these cases, he would have been a candidate for adult treatment court which may have deterred or prevented his involvement in later, more serious offenses.

2. The basis for the factual determination that escalation occurred in this case. 17

Upon review of the facts of this case, it was not clear error for the Trial Court Judge to find that "escalation" occurred in this case as that term has previously been defined and applied in *People v. Shinolster*, 196 Mich App 531; 493 NW2d 502 (1992) *lv* den 439 Mich 922 (1992), and other cases. In this case, facts were introduced during the plea and sentence proceedings which established that the Defendant was engaged in a series of transactions by the police after initially being arrested for a possessory offense- ie., possession of a controlled substance less than 25 grams. In each subsequent transaction, the quantity of controlled substance was methodically increased with the principal purpose and effect of increasing the Defendant's sentence.

C. The Trial Court's Determination That The Objective And Verifiable Factors

Present In This Case Constituted Substantial And Compelling Reasons To Depart From The Statutory Minimum Sentence Was Not An Abuse Of Discretion. 20

In this case, there were objective and verifiable facts referenced in the Presentence Report and received at the time of the plea and sentencing from which the Trial Court Judge could conclude that "escalation" occurred which should be considered in mitigation of sentence. Additional facts and information were received by the Trial Court Judge from the Sentence Memorandums filed by the respective parties, as well as statements made at the time of sentencing. From these facts and information, it was not an abuse of discretion for the Trial Court Judge to determine that escalation and/or sentence manipulation was a substantial and compelling reason for departure in this case.

D. Application Of The Concepts Of Sentence Entrapment And Sentence Manipulation From Other Jurisdictions. 25

There is a split of authority under federal law whether sentence entrapment and sentence manipulation are appropriate factors to consider in mitigation of sentence. Where the factors have been applied, court have recognized the distinction between them and applied them separately and together in determining whether a downward departure from a mandatory minimum sentence is appropriate. The rationale for considering sentence entrapment as a reason to depart was stated by the Court in *United States v. Staufer*, 38 F3d 1103, 1106 (CA 9, 1994). Recent decisions from other state courts have found that the trial court should have discretion to impose a downward departure sentence where law enforcement allows a defendant to continue criminal activities for no apparent purpose other than to enhance the defendant's sentence.

STATEMENT OF FACTS

Defendant entered a plea of guilty to the following charges in the above referenced case:

- Delivery/Manufacture of a controlled substance bet. 50-224 grams (MCL 333.7401(2)(a)(iii)
- Possession of a controlled substance L/T 25 grams (MCL 333.7403(2)(a)(b))
- Resisting and obstructing police officer (MCL 750.479)
- Possession of Marijuana (MCL 333.7403(2)(d))

His Guilty Plea was entered on July 13, 2001, before the Honorable David Breck of the Sixth Judicial Circuit Court of Michigan. The plea was entered contemporaneously with a guilty plea in a series of other cases, as follows:

Case #01-176292 FH involved the first of a series of encounters with police that led to the charges and conviction in this case. In Case #01-176292 FH, the Defendant was stopped by the Madison Heights Police Department for a traffic violation on December 7, 2000. The vehicle was searched after the officers smelled marijuana inside the vehicle and observed marijuana ashes and seeds on Defendant's leg. *See* Presentence Report [PSR], p. 2. Upon a search of the vehicle, the Defendant was arrested and charged with possession of a small baggie of marijuana and a single rock of cocaine. Subsequently, Defendant pled guilty to Possession of Controlled Substance Less Than 25 Grams, Possession of Marijuana, and Driving with a Suspended License.

In Case #01-177607, an undercover officer from the Oakland County Sheriff's Department contacted the Defendant on March 7, 2001, to arrange for the purchase an ounce of crack cocaine for $1,100. PSR, p. 2. The transaction was consummated the following day when the Defendant delivered 2.36 grams of crack cocaine to an officer. In this case, Defendant pled guilty to Delivery/Manufacture of Controlled Substance Less Than 50 Grams and Delivery/Manufacture of Marijuana.

In Case #01-177609 FH, an undercover officer of the Oakland County Sheriff's Office

met with the Defendant on March 12, 2001, and exchanged $2,000 in NET funds for 49.2 grams of crack cocaine. PSR, p. 2. In this case, Defendant pled guilty to Delivery/Manufacture of a Controlled Substance Less Than 50 Grams. This case involved the final transaction which preceded that in the instant case.

On August 8, 2001, the Defendant was sentenced in Case #01-177566 FH to serve a term of incarceration with the Michigan Department of Corrections for 8 to 20 years on the charge of Delivery/Manufacture of Controlled Substance between 50-224 grams, a jail term of 146 days on the charge of Possession of Marijuana, and a probationary sentence on the other charges in this case. On the charges in the other cases, the Defendant either received a concurrent jail sentence or a form of probationary sentence (i.e. straight or lifetime probation).

Prior to sentencing, a sentence memorandum was filed by the Prosecutor and Defense Counsel, which was referenced in the closing remarks by each of them. *See* Appellant's and Appellee's Appendixes. In Defendant's sentencing memorandum, it was argued that the Defendant could have been arrested after the first transaction. It was further stated:

> "The only legitimate reason not to arrest him would be to see if they could move up the chain to the person who supplied the drugs. The(y) never questioned Mr. Claypool about his supplier and, in fact, the officer acknowledged to this attorney that he had no interest in having Mr. Claypool assist them in getting his supplier. Thus that supplier, Dee, is still on the street, continuing to sell drugs". (24a.)

In response to the Prosecutor's contention that the Defendant had a history of drug transactions, it was argued:

> "The prosecutor's brief states on page five, 'It is not the first time dealing drugs-only the first time he was caught.' There is absolutely no evidence that Mr. Claypool ever sold drugs to anyone except the undercover officer in these cases. None." (23a.)
>
> Later in the memorandum, it was argued:
>
> "The only reason for not arresting him after the first buy on March 8, 2001, that makes any sense is that the police recognized that such a sentence would be appropriate and decided that they wanted to make sure that he was facing a long

> stint in prison. This should not be the function of the police. The length or nature of a sentence should be determined by the judge, and not be subjected to manipulation by the police whatever their intentions might be." (24a.)

In their Sentencing Brief, the Prosecutor argued for imposition of the mandatory minimum sentence, stating:

> "While the Defendant may argue he has a steady work history, he used his job driving a taxicab to further his drug business. All sales were made while the Defendant was on duty driving his taxi. There are also no mitigating circumstances to allow a deviation. The Defendant worked alone and is solely culpable for the offenses. He also put many people at risk by fleeing across a heavily traveled thoroughfare during rush hour. There have been no post-arrest factors such as a cooperation with law enforcement to consider. There are no substantial or compelling reasons for this Court to deviate from the mandatory minimum sentence." (5b.)

At sentencing, Defense counsel argued for a deviation from the mandatory minimum sentence specified for the delivery (50 to 224 grams) conviction in this case. He first pointed out that the Defendant was "26 years old, and had only one prior misdemeanor in his criminal history". (26a.) Counsel further stated that "at the time he committed these offenses he was using approximately between three and five hundred dollars' worth of crack or cocaine or heroin per week in his own drug addiction". (26a.). With regards to the escalation of offenses, Counsel argued :

> "...the officer kept coming back to Mr. Claypool, asking him to get more drugs. And as an inducement, Mr. Claypool was paid $500 over and above the cost of drugs to get the drugs for the officer. This is a huge inducement to somebody and a huge incentive for somebody who has an addiction problem and is struggling to meet the costs of that addiction as well as to care for his family". (27a.)

Counsel then addressed the motives of the police for escalation of the offenses:

> "The only good reason not to arrest someone after you've purchased drugs from them is to either protect the identity of an informant or to move up the chain. The informant--- there's no identity to be protected in this case because the person who introduced the officer to Mr. Claypool was known to Mr. Claypool, and the police officers never made any attempt to move up the chain to the individual who was getting drug(s)-- who Mr. Claypool was getting drugs from.
>
> In fact, I believe, the first court appearance that I had on this matter for the deliveries, I asked the officer if he wanted any cooperation, and he said, no, we're

> not interested. So that only leaves the idea that police officers wanted more buys to put more prison sentences on Mr. Claypool". (27a.-28a.)

In response, the Prosecutor argued at sentencing:

> "Contrary to Mr. Davis's assertion that the only reason officer continue to try to purchase from individuals is to get larger prison sentences, in cases such as this they are attempting to see how large or how far up the chain an individual is with regards to the amounts that they can deliver. This isn't a case where you can go right-- in the drug trade you can't just go up to somebody you just meet and order four ounces of cocaine. There's a certain element of trust that needs to be built, especially when there's a first buy or a second buy.
>
> Therefore, I disregard Counsel's argument of sentence *entrapment* (emphasis added), but it's merely an investigative tool to see how large of a cocaine [sic] or how far up the chain an individual is". (28a.-29a.)

In finding substantial and compelling reasons to depart from the mandatory minimum sentence, the Trial Court Judge provided the following reasons:

First, the Judge was impressed with the fact that the Defendant was 26 years old at the time of the offense and "had only a minimal record, which was really just shoplifting". (30a.).

Second, the Defendant's employment history consisting of steady employment since 1998.

Third, the fact that the offense was escalated.

In fashioning an appropriate sentence, the Judge took into consideration as negative factors that the Defendant was on bond at the time of the offense, and that the offense carried a mandatory minimum sentence of ten (10) years. (30a.) The Judge considered that the sentence was above the Sentence Guidelines of 36 to 60 months for the offense. (30a) The Judge also expounded upon a comment noted in the Presentence Report (PSR, 2) that, prior to his confinement in these related cases, the Defendant had never participated in substance abuse treatment. (30a.) The Judge noted that, had the Defendant been charged earlier in the series of transactions which led to the convictions in these cases, he would have been a candidate for the adult treatment court which may have deterred or prevented his involvement in the later, more serious, case.

In an unpublished opinion per curiam, a panel of the Court of Appeals affirmed

Defendant's sentence in this case. The Court found that the trial court had not abused its discretion in departing from the mandatory minimum sentence required in this case. First the court reviewed the transactions:

> "On March 7, 2001, the purchase price was $1,100 for one ounce. On March 12, 2001, the purchase price was $2,000 for 49.2 grams. On March 14, 2001, the purchase price was $4,000 for approximately 4.5 ounces." (38a.)

The Court concluded:

> "Thus, it objectively appears that the police made additional purchases that resulted in escalating the seriousness of the offenses of which defendant was convicted. This fact is verified in the PSIR and, pursuant to *Shinolster*, the trial court properly considered this factor as justification for a downward departure from the mandatory minimum sentence." *People v. Claypool*, unpublished opinion per curiam of the Court of Appeals, decided October 18, 2002 (Docket No. 238984), at 2-3. (38a.)

This Court has granted the People's application for leave to appeal in an order dated July 10, 2003, limited to the issues of whether "sentencing manipulation" or "escalation" is a substantial and compelling reason for deviating from a statutorily imposed mandatory minimum sentence and whether a trial court may consider the legislative sentencing guidelines when determining the degree of a departure, which has already been determined to be supported by substantial and compelling reasons. *People v. Claypool*, 468 Mich 944; 666 NW2d 664 (2003).

ARGUMENT

I. THIS HONORABLE COURT SHOULD DETERMINE THAT SENTENCE ESCALATION, SENTENCE MANIPULATION AND/OR SENTENCE ENTRAPMENT ARE SUBSTANTIAL AND COMPELLING REASONS JUSTIFYING A DEPARTURE FROM A STATUTORILY IMPOSED MANDATORY MINIMUM SENTENCE.

Defendant was convicted by his plea of delivery of between 50 and 224 grams of cocaine, an offense subject to the mandatory minimum penalty of 10 years imprisonment, from which a sentencing court may depart for substantial and compelling reasons. MCL 333.7401(4); MSA 14.15(7401)(4). Defendant was sentenced to an 8-year minimum sentence on the basis of the sentencing Judge's findings of substantial and compelling reasons to depart from the mandatory 10-year term. To some extent, the issues presented in this case have been rendered moot or muted in their application as the result of new statutes adopted by the Legislature effective March 1, 2003, which eliminate the mandatory minimum provisions of MCL 333.7401 and MCL 333.7403. See 2002 PA 665. These new statutes provide that a person convicted of the principle offense referenced in this case, Delivery/Manufacture of a controlled substance between 50-224 grams (MCL 333.7401(2)(a)(iii)), is eligible for parole after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less. This statute appears to provide that the Defendant is now eligible for parole after serving five years of his sentence, and if paroled he would not serve the eight year term of sentence given in this case. MCL 791.234(12). Only in the event that the Defendant were not granted parole when he first becomes eligible, or for three years thereafter, would the outcome of this case appear to be determinative of his sentence.

Standard Of Review:

The appropriate standard of review was set forth by this Court in *People v. Babcock*, 469 Mich 247; 666 NW2d 231 (2003) in the Appendix. There, the Court stated, "The existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by the appellate court for clear error". Note 10.

"The detemination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law". Note 11. "A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." Note 12.

Legal Argument:

A. Escalation And/Or Sentence Manipulation Is An Accepted Objective And Verifiable Departure Factor.

1. As a matter of law, escalation and /or sentence manipulation has been accepted as an objective and verifiable factor in Michigan jurisprudence.

In 1987, the Legislature softened the harsh impact of the mandatory 10-year minimum penalty for this offense by allowing sentencing judges to depart below that minimum term "if the court finds on the record that there are substantial and compelling reasons to do so." The change was intended to "moderate what has been an uncompromising law and ... give judges greater flexibility in making sentencing decisions based on the individual circumstances of a case". *People v Shinholster*, 196 Mich App 531, 534; 493 NW2d 502 (1992), *lv den* 439 Mich 922 (1992). For this reason, the words "substantial and compelling" were not intended to create an insurmountable threshold for departure below the statutory minimum. Grounds for departure will exist in exceptional cases, *People v. Fields,* 448 Mich 58, 68; 528 NW2d 176 (1995).

In *People v. Downey*, 183 Mich App 405, 454 NW2d 235, appeal denied (1990), the Court created an "objective and verifiable" litmus test for determining if proffered reasons for departure from a mandatory minimum sentence are substantial and compelling". In *Downey*, the Court provided a nonexhaustive list of factors which could be considered, which included factors which go into determining rehabilitative potential of a defendant, including defendant's prior criminal record, age and work history. *id.* at 414-415. In analyzing the *Downey* opinion, the Court in *People v. Williams*, 189 Mich App 400, 473 NW 2d 727, appeal denied 439 Mich 900,

478 NW2d 473 (1991), found that "While the *legislative intent* in adopting the 'substantial and compelling' language was clearly to give *the sentencing judge broad discretion* to depart from the mandatory minimum sentences, the effect of the 'objective and verifiable test was to severely restrict this discretion". *Williams*, *id.* at 402 (emphasis added). In *Williams*, the Court held that "substantial and compelling reasons" for downward deviation from mandatory minimum sentence for cocaine offense must be something basic that would compel a judge to deviate from the statute.

Subsequent cases have applied the "objective and verifiable" litmus test stated in *Downey* and approved factors constituting "substantial and compelling reasons" in specific factual situations. A non-exhaustive list of such factors are: (1) the facts of the crime that mitigate culpability, (2) minimal or non-existent prior criminal record, (3) age of the offender, and (4) his or her employment history. *People v Windall Hill*, 192 Mich App 102; 480 NW2d 913 (1991); *People v Shinholster*, *supra; People v Harvey*, 203 Mich App 445; 513 NW2d 185 (1994).

Other circumstances which have been found to constitute "substantial and compelling" reasons to support departure are such factors as no history of drug dealing, family support, cooperation with the authorities, a minimal role in the offense, *and although not rising to the level of entrapment, conduct by the government which escalates the offense or induces the accused to commit the crime*, or the accused commits the crime due to coercion, threat or compulsion. *People v. Shinholster, supra*, cited with approval in *People v. Fields, supra* (emphasis added). In *Fields,* after an extensive analysis of the meaning and interpretation of the term "substantial and compelling reasons", the Court determined that "First, in evaluating whether a case presents substantial and compelling reasons to depart below a mandatory minimum, courts should place particular emphasis on mitigating circumstances surrounding the offense". *People v. Fields, supra* at 76. In determining that escalation was such a factor, the Court stated "As a mitigating circumstance surrounding the offense, it weighs heavily in favor of a deviation from the statutory minimum. *Id.* at 79. Thus, as the result of a natural progression of

cases seeking to identify appropriate factors to consider as substantial and compelling reasons, escalation has been considered as an objective and verifiable factor to consider in mitigation of sentence.

The view that "escalation" should be considered as a factor in mitigation of sentence has an extensive history in Michigan jurisprudence which antedates its consideration as a substantial and compelling reason to depart from a mandatory minimum sentence for a controlled substance charge. The concept of escalation has evolved and been recognized as either a complete defense to a criminal prosecution, or a substantial and compelling reason for departure from the mandatory minimum sentence. That line of cases began with *People v. Killian*, 117 Mich App 220 (1982), which involved a series of escalating drug transactions like the instant case. In recognizing entrapment as a defense to the delivery charge in that case, the Court stated at 223:

> "The most troubling aspect of the activities of the police in this case is the escalation of defendant's culpability. The police knew that defendant used both marijuana and cocaine and that he had offered to sell marijuana to an acquaintance who was a police officer. Although there was testimony that defendant had been given a very small amount of cocaine to a friend, the police had good reason to believe that defendant was not gathering evidence of crimes which they had any reason to suspect defendant had committed or would commit in the future. We do not imply here that police must have probable cause to use an undercover agent or informer to make a drug buy. See *People v. Wright (On Remand)*, 99 Mich App 801, 817; 298 NW2d 857 (1980). We emphasize that police not only did not suspect defendant of involvement in cocaine sales; they had every reason to suspect that he was not involved. See *People v. Turner*, 390 Mich 7, 23; 210 NW2d 336 (1973). See also *Reynolds v. State*, 155 Ind App 226, 292 NW2d 290 (1973). In part, the police activity here is entrapment because the sale of large quantities of cocaine is an offense of a different order than the use of cocaine or the sale of marijuana.). "

Killian was followed by *People v Shinholster*, *supra*. In *Shinholster, supra,* the Court found that "the government's actions- although not rising to the level of entrapment- purposefully escalated the crime" and was a factor in finding substantial and compelling reasons to depart below the mandatory minimum sentence. *People v. Shinholster, supra*, at 535.

In *People v Fields*, *supra*, the Court took notable recognition of the fact that escalation of

the offense is a factor which the Court may consider in exercising its discretion to depart from the mandatory minimum sentence. Commenting on the factors considered by the Court in *Shinholster*, the Court stated:

> "In addition, the Court found that the government's actions, although not rising to the level of entrapment, purposefully escalated the crime. This last factor is of *particular importance* in our approval of the resolution reached in *Shinholster*. As a mitigating circumstance surrounding the offense, it weighs *heavily* in favor of a deviation from the statutory minimum." (emphasis added).

In *People v. Ealy*, 222 Mich App 508 (1997), the Court expressly recognized and considered a series of federal cases where sentencing entrapment has been applied, stating:

> "Although the issue of sentencing entrapment has not been addressed in Michigan, federal courts have considered the issue. In *United States v. Staufer*, 38 F3d 1103, 1106 (CA 9, 1994), quoting *United States v. Stuart*, 923 F 2d 607, 614 (CA 9, 1991), the court indicated that sentencing entrapment occurs when 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.' *See also United States v. Stavig*, 80 F 3d 1241, 1245 (CA 8, 1996), quoting *United States v. Aikens*, 64 F3d 372, 376 (CA 8, 1995), ('[S]entencing entrapment may occur 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 sentencing imposed against that defendant') and *United States v. Garcia*, 79 F3d 74, 75 (CA 7, 1996)."

In implicitly recognizing sentencing entrapment as an appropriate factor to evaluate in mitigation of sentence, the Court in *Ealy, supra,* analyzed the case as a question of fact in light of whether entrapment by escalation had occurred, quoting from *United States v. Walls,* 315 US App DC 111; 70 F 3d 1323 (1995): "the fact that the defendants showed no hesitation in committing the crime for which they were convicted was sufficient to defeat their sentencing entrapment argument." However, in arriving at its determination that there was no sentence entrapment in that case, the *Ealy* Court made specific findings that there was no evidence that the police continued the purchases merely to enhance defendant's eventual sentence. *Id* at 511. Rather, an officer had testified that he purchased greater amounts of cocaine from defendant to determine how much defendant could deliver and to discover defendant's source. *Id.* at 509.

These facts are distinguishable from those of the present case, where it was contended and unrebutted at sentencing that the only reason the police continued purchases was to enhance the Defendant's sentence.

Contemporaneous with the *Ealy* case, in *People v. Harvey*, unpublished opinion of July1, 1997 (Court of Appeals #s 194585, 194909, CDRC), escalation of the offense was a factor considered by the Court to depart below the mandatory ten year term. The *Harvey* case involved two transactions for controlled substances, with the second transaction involving over twice the quantity of the first transaction. It is interesting to compare and note the differences in the price per unit for each transaction which occurred in *Harvey* and the present case. This raises the question whether there are any parameters on police officers in using financial enticements to engage defendants in the sale or purchase of controlled substances.

In *People v. Isaias Rodriguez*, unpublished memorandum opinion of the Court of Appeals, decided December 16, 1997 (Docket No. 187060), a panel of the Court of Appeals determined that "escalation" was an appropriate basis for departure, as referenced in *People v. Shinholster*, supra., and *approved* in *Fields, supra* at 78-79 (emphasis added). The Court found that the facts of that case, involving five separate transactions with increasing quantities, was indistinguishable from that in *Shinolster, supra.*

In *People v. Sosa*, unpublished opinion per curiam of the Court of Appeals, decided December 28, 1999 (Docket No. 213737), a panel of the Court of Appeals considered the distinction between sentence entrapment and sentence manipulation as separate forms of escalation, and concluded that the facts of that case did not warrant the conclusion that the police engaged in sentence manipulation. However, in the *Sosa* case, unlike the present case, there was a specific finding of fact that the Defendant had engaged in sales of controlled substances to persons other than the police, a fact upon which the police relied in increasing the size of subsequent transactions.

These cases all indicate that escalation as a factor to consider in mitigation of sentence is

a concept imbedded in Michigan caselaw, whether viewed from the perspective of placing limits on outrageous police conduct or considering the predisposition of the defendant as a measure of his culpability and capacity for rehabilitation. The Prosecutor now argues that this long history and line of cases developed over 20 years or more is neither significant or controlling and should be replaced with a blanket prohibition against consideration at sentencing of escalation of the number or level of offenses, either as the result of conduct of police officers in escalation of the offense or the defendant's (lack of) predisposition in mitigation of the offense. The Prosecutor seeks to exclude any consideration of such factors under the umbrella of the term "sentence manipulation". To do so would be a significant departure from caselaw and precedent under Michigan law.

2. As a matter of sound public policy, escalation and/or sentence manipulation should be accepted as an objective and verifiable factor for departure from a mandatory minimum sentence.

The Prosecutor urges this Honorable Court to leap over historical precedent and reason by holding that the escalation of the offense as the result of measures taken by law enforcement personnel should never be considered as a mitigating circumstance. Yet, in the present case, the Prosecutor fails to offer or demonstrate any strong policy considerations why such a position should be extended to Sentencing considerations. Nowhere was it argued or presented that the escalation which occurred in this case was necessary to improve law enforcement objectives of investigating related criminal activity or penetrating organized crime. Rather it was presented as focused on enhancing the sentence of the Defendant by determining how far up the ladder of the organization that he was. (28a.). Yet this purpose, while cited as being lawful, may have low relevance in determining the culpability and appropriate punishment for the Defendant because of its subjective nature- depending on the availability of drugs in various locales and the inducements offered to acquire them, there may be low correlation between the transaction size and a person's status or relationship with organized crime, or his propensity to commit the crime. If, in one locale, a drug addict can be engaged to walk readily to the street corner to buy and sell

drugs to support his habit, but in another locale, drugs are available only through persons conducting a criminal enterprise engaged for profit, can it truly be said that both are equally culpable or pose an equal threat to society? If the answer to this question is no, then the Sentencing Judge should have some means by which to distinguish between these individuals at the time of Sentencing.

There was no information or evidence offered by the Prosecutor in this case that the Defendant acquired the controlled substances as the result any particular relationship or participation in organized crime, or that he even had a prior or existing relationship with the source of the contraband. (23a.- 24a.) There was no evidence or information that the Defendant had engaged previously in the sale of controlled substances prior to this series of transactions. Allowing police officers unfettered discretion to entice and decide how many transactions in which to engage defendant, each carrying the consequences of consecutive punishment, without any review or consideration of such factors by a sentencing judge, is to shift sentencing discretion from the Courthouse to police departments. Conversely, allowing the Trial Court Judge to retain discretion to evaluate the conduct of the police and the defendant in a given case will serve as a check and balance between appropriate law enforcement activities and proportionate punishment based on the defendant's culpability and capacity for rehabilitation.

Additional reasons why escalation should be considered as a basis for departure can be found in the *Federal Sentencing Guidelines*. There, various factors which are related to or reflect the concept of escalation have been adopted to consider in mitigation of sentence. Under §2D1.1, Note 7, the mandatory minimum sentence may be "waived" and a lower sentence imposed by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense". In a case such as the present one, where an offer of cooperation was made on behalf of the Defendant but refused by police officers, there is the indicia that escalation of sentence was the focus of the police in direct contravention to the obvious policy objectives of such a factor. (27a.-28a.) At the same time, isn't escalation of the

offenses by the police the opposite of cooperation by the defendant and a factor which should be taken into account at the time of sentencing as well? §2D1.1, Note 14, provides that if, in a reverse sting, the court finds that the government agent set a price for the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted. Conversely, isn't it reciprocal that, where the police engage a defendant to sell controlled substances under the inducement of artificially high rewards (ie. such as supporting a drug habit), is also a factor which should be taken into account at sentencing? The fact that these factors are referenced and taken into account in the *Federal Sentencing Guidelines* is recognition of the fact that courts can ensure that the sentences imposed reflect the defendants' degree of culpability only if they are able to reduce the sentences of defendants who are not predisposed to engage in deals as large as those induced by the government. *United States v. Staufer*, 38 F 3d 1103, 1106 (CA 9, 1994).

B. Evidence On The Record Clearly Establishes Sentence Manipulation By The Police And/Or Escalation.

1. Distinguishing the terms "escalation", "sentence manipulation", and "sentence entrapment".

The Trial Court Judge referred to the escalation of offenses by police officers, and the possible deterrence of Defendant's involvement in this case, as a factor in his sentence decision[1] (30a.). The Trial Court Judge used the term "escalated", <u>not</u> "manipulated", <u>not</u> "entrapment". In their Brief, the Prosecutor endeavors to distinguish the terms sentence manipulation and

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[1] The progressive escalation of offenses is described in the Presentence Report, under Description of the Offense, as involving a series of transactions with graduated levels of consequences and penalties.

sentence entrapment. The terms were discussed in the case of *United States v. Cannon*, 886 F Supp 705 (D.N.D. 1995):

> "Sentencing entrapment is a relatively new theory, first discussed in this circuit in 1991. See *United States v. Lenfesty*, 923 f 2d 1293, 1300 (8th Cir. 1991). Sentencing entrapment is analogous to the defense of entrapment, and considers whether a defendant, who was admittedly predisposed to commit a crime, was induced to commit additional offense conduct that he was not predisposed to commit, and which results in inflating the penalty imposed. The Eighth Circuit Court of Appeals adopted this theory in *United States v. Barth*, 990 F 2d 422, 424-25 (8th Cir, 1993).
>
> Sentencing manipulation is an even newer theory, first distinguished from sentencing entrapment in this circuit in 1993. See *United States v. Shephard*, 4 F 3d 647, 649 (8th Cir. 1993). Sentencing manipulation is analogous to the defense of outrageous misconduct, and focuses on the conduct and motives of the government, rather than on the predisposition of the defendant. *Id.* 'When an accusation of sentencing factor manipulation surfaces, the judicial gaze should, in the usual case, focus primariliy- though not exclusively- on the government's conduct and motives'. *United States v. Gibbens*, 25 F 3d 28, 31 (1st Cir. 1994). In effect, it is a theory under which the judiciary can fashion a code of conduct for reverse sting operations, to guard against government misconduct aimed solely at 'ratcheting up' a defendant's sentence. *Id.*"

The Prosecutor has chosen to frame the argument solely in the context of whether sentence manipulation constitutes a substantial and compelling reason to deviate from the mandatory minimum sentence. The effect of doing so is to have this Court disregard facts which were known to, and considered by the Trial Court Judge in making his decision to depart from a mandatory minimum sentence. In essence, the Prosecutor advocates that no conduct or circumstances, whether reflective of the police officers or the defendant, should be recognized in mitigation of the offense at the time of sentencing. However, Defendant maintains that this interpretation runs contrary to the intent of the Legislature to "moderate what has been an uncompromising law and ... give judges greater flexibility in making sentencing decisions based on the individual circumstances of a case". *People v Shinholster*, *supra* at 534. Defendant further maintains that the supporting facts and arguments presented in this case contain indicia of both sentencing entrapment and sentencing manipulation which were factored into the decision of the Trial Court Judge to depart from the mandatory minimum sentence.

In their Brief, the Prosecutor uses the specious and circuitous argument that, because the Prosecutor characterizes the facts of this case in the context of sentencing manipulation, it was therefore improper for the Trial Court Judge to consider factors bearing upon the predisposition of the Defendant in mitigation of sentence. The Prosecutor argues that, "when deviating from the mandatory minimum sentence, the sentencing judge indicated that, because Defendant could have been arrested sooner than he was, he was denied treatment options that would have otherwise been available to him (30a), *not,* that he believed that Defendant was induced by the police into committing a greater offense than he otherwise would have committed or that, while inclined to commit a minor offense, was entrapped into committing a greater offense". *Prosecutor's Brief*, p. 12. In essence, the Prosecutor argues that, having characterized this as sentencing manipulation, it was improper for the Trial Court Judge to consider factors bearing upon sentencing entrapment. But isn't the fact that, had the Defendant received treatment for his drug addiction (ie. predisposition to commit a lesser or possessory offense) sooner he would not have been entrapped into committing a greater offense (ie. delivery offense) to support his habit the essence of sentencing entrapment theory. If so, then it is misleading to analyze the reasons for departure in this case solely in the context of sentence manipulation which focuses only on the conduct of police officers. For reasons which will be discussed later, there were objective and verifiable factors bearing upon the Defendant's predisposition (or lack of) from which the Trial Court Judge could or did conclude that the Defendant could have been deterred from committing more serious offenses had he been apprehended and rehabilitated. The most obvious factors included the Defendant's age and lack of significant prior criminal history. Other factors, as will be seen later, were objective and verified in the Presentence Report, perhaps too numerous to enumerate or articulate all at the time of sentencing.

In any event, the Trial Court Judge chose to use the term "escalation" rather than "manipulation" or entrapment". He did not choose to pigeonhole the factors which he considered into a narrow category focusing solely on the conduct of the police, but considered

both the conduct of the defendant and the police in arriving at his decision. Similarly, Michigan caselaw has not previously pigeonholed the analysis of these cases solely in the context of whether there was sentencing manipulation or sentencing entrapment. Michigan caselaw also adopted the term "escalation" in establishing a line of cases which does not distinguish between the conduct of police officers and conduct of the defendant as factors to consider at the time of sentencing. Arguably, consideration of factors reflective of the Defendant's conduct and predisposition to commit the offense are always appropriate factors to consider *at the time of sentencing* as a measure of his culpability and in order to arrive at a proportionate and individualized sentence. However, even if sentence manipulation is adopted as the test for evaluating whether escalation occurred in a given case, it does not completely exclude any and all consideration of the Defendant's predisposition. Just as a very young, very old, or handicapped person is more vulnerable as a victim of a crime, a fact which is accounted for under the sentence guidelines, so too may a vulnerable defendant (ie. addicted to drugs, etc.) be susceptible to conduct by police which escalates seriousness of the offense. However, even when evaluating this case in the context of sentence manipulation as defined in such cases as *United States v Cannon, Supra.*, Defendant contends that test would still be met under the facts of this case where the police conduct appeared to aim solely at increasing Defendant's sentence.

2. The basis for the factual determination that escalation occurred in this case.

In *People v. Babcock*, 469 Mich 247; 666 NW2d 231 (2003) this Court stated, "The existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by the appellate court for clear error". Note 10. Since escalation is, in part, based upon entrapment theory, the Defendant should be required to show that "escalation" occurred in this case by a preponderance of the evidence, the same burden of proof used in entrapment proceedings. *People v. Woods,* 241 Mich App 545 (2000); *People v. Griffin*, 187 Mich App 28, 30; 466 NW2d 712 (1991). Findings of fact by the trial court may not be set aside unless clearly erroneous. MCR 2.613(C). A finding is

clearly erroneous if the reviewing court is left with a firm conviction that the trial court made a mistake. *People v. Manning*, 243 Mich App 615, 620 (2000).

In *People v Shinholster*, 196 Mich App 531, 534; 493 NW2d 502 (1992), *lv den* 439 Mich 922 (1992), the term escalation was identified as "*the government's actions- although not rising to the level of entrapment- [which] purposefully escalated the crime*" *Id* at 535. This definition was approved in *People v. Fields*, 448 Mich 58; 528 NW2d 176 (1995) (emphasis added) where the Court stated: Although not a precise definition, it would appear that the Trial Court Judge relied upon this interpretation of the term "escalation" in making a factual determination as to its existence or nonexistence in this case.

In support of his finding that escalation occurred in this case, facts were received by the Trial Court Judge during the plea and sentence proceedings which established by a preponderance of the evidence that "escalation" occurred in this case. In preparation for sentencing, a Presentence Report (PSR) was prepared by the Oakland County Probation Department which provides a factual description of the offenses in this case. Defendant's first contact with the police occurred on December 7, 2000, when the Madison Heights Police Department stopped the Defendant for a traffic violation. (PSR, 4). When the officer approached the vehicle, he could smell marijuana inside the vehicle and the officer observed marijuana ashes and seeds on the Defendant's leg. Upon searching the vehicle, the officers observed a small baggie of marijuana. The officers also found money on the front seat and observed a small packet with a single rock of cocaine. As a result of this incident, the Defendant was charged with Possession of a Controlled Substance Less Than 25 Grams, Possession of Marijuana, and Driving While License Suspended. The resulting charges for possessory offenses were consistent with the evidence that Defendant was <u>using</u> controlled substances.

The first incident was followed by a sequence of cases which all resulted in charges for offenses involving the sale and/or delivery of controlled substances. On March 7, 2001, undercover officers of the Oakland County Sheriff's Department *contacted the Defendant* in

order to purchase an ounce of crack cocaine. (PSR, 4). Arrangements were made to purchase the substance, and on March 8, 2001 officers met with the Defendant and exchanged $1,100 for 2.36 grams of crack cocaine.

On March 12, 2001, the Defendant again met with an undercover officer from the Oakland County Sheriff's Department and exchanged 49.2 grams of crack cocaine in exchange for $2,000 in net funds. (PSR, 4).

On March 14, 2001, an officer for the Oakland County Sheriff's NET *contacted the Defendant* regarding a purchase of $4,000 worth of crack cocaine, approximately 4 1/2 ounces (127.6 grams). Arrangements were made, and the exchange was conducted in the parking lot of a Pizza Hut restaurant. Defendant was subsequently arrested. (PSR 4).

At Sentencing Memorandum, Defense Counsel characterized the sequence of transactions, stating:

> "I would also indicate to the Court that the circumstances of these offenses, with the exception of 01-176292 FH, these offenses were committed after an acquaintance of Mr. Claypool' s introduced him to an undercover officer. The undercover officer could have made the arrest after the first buy, which took place on March 8th, in which circumstance Mr. Claypool would be facing a sentence of possibly one to 200 or lifetime probation and one to four on the delivery or manufacture of marijuana.
>
> Instead the officer kept coming back to Mr. Claypool asking him to get more drugs. And as an inducement, Mr. Claypool was paid $500 over and above the cost of drugs to get the drugs for the officer. This is a huge inducement to somebody and a huge incentive for somebody who has an addiction problem and is struggling to meet the costs of that addiction as well as to care for his family.
>
> The only good reason not to arrest someone after you've purchased drugs from them is to either protect the identify of an informant or to move up the chain. The informant-- there's no identity to be protected in this case because the person who introduced the officer to Mr. Claypool was known to Mr. Claypool, and the police officers never made any attempt to move up the chain to the individual who was getting drug-- who Mr. Claypool was getting drugs from.
>
> In fact, in, I believe, the first court appearance that I had on this matter for the deliveries, I asked the officer if he wanted any cooperation, and he said, no, we're not interested. So that only leaves the idea that police officers wanted more

buys to put more prison sentences on Mr. Claypool." (27a.- 28a.).

Thus, it was Defense Counsel's contention that, based upon personal knowledge including an offer of cooperation on behalf of the Defendant, the police had no motivation other than to increase the seriousness of the offenses and consequently, Defendant's sentence. This conclusion was supported by information, or the lack of information in the Presentence Report. In that report, there was no information or indication that the Defendant had engaged in such conduct prior to his involvement in this case, or that he had any significant record of prior criminal convictions. None of these facts indicate that the Defendant was an active participant, or part of an investigation into, a drug ring that would warrant additional transactions by the police other than to increase his sentence. Under the plain meaning of the term "escalation" as expressed in *Shinolster, Fields*, and other cases, these facts indicate by a preponderance of the evidence that "*the government's actions- although not rising to the level of entrapment- [which] purposefully escalated the crime*", and the findings of the Trial Court Judge were clearly not erroneous in this respect.

C. The Trial Court's Determination That The Objective And Verifiable Factors Present In This Case Constituted Substantial And Compelling Reasons To Depart From The Statutory Minimum Sentence Was Not An Abuse Of Discretion.

In this case, the Trial Court cited several factors in its decision to downwardly depart:

(1) The Defendant was 26 years old at the time of the offense and "had only a minimal record, which was really just shoplifting". (30a.).

(2) The Defendant's employment history consisting of steady employment since 1998. (30a.)

(3) The fact that the offense was escalated. (30a.)

In arriving at his determination that the sentence was escalated, the Trial Court Judge had an opportunity to review the Sentence Memorandum prepared by Defense Counsel. In that Memorandum, Defense Counsel outlined his arguments which he also summarized at the time of Sentencing:

> "The only legitimate reason not to arrest him would be to see if they could move up the chain to the person who supplied the drugs. The(y) never questioned Mr. Claypool about his supplier and, in fact, the officer acknowledged to this attorney that he had no interest in having Mr. Claypool assist them in getting his supplier. Thus that supplier, Dee, is still on the street, continuing to sell drugs". (24a.)

In response to the Prosecutor's contention that the Defendant had a history of drug transactions, it was argued:

> "The prosecutor's brief states on page five, 'It is not the first time dealing drugs-only the first time he was caught.' There is absolutely no evidence that Mr. Claypool ever sold drugs to anyone except the undercover officer in these cases. None." (23a.)

Later in the memorandum, it was argued:

> "The only reason for not arresting him after the first buy on March 8, 2001, that makes any sense is that the police recognized that such a sentence would be appropriate and decided that they wanted to make sure that he was facing a long stint in prison. This should not be the function of the police. The length or nature of a sentence should be determined by the judge, and not be subjected to manipulation by the police whatever their intentions might be." (24a.)

The Trial Court Judge also had the opportunity to review the Sentence Memorandum in which the Prosecutor responded as follows:

> "Contrary to Mr. Davis's assertion that the only reason officer continue to try to purchase from individuals is to get larger prison sentences, in cases such as this they are attempting to see how large or how far up the chain an individual is with regards to the amounts that they can deliver. This isn't a case where you can go right-- in the drug trade you can't just go up to somebody you just meet and order four ounces of cocaine. There's a certain element of trust that needs to be built, especially when there's a first buy or a second buy.
>
> Therefore, I disregard Counsel's argument of sentence *entrapment* (emphasis added), but it's merely an investigative tool to see how large of a cocaine [sic] or how far up the chain an individual is". (28a.-29a.)

In addition to the arguments of counsel, the Trial Court Judge also had the opportunity to review the presence and absence of objective and verifiable facts in the Presentence Report. In that report, there was no information or indication that the Defendant had engaged in such conduct prior to his involvement in these cases. There was information in the PSR that the Defendant had acquired an addiction to cocaine and opiates (PSR, 7); that the Defendant's mental

health and addiction to controlled substances was impacted by an accident in which he sustained injuries, and metal plates had to be inserted into his head (PSR, 1,7); that, the Defendant suffered memory loss as a result of these injuries that may have contributed to his drug problems and involvement in this case (PSR,6); that, prior to his confinement in the Oakland County Jail, the Defendant had never participated in substance abuse treatment (PSR, 1); and, that the Defendant commenced a Substance Abuse Treatment program while he was a prisoner at the jail. (PSR, 7). which was refused by the officer (24a., 27a.-28a.); that the Defendant had acquired an addiction to cocaine and opiates (PSR, 7); that the Defendant's mental health and addiction to controlled substances was impacted by an accident in which he sustained injuries, and metal plates had to be inserted into his head (PSR, 1,7); that, the Defendant suffered memory loss as a result of these injuries that may have contributed to his drug problems and involvement in this case (PSR,6); that, prior to his confinement in the Oakland County Jail, the Defendant had never participated in substance abuse treatment (PSR, 1); and, that the Defendant commenced a Substance Abuse Treatment program while he was a prisoner at the jail. (PSR, 7).

When viewing all of the information that was available to the Trial Court Judge at the time of sentencing, the facts received seemingly point to no other conclusion but that penal considerations played a significant role in the officer's decision to pursue further transactions with the Defendant in this case. The Prosecutor's argument that the police were trying to determine how far up the chain that the Defendant rose is but a re-characterization of the contention that they wanted to determine how large a sentence could be imposed, after having engaged him previously in an offense for possession only. The Prosecutor's Argument also fails to explain why the police would refuse an offer of cooperation by Defense Counsel but for their desire to ratchet up defendant's sentence.

In addition, as argued earlier, such a sequence of transactions with a person who himself was affected by a substance abuse problem may not be a true measure of the Defendant's culpability for these offenses. On a limited income as a cab driver of $3,000 per month (PSR, 7),

an offer of $500 to complete a drug transaction would have been a large inducement to a person in need of money to support his habit and pay living expenses. It is not a stretch of logic to recognize that, had the Defendant been convicted and received treatment earlier in this series of cases for his substance abuse addictions, he may been rehabilitated prior to his involvement in the last offense. The Trial Court Judge determined that, had the Defendant been charged earlier in the series of transactions that led to the convictions in these cases, he would have been a candidate for the adult treatment court where he would have received treatment for his substance abuse problem. (30a.) This conclusion was consistent with a comment noted in the Presentence Report that, prior to his confinement in these related cases, the Defendant had never participated in substance abuse treatment. (PSR, 3,9). These objective and verifiable facts are directly relevant to the Defendant's predisposition to commit the crime, his degree of culpability, and his capacity for rehabilitation which are appropriate considerations for substantial and compelling reasons for departure discussed in *People v. Fields,* 448 Mich 58; 528 NW2d 176 (1995), and *People v. Windall Hill*, 192 Mich App 102, 115; 480 NW2d 913 (1991). Even when viewed only in the context of sentence manipulation, these facts also support the conclusion that the seriousness of the offenses were "escalated" for a principle purpose of increasing the Defendant's sentence which is appropriate to consider in mitigation of sentence.

In its review of the case, the Court of Appeals reviewed the individual transactions:

> "On March 7, 2001, the purchase price was $1,100 for one ounce. On March 12, 2001, the purchase price was $2,000 for 49.2 grams. On March 14, 2001, the purchase price was $4,000 for approximately 4.5 ounces." (38a.)

The Court concluded:

> "Thus, it objectively appears that the police made additional purchases that resulted in escalating the seriousness of the offenses of which the defendant was convicted. This fact is verified in the PSR and, pursuant to *Shinolster*, the trial court properly considered this factor as justification for a downward departure from the mandatory minimum sentence." *People v. Claypool*, unpublished opinion per curiam of the Court of Appeals, decided October 18, 2002 (Docket No. 238984). (38 a.)

In their review of this case, the Court of Appeals considered each of the three reasons cited by the Trial Court Judge for the downward departure from the mandatory minimum sentence. The third factor reviewed by the Court of Appeals was the government's involvement in arranging the drug deals with the Defendant so as to escalate his sentence. The Court of Appeals determined that the trial court's consideration of the government's role in the escalation of the offenses was appropriate. The Court of Appeals reviewed the record which reflected three successive purchases of crack cocaine from the defendant after his initial arrest for a charge of possession of cocaine and marijuana. Each successive purchase within a time frame of a few days involved a larger quantity for an increased monetary enticement. The escalation in quantity relative to the price per unit suggests that the Defendant was enticed early with promises of high rewards, followed by purchases of larger quantities designed to place him over statutory threshold limits. The Court of Appeals determined that it objectively appeared that the police made additional purchases that resulted in escalating the seriousness of the offenses of which the defendant was convicted. While the People argue that escalation should never be a factor to consider as a substantial and compelling reason for departure under any circumstances, the Defendant contends herein that the facts of this case clearly establish that escalation occurred and it was not clear error for the Trial Court Judge to make such a finding or for the Court of Appeals to affirm him in this respect.

The minimal sentencing departure by the trial court judge reflects the overall facts of this case and the weakness in the prosecution's allegations and inference that Mr. Claypool was a big-time drug dealer and at the same time admonished Mr. Claypool for being involved with drugs. Substantial and compelling reasons for departure should not be a standard that is impossible for a defendant to reach. *People v Shinholster, supra*, cited with approval in *People v Fields, supra.* Departure below the mandatory minimum was fully justified by the trial court at sentencing and, based upon objective and verifiable factors, should stand.

D. Application Of The Concepts Of Sentence Entrapment And Sentence Manipulation From Other Jurisdictions.

Under federal law, there appears to be a split amongst the circuits whether sentence entrapment and sentence manipulation are appropriate factors to consider in mitigation of sentence. Where the factors have been applied, courts have recognized the distinction between them and applied them separately and together in determining whether a downward departure from a mandatory minimum sentence is appropriate. In *United States v. Shephard*, 4 F3d 647, 649 (CA 8, 1993), cert den 510 US 1203; 114 S Ct 1322; 127 L Ed 2d (1994), the Court addressed specifically a defendant's claim that the court should have departed downward from a mandatory sentence because of "sentence entrapment". The Court explicitly stated:

> "We recognize that there could be situations in which the government engages in continuing undercover sting transactions for the sole purpose of ratcheting up a sentence under the guidelines. We are aware that a potential for abuse exists, but abuse is not present on the record before us."

The Court in the *Shephard* case implicitly, if not explicitly, recognized sentence entrapment as a factor to consider in mitigation of sentence under appropriate facts, and did not adopt a blanket prohibition against consideration of sentence manipulation, sentence entrapment, or escalation as a reason to depart downward at sentencing. In *Shephard*, the court found that a lengthy series of transactions were material not only to Shephard's own conviction but to breaking another substantial cocaine ring in the city, that there was substantial evidence of other drug dealings by Shephard, and that he possessed large amounts of cash far exceeding the $6,000 cash the government gave him in the course of the controlled buys. These are facts completely distinguishable and more egregious than those of the present case.

In *United States v. Staufer*, 38 F3d 1103, 1106 (CA 9, 1994), the Court stated its rationale for sentence entrapment as a reason to depart downward under sentencing guidelines:

> "Prior to the enactment of the Sentencing Guidelines, the only discretion delegated to law enforcement agencies was over whom to investigate and prosecute, and courts could adequately prevent government abuse by ensuring that only defendants with a criminal predisposition were being targeted. By exercising their discretion in sentencing, moreover, courts were able to ensure that

> defendants' prison terms did not exceed their culpability. Now that our sentencing scheme has moved from a discretionary process to a determinate system based on the weight of the drugs involved in a transaction, the entrapment doctrine designed for the previous system no longer adequately protects against government abuse nor ensures that defendants will be sentenced on the basis of the extent of their culpability. *See United States v. Calva*, 979 F 2d 119, 123 (8th Cir. 1992) (recognizing that the Sentencing Guidelines mechanism of boosting sentences based on the cumulation of additional drug sales has the potential for abuse by police); *see also United States v. Pacheco-Osuna*, 23 F 3d 269 at 272 (9yh Cir. 1994) (recognizing that "misconduct of an entrapping nature" may warrant a downward departure in part because "entrapment, and issues like it, can cast light upon a defendant's culpability"). Under the present sentencing scheme, government abuse can be discouraged and corrected only if courts also are able to ensure that the government has some reason to believe that defendants are predisposed to engage in a drug deal of the *magnitude* for which they are prosecuted. Furthermore, courts can ensure that the sentences imposed reflect the defendants' degree of culpability only if they are able to reduce the sentences of defendants who are not predisposed to engage in deals as large as those induced by the government."

While some courts have focused on sentence entrapment as a basis for departure from a mandatory minimum sentence, other courts have applied various tests to determine if sentence manipulation should be used as a basis to depart. In the recent case of *People v. Smith*, 99 Cal App 4th 138; 120 Cal Rptr 2d 831 (2002), the court noted that the decisions of the federal courts of appeals that have recognized the pre-arrest manipulation of sentences can be grounds for reducing a defendant's sentence have provided varying descriptions of what a defendant must show. Some Courts have required a showing the police engaged in "outrageous conduct", *United States v. Lacey*, 86 F3d 959, 963 (10th Cir. 1996), some have required a showing of "extraordinary conduct" or "something less", *United States v. Montoya*, 62 F 3d 1, 4-5 (1st Cir. 1995), and some have required only a showing the police conduct was for the sole purpose of ratcheting up a sentence, *United States v. Shephard*, supra at 649. Rejecting a rule that would require a showing of outrageousness, the *Smith* court said that in California such a showing establishes a complete defense to the prosecution and thus obviates any need to reach the issue of sentencing. Instead, the Court concluded by stating that "We believe defendants establish sentence manipulation for purposes of the quantity enhancement when they show the police

selected the amount of drugs for no legitimate law enforcement purpose but solely to maximize the defendants' sentence"

In many instances, whether viewed under federal law or through application of the term "escalation" under Michigan law, the Courts have used and applied the concepts of sentence manipulation and sentence entrapment interchangeably or together. In *United States v. Cannon*, 886 F.Supp. 705 (D.N.D. 1995), after distinguishing at length the difference between sentence entrapment and sentence manipulation, the Court determined that "*These* arguments can be raised in mitigation at the time of sentencing even when the defenses of entrapment or outrageous misconduct have failed in the determination of guilt at trial. *Id.* at 708, citing *United States v. Hulett*, 2 F3d 779 (8th Cir. 1994)(emphasis added). In *Cannon*, the Court stated the test for sentencing manipulation is whether the government conduct was outrageous and aimed only at increasing the sentence, or whether it served some legitimate law enforcement objective. *Id.* at 708, citing *United States v. Calva*, 979 F2d 119, 122-23 ((8th Cir. 1992). In finding "no legitimate law enforcement purpose" existed in that case for escalating a weapons offense from the sale of handguns to the sale of machine guns, the court determined that the only motive for the action was to increase the defendants' sentences from five years to thirty years.

In *United States v. Parrilla*, 114 F3d 124, 127 (9th Cir. 1997). the Court quoted extensively from *United States v. Staufer, supra,* in its application of the doctrine of sentence entrapment. The Court stated, "Our holding rests upon the basic principle that a defendant's sentence should reflect his 'predisposition, his capacity to commit the crime on his own, and the extent of his culpability'. *Id.* at 127, citing *United States v. Staufer, supra,* with approval.

In *United States v. Riewe*, 165 F 3d 727 (9th Cir. 1999), the court considered both sentence entrapment and sentence manipulation in determining whether to depart below a statutory minimum term for escalating sales of methamphetamines, stating:

> "Sentencing entrapment or sentence factor manipulation occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment. *United States v.*

> *Staufer*, 38 F 3d 1103, 1106 (9th Cir., 1994) (internal quotation marks and citation omitted). A defendant bears the burden of proving sentencing entrapment by a preponderance of the evidence. See *United States v. Parrilla*, 114 F3d 124, 127 (9th Cir. 1997). The district court is obligated to make express factual finding as to whether the defendant met this burden. *See id.*"

In *Riewe*, like the present case, Defense counsel argued that the police "should have arrested him after the first buy, [or] they should have taken up his offer to be introduced to the source". *Id.* at 729. The Court determined that "if the government induced Riewe to sell more methamphetamines than he was predisposed to sell, the district court should have subtracted the amount of drugs tainted by the entrapment, and thereby reduced his mandatory minimum sentence to five years under 21 U.S.C. 841(b)(1)(B)(viii). *Id.* at 729.

Other cases in which sentence entrapment or sentence manipulation have been recognized as factors to consider in sentencing include *United States v. Barth*, 788 F Supp 1055 (D Minn 1992), affirmed in part and vacated in part, 990 F. 2d 422 (8th Cir 1993), where the court reasoned in dicta that, although it was not present in that case, "sentencing entrapment may be legally relied upon to depart under the sentencing guidelines, *id.* at 424; *United States v. Lenfesty*, 923 F2d 1293, 1300 (8th Cir.)(indicating that it is possible that when "outrageous official conduct overcomes the will of an individual predisposed only to dealing in small quantities" a sentence reduction may be appropriate), *cert. denied*, 499 U.S. 968, 111 S Ct 1602 (1991). *See also United States v. Calva*, 979 F 2d 119, 123 (8th Cir. 1992); *United States v. Pacheco-Osuna*, 23 F 3d 269 (9th Cir 1994).

In the recent case of *The State of Florida v. Charles A. Steadman*, ___ Fla App ___; ___ So2d ___ (#3D01-3326, 9-4-02), the Court undertook a review of applicable federal and state law in determining whether a departure from a mandatory minimum sentence was appropriate. In Steadman, similar to the present case, the defendant was charged with multiple offenses for the sale of cocaine within 1,000 feet of a school. In that case, the State did not dispute that the only reason Steadman was not arrested after his first buy was to manipulate Steadman's sentence so as to obtain an enhanced punishment. It was also determined that the State offered no

legitimate law enforcement purpose for the police conduct whose only purpose was to increase the severity of Steadman's sentence. After reviewing the current state of applicable federal and state law, the Court determined as follows:

> "By enacting sentencing guidelines, the legislature sought to impose uniformity in sentencing. *See* Fla. Stat. Sec. 921.001(4) (2002). That purpose is undermined when law enforcement is allowed discretion to determine what a criminal's sentence will be. We therefore, hold that, although a defendant does not have a right to be arrested in order to be prevented from committing further crimes, a trial court has discretion to impose a downward departure sentence, when law enforcement allows a defendant to continue criminal activities for no reason other than to enhance his or her sentence..." *id.* (See Exhibit A, attached).

The facts in the present case are synonymous with those of the *Steadman* case in that there was no significant purpose for the efforts by police to engage the Defendant in a series of transactions other than to escalate the level of punishment. With each decision to defer an arrest and instead arrange for another undercover buy, the police increased the potential for consecutive mandatory minimum sentences. This Honorable Court is urged to arrive at the same conclusion as the Court in *Steadman,* that a trial court has discretion to impose a downward departure sentence when law enforcement allows a defendant to continue criminal activities for no reason other than to enhance his or her sentence.

In conclusion, if viewed in the context of sentence entrapment, there are objective and verifiable facts directly relevant to the Defendant's predisposition to commit the crime, his degree of culpability, and his capacity for rehabilitation which were appropriate considerations for substantial and compelling reasons for departure in this case, as discussed in *People v. Fields,* 448 Mich 58; 528 NW2d 176 (1995), and *People v. Windall Hill*, 192 Mich App 102, 115; 480 NW2d 913 (1991). Even when viewed only in the context of sentence manipulation, other facts support the conclusion that the seriousness of the offenses were "escalated" for the primary purpose of increasing the Defendant's sentence which is an appropriate reason to consider in mitigation of sentence.

II. A SENTENCING JUDGE SHOULD NOT BE PROHIBITED FROM USING THE LEGISLATIVE SENTENCING GUIDELINES TO ASSIST IN DETERMINING THE DEGREE OF A DEPARTURE AFTER HAVING ALREADY DECIDED TO DEVIATE FROM A STATUTORILY MANDATED MINIMUM SENTENCE BASED UPON A SUBSTANTIAL AND COMPELLING REASON.

In its order granting leave to appeal in this case, this Court asked the parties to review whether a trial court may consider the legislative sentencing guidelines recommendation when determining the degree of a departure, which has already been determined to be supported by substantial and compelling reasons. *People v Claypool*, 468 Mich at 944. (40a.). The Defendant concurs with the People's position that the answer to this question is "yes".

Standard of Review:

The Defendant concurs with the People's position that this question is a matter of law which should be reviewed by this Court *de novo*. *People v. Koonce,* 466 Mich 515, 518; 648 NW2d 153 (2002).

Legal Analysis:

The statutory Sentencing Guidelines, MCL 777.1 et seq.; MCL 777.13; and the Controlled Substances Act, MCL 333.7101 et seq., are "in pari materia" for drug offenders. *People v. Izarraras-Placante*, 246 Mich App 490 (2001). The Court in that case commented:

> "When construing statutes that are in pari materia, our (the Court's) goal is to further legislative intent by find an harmonious construction of the related statutes, so that the statutes work together compatibly to realize that legislative purpose. *Id.* at 498. We reconcile these particular statutory provisions by concluding that only in cases where substantial and compelling reasons exist to warrant a departure may the court then consider the guidelines in determining the magnitude of the departure." *Id.* at 498.

The Defendant agrees with the People that the reasoning of the Court in *Izarraras-Placante* was affirmed by this Court in *People v. Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003) where this Court stated that:

> "[The Legislature] has also subscribed to the principle of proportionality in establishing the statutory sentencing guidelines. Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range.

> Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender's criminal history. Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is the function of the seriousness of the crime and of the defendant's criminal history."

The Court further determined that the extent of a departure from the legislative sentencing guidelines should be driven by the goal of attaining a proportionate sentence, *Id.* at 272, .

The statutory Sentencing Guidelines were adopted for offenses like the one at bar occurring after January 1, 1999. Possession with Intent to Deliver between 50 and 224 grams of cocaine is a Guidelines Class or Level B offense. MCL 777.13; MSA 28.----. The statutory Guidelines range for this offense and this offender was computed by the presentence investigator as 36 to 60 months' incarceration.[2]

Having determined that there were substantial and compelling reasons to depart from the mandatory minimum sentence in this case, it was appropriate for the Trial Court to take into consideration the sentencing guidelines in fashioning an appropriate sentence. In doing so, the sentencing court should fashion a sentence to leave room for the principle of proportionality to operate, so that an offender convicted of the same crime who has a more serious prior criminal record or whose offenses were more aggravated with regard to that offense can receive a more severe sentence. *People v. Milbourn,*435 Mich 630, 658-659; 461 NW 2d 1 (1990). In *People v. Harris,* 290 Mich App 652; 476 NW2d 767 (1991), the Court of Appeals stated that the Milbourn analysis requires a threefold inquiry:

> "1. If the sentence is to be within the guidelines, where on the guideline range should the sentence fall?
>
> 2. What unique facts exist that are not already adequately reflected in the

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[2] Sentencing Information Report (SIR).

guidelines, and why to such facts justify any departure from the guidelines?

3. If there is to be a departure, what should be its magnitude and the justification for the specific departure imposed?" Harris, 290 Mich App 652, 668-669; 476 NW2d 767 (1991).

Applying the appropriate analysis to the case at bar, the sentencing court did not really state specific reasons why a departure from the sentencing guidelines was appropriate in this case. The fact that he Defendant was on bond when the offense was committed, his prior record, and the particulars of the offense were variables already reflected in the sentencing guidelines. Defendant therefore contends that, if any review of the sentence is appropriate in this case, that this Court find that a departure from the Sentencing Guidelines was unsupported as within the Court's discretion, vacate the sentence, and remand this matter to the Oakland County Circuit Court with instructions to sentence the Defendant to a sentence within the Sentencing Guidelines.

RELIEF

WHEREFORE, Defendant prays that this Honorable Court affirm the decision of the Court of Appeals to uphold the downward departure from the statutorily mandated minimum sentence for "substantial and compelling reasons". Defendant further requests that this Court reverse the decision of the Court of Appeals upholding the sentence and remand this matter to the Oakland County Circuit Court with instructions for the imposition of a sentence within the guidelines for the offense.

Respectfully Submitted,

_____
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Attorney for Defendant

Dated: October 29, 2003