No. 22-

IN THE
Supreme Court of the United States

WIGBERTO VIERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

VIVIAN SHEVITZ
(*Counsel of Record*)
315 9th Street
Royal Oak, MI 48067
(914) 763-2122
vivian@shevitzlaw.com

Attorney for Petitioner

QUESTION PRESENTED

This case arises out of a series of "reverse sting" drug busts in the Southern District of New York. A loosely-supervised DEA informant was told to target people from his criminal life and induce them come to New York to rob fictitious armed drug couriers of a large quantity of cocaine and heroin, a quantity far exceeding that triggering mandatory minima, and to bring guns. In these cases, individuals, including Petitioner, are punished for offenses involving quantities never previously accessible; Petitioner's criminal history had consisted of small street sales with no previous violent conduct. The jury convicted based on predisposition. the sentencing judge apologized to the defendant for imposing the required sentence -- the sentence was greater than necessary. (18 U.S.C. 3553(a)).

The question presented is: Whether this Court should recognize the defense of sentencing manipulation, in accordance with the majority of Courts of Appeals, and rule that sentence reductions, even below a mandatory minimum, may and must be granted when the government's conduct strips the judge of his sentencing authority in order to preserve the separation of powers and the authority of the Judiciary to dispense Due Process, as well as the rights of the defendant to fair sentencing.

PARTIES TO THE PROCEEDING

Petitioner is Wigberto Viera, aka Roberto Viera, the defendant-appellant below.

Respondent is the United States of America, the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner WIGBERTO VIERA respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Second Circuit's decision affirming the convictions is unpublished. It is reproduced in the Appendix to this Petition ("App.") at 1a-4a. The Court denied a petition for rehearing (see App. 5a) on June 24, 2022.

JURISDICTION

The court of appeals issued its decision on May 10, 2022. The Court denied a timely petition for rehearing and rehearing en banc on June 24, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

UNITED STATES CONSTITUTIONAL, STATUTORY AND SENTENCING GUIDELINE PROVISIONS

The Fifth Amendment to the United States Constitution states, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *. "

18 U.S.C. § 3553(a) states:

> (a) Factors To Be Considered in Imposing a Sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.

> (b) The court, in determining the particular sentence to be imposed, shall consider – (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for - 2 (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines - … (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense ….

18 U.S.C. § 3661 states: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

U.S.S.G. § 1B1.4 states: Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines) In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

STATEMENT OF THE CASE

"Petitioner Roberto" Viera was a long-time low-level drug dealer, according to the record. No one said differently. He sold drugs, without violence, in small quantities in Camden, New Jersey. There were never large amounts and no guns were involved in his low-level crimes.

He claimed entrapment in this case: he was induced to participate in a scheme to rob (non-existent) drug couriers of large amounts of (non-existent) drugs, and to retrieve a gun to commit the robbery with others. The jury convicted.

Sometime in the fall of 2013, one Jose Rodriguez, a drug dealer -turned witness was working off a felony case by "naming names" to his handler, DEA Agent Todd Riley. He "named" Petitioner Viera after he could not think of others as someone who might agree to a multi-kilo robbery scheme and who would come to New York from New Jersey to participate.[1] Agent Riley testified at trial that Rodriguez became Riley's cooperating witness in December 2012. Riley had arrested Rodriguez, a "mid-level drug dealer", after Rodriguez showed up to pick up

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[1] In six proffer sessions, over a ten-month period, Jose Rodriguez had never mentioned Petitioner Viera. (T.155). Rather, as Agent Riley testified on redirect, his investigation using informant Rodriguez was ongoing and private. He had "further conversations or debriefings with cooperator Rodriguez not at the US Attorney's officer and not subject to the proffer agreement. Rodriguez would talk with Agent Riley about potential targets but Riley "continued to pick his brain on the knowledge he has of his past criminal activity and everything he knows up until, you know, this week." It was "during one of these discussions" that he had "learned about" Appellant Viera. (T. 167).

a "couple kilograms of cocaine". Thereafter, Riley developed, with Rodriguez' constant "help," a "cottage industry" targeting people Rodriguez dug up to commit a fake robbery of non-existent drug couriers, to cross State lines to do so, and to do so with guns.

Pretrial submissions showed that Agent Riley's operation was supposed to target previously violent offenders. Riley claimed that he always corroborated any information about a past offender that Rodriguez, his free-wheeling-informant, was feeding him. Riley corroborated that Petitioner had been incarcerated with Rodriguez in 2014, almost 10 years earlier. Riley could not have corroborated any "violence" in Petitioner's criminal history, because there was no violence.

Rodriguez's first encounter with Petitioner Viera was unrecorded and unwitnessed and was not the subject of a DEA report. Rodriguez claimed he had located Viera on the street in Camden. After Rodriguez determined that Petitioner was "interested" in the project, Rodriguez kept him on the line and continued talking about this plan-in-formation. These further discussions between Rodriguez and Petitioner were recorded, and showed that Petitioner seemed to have wanted to be a participant.

As happened with the series of cases set up by Riley and Rodriguez this way,[2] Rodriguez kept telling Petitioner that the day was coming, and encouraged

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[2] In moving to dismiss prior to trial, counsel cited a series of identical cases in the district: *United States v. Davis et al*, 13 Cr. 986 (LTS), *United States v. Cook et al*.,

Petitioner to recruit others to do the job. Petitioner recruited three others (none of whom had been violent). With Rodriguez and an informant "playing" the link with the Florida drug shippers, the plan for the robbery was fed to Viera. Viera and his recruits were told that the couriers may be armed, and that they should be ready.

On the date the robbery was to happen, Petitioner and his "recruits" together drove from New Jersey to New York City, expecting to rob a drug load being transported from Florida to New York, and expecting that the people driving the load from Florida would be armed.

As rehearsed, Rodriguez and Mike, the informant, led Viera and the others in the car to where they thought the robbery would take place, 125th Street at 12th Avenue in Manhattan. There, they were intercepted by police and arrested. During the arrest process at the scene, Santiago was shot, and Appellant Viera was wounded. Thereafter they were charged in this case.

According to codefendant/witness Santiago at trial, Santiago had never committed any such violent robbery in the past either. He had not previously worked with Petitioner. He testified that Petitioner had brought one gun into the car – an AK rifle – that was in a bag that remained in the trunk during the episode.

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13 Cr. 77 (AJN), *United States v. Brandt et al.,* 13 Cr. 487 (RPP), *United States v. Holguin, et al.* 13 Cr. 363 (RPP), *United States v. Tajman et al,* 13 Cr. 531, *United States v. Comacho*, et al. 13 Cr. 58 (KBF), *United States vs. Rollins, et al.* 13 Cr. 362 (WHP), *United States vs. Aquino, et al.* 13 Cr. 530 (TD), *United States vs. Gomez, et al* (SAS) 14 Cr. 459.

Santiago brought a handgun and a Mossberg rifle. Because he thought he was being attacked by the police when they swooped to stop and arrest Petitioner and the other "robbers" at the location, Santiago tried to defend himself with the handgun, which he had placed between the front seats. (There is no evidence Petitioner ever used that or any other AK weapon in the past. Petitioner was sitting in the back seat when the takedown occurred.)

When Rodriguez first solicited Viera to participate in a robbery, there was no discussion of any specific "quantity" of drugs. Rodriguez testified he had told Viera that "somewhere in the 20s is – is poss – so far that's what it is." Viera was heard to say "that's good. That's great." As the time drew closer, the informant settled on 22 kilos of imaginary drugs (T.244).

Throughout his life Petitioner had been a street quantity hand-to-hand dealer. An opportunity to get so much quantity to sell was like winning a lottery. Up till then, the most Petitioner did was to chip in with others to "buy a kilo to sell on the[] block, or whatever" (as Rodriguez had testified he was told by Petitioner while they were in jail together in the past). (T.201). Santiago stated that the robbers intended to do the same thing, street sales in Camden, after they divided up the drugs they thought they would get from the robbery.

The Court gave an entrapment charge. The jury found the defendant guilty. The jury also responded to question that the conspiracy involved quantities more than 5 kilos of cocaine and more than 1 kilo of heroin – a finding necessary to

require the mandatory-minimum. The jury also found Viera guilty of a gun charge, 18 USC 924(c), because the defendants had brought guns to the scene of the robbery.

At the sentencing, District Judge Ramos *apologized* to the defendant for sentencing him to the 15-year mandatory minima (10 years for the drug quantity and a consecutive 5 for the (induced) gun crime): "It is unfortunate, … and I say this sincerely to Mr. Viera, that I have to sentence him to as long as 15 years. If I could sentence him for less time, I would." (Sentencing T.13-14.)

On appeal, Petitioner Viera argued that there had been no real agreement to 22 kilos or 5 pounds of heroin— and that these were quantities well more than Viera had ever been able to obtain. When Viera was told by the government agent that there would be 22 kilos in the shipment, Viera said "great".

Viera argued that this manipulation of the sentencing factor was a violation of Due Process: there is nothing in Viera's history to show he had access to such an amount or had ever used a gun in connection with his "real" drug sales. Agents setting up "the crime" could have given him the opportunity to agree, or pass, on a 4-kilo haul, which would have obviated the mandatory minimum.

The Second Circuit reported Viera's claim and its affirmance:

> Viera suggests that the Government committed "sentencing manipulation" by setting him up to steal and sell a quantity of drugs designed to trigger a mandatory minimum sentence. See Appellant's Br. at 45–46. None of our cases has recognized "sentencing manipulation," and we have additionally noted that even if we were to do so, it

> would "require a showing of outrageous misconduct," which Viera has not made. *See [United States v.] Cromitie*, 727 F.3d [194] at 226 [2d Cir. 2013] (internal quotation marks omitted)

The Second Circuit thus again declined to recognize sentencing manipulation. However, during oral argument of the appeal, Circuit Judge Calabresi expressed his dismay that the government tactic made it impossible for him to function as a judge reviewing a sentence. But, he said, he could not do anything about it.

A petition for rehearing and rehearing *en banc* as to the sentencing manipulation claim was denied. Petitioner seeks a Writ of *Certiorari.* He is serving a sentence of 180 months, when he had never committed violent conduct in the past, and his sentencing judge told him he did not want to impose the sentence required. This Court should take the case to resolve whether there is a remedy for sentencing manipulation by the government, and if so, to explain what gives rise to a remedy.

REASON FOR GRANTING THE PETITION

THE COURT SHOULD GRANT *CERTIORARI* TO RESOLVE SENTENCING ISSUES ARISING IN REVERSE STING/ STASH HOUSE CASES, AND SHOULD RULE THAT THERE IS A REMEDY UNDER THE DUE PROCESS CLAUSE WHEN A SENTENCE REQUIRED FROM "QUANTITY" MANIPULATION IS A MANDATORY MINIMUM THAT A SENTENCING JUDGE FINDS "GREATER THAN NECESSARY."

Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence. In *United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992), the Court held that the sentencing manipulation defense "requires us to consider whether the manipulation inherent

in a sting operation, even if insufficiently oppressive to support an entrapment defense . . . or [a] due process claim . . . must sometimes be filtered out of the sentencing calculus". Here, Petitioner seeks to argue that the type of manipulation the government engages in to achieve a mandatory minimum and "cut out the judge" *is* sufficiently "oppressive" to rise to a Due Process claim. The trial judge did not want to impose these sentences in this made-up crime; one of the appeals court judges expressed dismay that he was prevented from judging.

Seven Courts of Appeals have recognized sentencing manipulation or sentencing entrapment, or both, as available grounds for sentence reductions. The First and Eleventh Circuits have stated that a successful claim of sentencing manipulation may be grounds for a sentence below an otherwise applicable mandatory minimum. *United States v. Kenney*, 756 F.3d 36, 51 (1st Cir. 2014); *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007). Sentencing manipulation was seen by the First Circuit as grounds for equitable relief in imposition of a reduced sentence. *United States v. West*, 631 F.3d 563, 570 (1st Cir. 2011).

The Seventh Circuit is skeptical, but addressed sentencing entrapment as a possible basis for a sentence reduction. The Seventh Circuit explained that sentencing entrapment "occurs when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense." *United*

States v. Turner, 569 F.3d 637, 641 (7th Cir. 2009), *citing United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996).

Other courts are split on whether to recognize sentencing manipulation claims. The Eleventh Circuit once rejected sentencing manipulation as a viable theory. *See United States v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992). Several courts will entertain manipulation claims. *See United States v. Brewster*, 1 F.3d 51, 55 (1st Cir. 1993); *United States v. Calva*, 979 F.2d 119, 122-23 (8th Cir. 1992); *United States v. Shepherd*, 857 F. Supp. 105, 110 (D.D.C. 1994); *United States v. Monocchi*, 836 F. Supp. 79, 87-88 (D.Conn. 1993).

The Eighth Circuit has recognized sentencing manipulation, if established, as a ground for a downward departure. That Court noted that sentencing manipulation reflects artificial inflation of the offense level by the government's actions that increases the quantity of drugs for which a defendant is held responsible and constitutes a due process violation. *United States v. Torres*, 563 F.3d 731, 734-35 (8th Cir. 2009). The Eighth Circuit also recognized that sentencing entrapment is a "viable theory for a downward departure under the Sentencing Guidelines" due to the fact that the Guidelines "have a 'terrifying capacity for escalation of a defendant's sentence' as a result of government misconduct." *United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000) (citations omitted). The United States Court of Appeals for the D.C. Circuit also has recognized the viability of both sentencing entrapment and sentencing manipulation. *United States v. Mack*, 841

F.3d 514, 523-24 (D.C. Cir. 2016). Similarly, the Ninth Circuit has recognized the existence of both concepts. *United States v. Boykin*, 785 F.3d 1352, 1360-61 (9th Cir. 2015).

The Second, Third, Fourth, and Fifth Circuits have neither expressly adopted nor rejected sentencing entrapment and sentencing manipulation as grounds for sentence reductions. However, those Courts – including the opinion below here, assumed that the doctrines existed but that the Court had not recognized a situation where it should apply. *United States v. Floyd*, 375 Fed. Appx. 88, 89-90 (2d Cir. 2010); *United States v. Washington*, 869 F.3d 193, 210-11 (3d Cir. 2017); *United States v. Sed*, 601 F.3d 224, 229 (3d Cir. 2010); *United States v. Jones*, 18 F.3d 1145, 1154-55 (4th Cir. 1994); *United States v. Tremelling*, 43 F.3d 148, 151- 52 (5th Cir. 1995).

The manipulation in this case subjected Appellant Viera to an unfair -- excessive -- sentence. The government did so by tying the sentencing judge's hands behind his back and blindfolding him. The Court should grant *certiorari* and hold this sentencing "scheme" violates Due Process. *Hampton v. United States*, 425 U.S. 484, 490 (1976) ("The limitations of the Due Process Clause of the Fifth Amendment come into play … when the government activity … violates some protected right of the Defendant.").

Defendant has a Due Process right to be sentenced fairly, to a term no greater than necessary. The right to a fair sentence is a protected right under the law. 18 U.S.C. § 3553(a).

Petitioner seeks to argue that Courts have improperly assumed that the same standards used in "entrapment" analysis – "outrageous" or "coercive" conduct – is automatically applicable to a remedy of sentencing reduction. However, the remedies are not the same. Dismissal of an indictment or suppression of evidence have required shock-the-conscience "outrageousness."

But while Courts must tread lightly when dismissing indictments that are in the prosecutors' prerogative, the prosecution has no authority to sentence. The 'outrageousness" standard assumed applicable by the Second Circuit below, should not be used here.

Petitioner seeks to appeal and argue that, when sentencing factors are built into a government crime scheme, when there is manipulation to the extent that a judge is precluded from considering factors s/he is required to consider, it is an outrageous usurpation of judicial power. There is no reason it should require a showing of something "violent" or "physical" on the part of the government when the result is a sentence that exceeds proper bounds.

This Court needs to set the standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VIVIAN SHEVITZ /S/
(*Counsel of Record*)
315 9th Street
Royal Oak, Michigan
48067
(914) 763 2122
vivian@shevitzlaw.com

APPENDIX

21-957-cr
U.S. v. Viera

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of May, two thousand twenty-two.

PRESENT: GUIDO CALABRESI,
JOSÉ A. CABRANES,
JOSEPH F. BIANCO,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee, 21-957-cr

v.

WIGBERTO VIERA, AKA ROBERTO, AKA WIZ,

Defendant-Appellant,

LOUIE SANTIAGO, AKA LIONEL, AKA "L", AKA LEONEL, ERNESTO COLON, EDUARDO DEJESUS, EVA FIGUEROA,

Defendants.

FOR DEFENDANT-APPELLANT: VIVIAN SHEVITZ, South Salem, NY.

FOR APPELLEES: BRANDON D. HARPER (David Abramowicz, *on the brief*), Assistant United

States Attorneys, *for* Damian Williams, United States Attorney, Southern District of New York, New York, NY.

Appeal from an order and judgment of the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order and judgment of the District Court be and hereby are **AFFIRMED**.

Defendant Wigberto Viera ("Viera") was convicted at trial of: (1) conspiracy to distribute narcotics in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A); (2) conspiracy to commit Hobbs Act Robbery in violation of 18 U.S.C. § 1951; and (3) possession of a firearm during a crime of violence or narcotics trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A)(i). The case against him was based largely on a "reverse sting" operation in which law enforcement worked with a cooperating witness and led Viera to believe he was engaging in an armed robbery to steal cocaine and heroin from drug dealers. Viera was arrested when he arrived near the appointed time and place to conduct the robbery. Viera was convicted at trial on all counts and sentenced to 15 years' imprisonment. As is relevant to Viera's appeal, the jury was instructed that either Count 1 (the narcotics conspiracy), or Count 2 (the Hobbs Act robbery conspiracy), or both, could serve as predicate offenses for Count 3 (the firearm possession). Supp. App'x 91. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

DISCUSSION

I. *Yates* Claim

Under *Yates v. United States*, 354 U.S. 298 (1957), *overruled in part on other grounds by Burks v. United States*, 437 U.S. 1 (1978), a "concern arises where disjunctive theories of culpability are submitted to a jury that returns a general verdict of guilty, and one of the theories was legally insufficient. In such circumstances, 'it is impossible to tell which ground the jury selected,' the legally sufficient ground or the insufficient one." *United States v. Agrawal*, 726 F.3d 235, 250 (2d Cir. 2013) (quoting *Yates*, 354 U.S. at 312) (citation, some internal quotation marks, and brackets omitted). As the Government acknowledges, following *United States v. Davis*, 139 S. Ct. 2319 (2019), Count 2 was not a valid predicate offense for Viera's conviction under Count 3. *See United States v. Barrett*, 937 F.3d 126, 129-30 (2d Cir. 2019). Viera therefore argues that we should set aside his conviction on Count 3.

We review an unpreserved *Yates* claim such as Viera's for plain error. *United States v. Skelly*, 442 F.3d 94, 99 (2d Cir. 2006). Plain error is "(1) error, (2) that is plain, and (3) that affects substantial rights," and we upset the verdict only where "the error seriously affects the fairness,

integrity, or public perception of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (internal quotation marks and brackets omitted). The burden falls on the defendant to establish the elements of plain error. *United States v. Eldridge*, 2 F.4th 27, 37 (2d Cir. 2021).[1]

As we have explained, no prejudicial *Yates* error arises in a situation where the jury "would have returned a guilty verdict on [a § 924(c) charge] even if it had been instructed" only to consider valid predicate offenses under § 924(c). *Id.* at 39; *see United States v. Vasquez*, 672 F. App'x 56 (2d Cir. 2016) (summary order) (rejecting a *Yates* challenge where valid narcotics conspiracy and invalid Hobbs Act robbery conspiracy predicate offenses for a § 924(c) charge were "inextricably intertwined"); *see also United States v. Coppola*, 671 F.3d 220, 237 (2d Cir. 2012) (rejecting a *Yates* challenge where, if a jury were to conclude that the defendant was guilty on an invalid ground "the jury necessarily would have had to conclude" that the defendant was also guilty on a valid ground).

Here, the District Court concluded that "the drug trafficking charge [wa]s inextricably intertwined with the Hobbs Act charge, as the entire purpose of the Hobbs Act conspiracy was to distribute narcotics." Supp. App'x 116. This was not error, much less plain error. *See United States v. Capers*, 20 F.4th 105, 125 (2d Cir. 2021) (explaining that where "the goal of the robbery conspiracy [is] to obtain narcotics to distribute, the robbery conspiracy [is] itself an integral part of the narcotics conspiracy" such that the two would be "inextricably intertwined" (citation omitted)). Therefore, Viera's *Yates* challenge fails.

On appeal, Viera argues that this case is governed by *United States v. Heyward*, 3 F.4th 75 (2d Cir. 2021). We do not agree. In *Heyward*, we vacated a conviction under § 924(c), concluding that we were "left with a distinct uncertainty" over whether the jury had based its conviction on valid or invalid predicate offenses under *Davis*. *Id.* at 85. But it is enough to distinguish *Heyward* that there were clear indicia in that case that the jury viewed the valid § 924(c) predicate (a narcotics conspiracy) as distinct from the invalid § 924(c) predicate (a racketeering conspiracy). For example, the jury in that case specifically indicated on a special verdict form that a gun supporting the defendant's § 924(c) possession charge had been discharged in furtherance of the racketeering conspiracy, and *not* in furtherance of the narcotics conspiracy. *Id.* at 79-80.

[1] *Davis* was not decided until after Viera's trial, and he filed a post-trial motion based on *Davis* prior to sentencing, which the District Court denied. Record on Appeal, Doc. Nos. 185, 214. Viera therefore urges that a "modified" plain error analysis applies. *See* Appellant's Br. 36; *United States v. Viola*, 35 F.3d 37, 43 (2d Cir. 1994) (applying "modified" plain error review to an unpreserved argument based on a supervening change in precedent, shifting the burden to the government to rebut an effect on defendant's substantial rights). But as we have recently recognized, the rule we adopted in *Viola* has been abrogated. *Eldridge*, 2 F.4th at 37; *see Johnson v. United States*, 520 U.S. 461, 467 (1997) (applying normal plain error review when considering an error resulting from a supervening change in law). We therefore conduct a "normal" plain analysis here.

In sum, the District Court correctly rejected Viera's *Yates* challenge and denied his August 29, 2019 motion.

II. The Reverse Sting

Viera advances two additional arguments on appeal, both of which are essentially challenges to the sort of sting operation used by law enforcement against him.

First, he argues that the sting induced him to commit violence he was otherwise uninclined to commit, and it was therefore "outrageous" and violative of due process. *See* Appellant's Br. 5, 11 (citing *Hampton v. United States,* 425 U.S. 484, 489 (1976)). But the outrageous conduct analysis "cannot depend on the degree to which the government action was responsible for inducing the defendant to break the law." *United States v. Cromitie*, 727 F.3d 194, 218 (2d Cir. 2013). The Government's employment of a basic reverse-sting operation here was not wrongful, much less "outrageous." *See United States v. Al Kassar*, 660 F.3d 108, 121 (2d Cir. 2011) ("[T]o be 'outrageous,' the government's involvement in a crime must involve either coercion or a violation of the defendant's person.").

Second, Viera argues that the District Court erred based on the quantities of narcotics used to calculate his sentence. Viera suggests that the Government committed "sentencing manipulation" by setting him up to steal and sell a quantity of drugs designed to trigger a mandatory minimum sentence. *See* Appellant's Br. at 45–46. None of our cases has recognized "sentencing manipulation," and we have additionally noted that even if we were to do so, it would "require a showing of outrageous misconduct," which Viera has not made. *See Cromitie*, 727 F.3d at 226 (internal quotation marks omitted).

CONCLUSION

We have reviewed all of the remaining arguments raised by Viera on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the April 8, 2021 order and judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

Appendix 5a

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of June, two thousand twenty-two.

United States of America,

Appellee,

v.

Wigberto Viera, AKA Roberto, AKA Wiz,

Defendant - Appellant,

Louie Santiago, AKA Lionel, AKA "L", AKA Leonel, Ernesto Colon, Eduardo Dejesus, Eva Figueroa,

Defendants.

ORDER

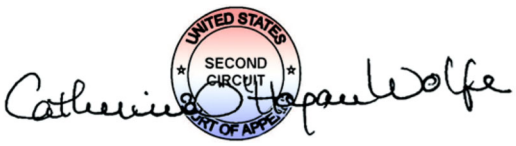
Docket No: 21-957

Appellant, Wigberto Viera, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



Declaration of service

I, Vivian Shevitz, declare under penalty of perjury:

On September 21, 2022, I served a copy of this petition on the Solicitor General of the United States, by mailing same to:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D. C. 20530–0001.

All parties have been served.

Dated: September 21, 2022

/s/_____
Vivian Shevitz