

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY BAIRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON
RECOGNIZING SENTENCING ENTRAPMENT AND SENTENCING
MANIPULATION DOCTRINES AS VIABLE DEFENSES AT SENTENCING
IN FEDERAL DRUG CASES?

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

Petitioner, Henry Baird, by and through his undersigned attorney,
respectfully petitions for a writ of certiorari to review the judgment entered
in this case by the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix.

JURISDICTION

On August 16, 2021, the Court of Appeals entered its Judgment affirming the conviction and sentence. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions include 18 U.S.C. § 3742, and 28 U.S.C. § 2106.

STATEMENT OF THE FACTS

On April 27, 2017, Mr. Baird was indicted and charged with, one count of Conspiracy in violation of 18 U.S.C. § 371; two counts of Interstate Travel in Aid of Racketeering Enterprises in violation of 18 U.S.C. § 1952(a)(3); one count of Conspiracy to Distribute a Controlled Substance (methamphetamine) in violation of 21 U.S.C. § 846; two counts of Attempt to Distribute a Controlled Substance (methamphetamine) in violation of 21 U.S.C. § 846; one count of Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 1956(h); one count of Money Laundering in violation of 18 U.S.C. § 1956(a)(3)(B); one count of Transport, Delivery and Receipt of Unregistered Machineguns in violation of 26 U.S.C. § 5841, 5861; and one count of Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. § 922(g)(1). Five other alleged co-defendants were similarly charged with related offenses.

The investigation began after the FBI learned from a paid confidential informant that on or about September 13, 2016, co-defendants other than Mr. Baird, were gathering firearms and conducting tactical training in rural Potter County, Pennsylvania. From September 2016 to April 2017 the Government conducted an undercover operation to investigate the Aryan Strike Force (“ASF”) using undercover law enforcement officers posing as members of a white supremacist organization and assisting certain co-defendants in forming a service unit for the organization. Co-defendant Joshua Steever was responsible for recruiting other individuals to ASF. Steever was the individual who maintained regular contact with the Government agents. Consequently, with the able assistance of the Government, Steever engaged in a coordinated effort to traffic purported methamphetamine to generate funds for the purchase of alleged firearm and ammunition for ASF’s members. The Government provided the organization with money, fake methamphetamine and gun parts. Prior to this mission, ASF was not involved in drug trafficking of any kind.

After another leader of ASF was subsequently arrested on unrelated charges, Mr. Steever took the leadership role in the organization. Mr. Steever then recruited Mr. Baird, a childhood friend of Steever. Steever recruited Mr. Baird into the organization only after another member was unable to participate in the transactions. There were four undercover drug transactions orchestrated by the Government. Of the four transactions, Mr. Baird attended the last two on March 12, 2017 and April 7, 2017. Consequently, on April 13, 2017, Mr. Baird was taken into custody and subsequently detained.

On April 24, 2018, Mr. Baird entered a negotiated guilty plea before the district court. Specifically, Mr. Baird pled guilty to Count Seven, Conspiracy to Distribute a Controlled Substance, specifically 500 grams or more of methamphetamine. That count subjected Mr. Baird to a mandatory minimum of ten years.

On June 10, 2020, a sentencing hearing was held. Among other things, Mr. Baird argued that he should receive a sentencing variance based upon a claim of sentencing entrapment and sentencing manipulation. The district court summarily rejected those arguments. The district court ultimately sentenced Mr. Baird to 14 years. Mr. Baird filed a timely appeal to the Third Circuit Court of Appeals.

On August 16, 2021, a three-judge panel of the Third Circuit affirmed. *See United States v. Baird*, No. 20-2262 (3d Cir. August 16, 2021). In that opinion, the Panel held that “[w]hile our sister courts of appeals are split on the validity of sentencing entrapment and manipulation, this Court has ‘neither adopted nor rejected the[se] doctrines.’” *Id.* at 5. A mandate was issued on September 7, 2021.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE WELL-DEVELOPED CONFLICT AMONG THE CIRCUITS ON RECOGNIZING SENTENCING ENTRAPMENT AND SENTENCING MANIPULATION DOCTRINES AS DEFENSES AT SENTENCING IN FEDERAL DRUG CASES?

To say that the federal circuits are split on recognizing whether sentencing entrapment and sentencing manipulation doctrines are viable defenses at sentencing in drug cases is a gross understatement. At the moment, there exists a checkerboard of circuits that recognize sentencing entrapment and sentencing

manipulation doctrines. Some circuits recognize one, but not the other, and some circuits do not recognize either. This case presents the Court with an opportunity to resolve this open and notorious conflict among the federal courts.

At the outset, sentencing entrapment occurs “when official conduct leads an individual otherwise indisposed to dealing in a larger quantity or different type of controlled substance to do so and the result is a higher sentence.” *United States v. Martin*, 583 F.3d 1068, 1073 (8th Cir. 2009); *see also United States v. Staufer*, 38 F.3d 1103 (9th Cir. 1994). To establish sentencing entrapment, a defendant must prove by a preponderance of the evidence that the government induced the actions at issue and that the defendant was not predisposed to do what the government induced. *Martin*, 583 F.3d at 1073.

Sentencing manipulation is distinct from sentencing entrapment.¹ Sentencing manipulation occurs whenever the “government unfairly exaggerates the defendant’s sentencing range by engaging in a longer-than-needed investigation and, thus, increasing the drug quantities for which the defendant is responsible.” *United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009); *see also United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996) (describing sentencing manipulation “when the government engages in improper conduct that has the effect of increasing a defendant’s sentence.”). Unlike sentencing entrapment, the focus for sentencing

¹ Although similar in some respects, sentencing entrapment and sentencing manipulation are distinct concepts. One circuit has described that difference as “kissing cousin[s].” *United States v. Gibbens*, 25 F.3d 28, 30 (1st Cir. 1994).

manipulation is centered on the government's conduct. *See United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007).

There is great inconsistency within the federal circuits in the treatment and availability of these important sentencing arguments which means that criminal defendants rights vary greatly depending on where they are prosecuted.

- A. FIRST CIRCUIT: Recognizes sentencing entrapment and sentencing manipulation claims, but uses terms “interchangeably.” *See United States v. Jaca-Nazario*, 521 F.3d 50, 57 (1st Cir. 2008).
- B. SECOND CIRCUIT: Declines to recognize either sentencing doctrine. *See United States v. Gomez*, 103 F.3d 249 (2d Cir. 1997); *United States v. Floyd*, 375 F. App'x 88, 89 (2d Cir. 2010).
- C. THIRD CIRCUIT: Declines to recognize either sentencing doctrine. *See United States v. Sed*, 601 F.3d 224, 229 (3d Cir. 2010) (“We have neither adopted nor rejected the doctrines of sentencing entrapment and sentencing factor manipulation.”).
- D. FOURTH CIRCUIT: Declines to recognize either sentencing doctrine. *See United States v. Jones*, 18 F.3d 1145, 1154 (4th Cir. 1994).
- E. FIFTH CIRCUIT: Declines to recognize either sentencing doctrine. *See United States v. Stephens*, 717 F.3d 440 (5th Cir. 2013).
- F. SIXTH CIRCUIT: Declines to recognize either sentencing doctrine. *See United States v. Guest*, 564 F.3d 777, 781 (6th Cir. 2009).

- G. SEVENTH CIRCUIT: Declines to recognize either sentencing doctrine. *See United States v. Blackman*, 830 F.3d 721 (7th Cir. 2016).
- H. EIGHTH CIRCUIT: Recognizes both doctrines. *See United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009); *United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000).
- I. NINTH CIRCUIT: Recognizes both doctrines. *See United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999).
- J. TENTH CIRCUIT: Recognizes both doctrines. *See United States v. Beltran*, 571 F.3d 1013, 1019-20 (10th Cir. 2009).
- K. ELEVENTH CIRCUIT: Recognizes sentencing manipulation, but not sentencing entrapment. *See United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007).
- L. D.C. CIRCUIT: Declines to recognize both doctrines. *See United States v. Hinds*, 329 F.3d 184, 188 (D.C. Cir. 2003).

The courts that have rejected the recognition of either sentencing entrapment and/or sentencing manipulation are wholly incompatible with this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), which requires that a district court consider non-frivolous mitigation arguments at sentencing, which should include the request for a variance based upon sentencing entrapment and/or sentencing manipulation.

Here, the district court summarily denied Mr. Baird's sentencing arguments of sentencing manipulation and sentencing entrapment. Because the district court

failed to articulate *any* reason for rejecting those arguments, Mr. Baird is uncertain as to the precise basis why the district court rejected those claims, particularly when the district court acknowledged that the Government played a significant role in creating the criminal conduct.

Here, the uncontradicted record presented to the district court showed that the Government played a significant role in concocting the entire criminal conduct at issue. Two co-defendants in this case (Lough and Robards), filed a pre-trial motion to dismiss the Indictment based upon an allegation of outrageous Government conduct. The district court held an evidentiary hearing over two days. The evidence presented at that hearing was illuminating.

In that hearing, the Government conceded that it controlled virtually every aspect in bringing the criminal venture to fruition and played the essential role. The initial meeting with the undercover government agent was designed to infiltrate ASF. At that meeting, it was the undercover agent who initiated the criminal activity. The Government ultimately decided that the initial business activity to infiltrate the organization was going to be the transport of simulated methamphetamine. The Government provided the money to acquire the receivers. The Government decided the dates when and where the drug trafficking would occur and locations. Notably, it decided the type and amounts of drugs to be distributed. It dictated how much money each person would get paid and the use of payment through gift cards. It determined what firearm receivers would get

transported. The Government controlled both the drug distributors and buyers. In short, the government directed everything.

Furthermore, the Government acknowledged that ASF was never a drug trafficking organization at all and that no criminal activity by ASF as a group was uncovered at all. None of the members were drug sellers. They brought no drugs to the operation. In fact, the Government acknowledged that no one in ASF brought anything to the drug trafficking operation. Equally important, the Government initiated each of the four deals. The Government alone controlled all aspects of the operation, including the length of the investigation, and thereby engaging in a clearly longer-than-needed investigation. Likewise, the Government's intentional and prolonged investigation, controlling the number of runs, type of drug, and drug weights, were calculated to subject Mr. Baird and the others to increased drug penalties.

Indeed, Mr. Baird's character was such that he was not predisposed to deal in methamphetamine, or for that matter, engaged in drug trafficking of any kind. In fact, he had no history of drug or firearm trafficking, until Steever, at the Government's encouragement, requested him to do so.

Significantly, the district court ultimately found that the Government played a significant role in concocting the criminal conduct stating

[t]he Government exercised some control over the operation. The Government decided when and where the methamphetamine runs would take place. The government decided which illegal items to transport using the Defendants as 'security' for the run. The Government also decided the weight of the synthetic drugs. ***It is certainly concerning that the Government controlled the weight of the***

drugs brought on each run. The weight is a substantial weight that triggers mandatory minimum sentences here.

(D.C. Doc. 331 at 64, Opinion March 5, 2019) (emphasis added).

Despite the district court's "concern," it summarily rejected Mr. Baird's sentencing entrapment and sentencing manipulation arguments at sentencing.

Mr. Baird fared no better on direct appeal. The Third circuit did not even acknowledge the validity of his sentencing entrapment and sentencing manipulation arguments.

This case raises profound concerns involving "the unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to increase his or her sentence without regard to predisposition, his capacity to commit the crime." *United States v. Stauffer*, 38 F.3d 1103, 1107 (9th Cir. 1994).

Here, the Third Circuit failed to acknowledge the viability of legitimate sentencing arguments in the form of sentencing entrapment and sentencing manipulation, which are appropriate mitigation claims under this Court's holding in *Booker*. The net effect of this disparity resulted in the substantially inconsistent treatment of Mr. Baird and other litigants within this Circuit. This inconsistency within the federal circuits means that criminal defendants' rights vary greatly depending on where they find themselves. This Court should establish uniformity on this critical issue that affects an overwhelming majority of federal defendants.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, this Court should grant the petition for writ of certiorari.

Dated: November 2, 2021

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CERTIFICATE OF SERVICE

I, Edward J. Rymsza, hereby certify that on this 2d day of November 2021, I served copies of the Motion for Leave to Proceed in Forma Pauperis and the Petition for a Writ of Certiorari in the above-captioned case were mailed, first class postage prepaid to the following:

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I certify that all parties required to be served have been served.

Dated: November 2, 2021

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CERTIFICATIONS

I, Edward J. Rymsza, Esq., hereby certify that:

1. I am a member of the bar of the Supreme Court of the United States,
2. the text of the electronic brief e-mailed to the Court is identical to the text of the other paper copies mailed to the Court,
3. the attached brief has been automatically scanned during preparation and upon sending by Avast anti-virus detection program and no virus was detected,
4. on the date below, one copy of the foregoing Petition for Writ of Certiorari was placed in the United States mail, first class, postage pre-paid addressed to:

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5. on the date below, ten copies of the same were placed in the United States mail, first class, postage pre-paid, addressed to:

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