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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

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|----|---------------------------|---|----------------------------------|
| 13 | UNITED STATES OF AMERICA, |) | Case No.: CR 07-1360 SVW |
| 14 | |) | |
| 15 | Plaintiff, |) | DEFENDANT’S SENTENCING |
| 16 | |) | MEMORANDUM AND |
| 17 | vs. |) | OBJECTIONS TO PSR |
| 18 | |) | |
| 19 | CARLOS IVAN CUENTAS, |) | Sentencing Date: August 25, 2008 |
| 20 | |) | |
| 21 | Defendant. |) | |

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1 I. INTRODUCTION.

2
3 This case is about two hand-to-hand deals involving powder cocaine and
4 cocaine base. This case is about nothing more than two drug deals between the
5 defendant and Osvaldo Guevara, a confidential informant working for the federal
6 government.

7 The government's sentencing position memorandum, however, seems to present
8 a completely new case--a case that was not charged, a case that was not proven, a case
9 based on evidence withheld from the defense.

10 Using the most egregious of tactics, the government overcharged this case,
11 engaged in sentencing entrapment, employed an informant who perjured himself at
12 trial. And now, the government has filed a sentencing position based upon the
13 declaration of Officer Frank Flores that demonstrates that the government withheld
14 discovery from the defense at trial, and now attempts to create a case against the
15 defendant that was not charged and not proven. The government seeks to introduce all
16 manner of supposition and irrelevant evidence--evidence the existence of which is
17 only now coming to light--against Mr. Cuentas for conduct unrelated to the case
18 charged and *which was not proven to a jury's satisfaction*.

19 The government's entire case relied upon the work, information, and testimony
20 of one confidential informant--an informant without any credibility who testified at
21 trial that the prosecutor told the informant to call the drug "crack" because "it sounded
22 better". The government's case relied entirely on this one witness--a witness who was
23 in the United States illegally, who had prior criminal convictions and sustained new
24 convictions for carrying loaded and concealed firearms while an active informant in
25 this case, who was regularly using illegal drugs while an active informant, who
26 received and continues to receive substantial amounts of money from the government

1 (and has failed to pay any taxes on that money), and who perjured himself at trial.
2 This informant does not face deportation despite being in the country illegally and
3 despite having criminal convictions that would subject him to deportation even if he
4 was a legal resident alien.

5 Having failed to prove their case at trial, the government finally relented and
6 entered a plea agreement with the defendant--a plea agreement that defendant had
7 been requesting prior to trial. But now, the government seeks to present a completely
8 different case to this Court at sentencing, making new allegations of the defendant's
9 criminality--allegations based on evidence that was never disclosed to the defense.

10 This is a drug case about two individual hand-to-hand deals with the informant
11 Osvaldo Guevara. This is not a gang case. This is not a gun case. This is not a
12 racketeering case. This is not a murder case. But the government would have the
13 Court impose a sentence as if it were.

14 This is a simple drug case that should have been brought in State court.

15 As set forth fully below, because the government has engaged in outrageous
16 conduct, the Court should reject the declaration of Officer Frank Flores and reject the
17 government's sentencing position. Because of the sentencing disparity for crack
18 cocaine as compared with powder cocaine that remains in the advisory Guidelines and
19 the statutory mandatory minimum, the Court should find the mandatory minimum as
20 applied to crack cocaine unconstitutional, and impose a sentence based on an
21 equivalent quantity of powder cocaine, namely 33-41 months, based on an advisory
22 Guideline Offense Level of 14 at a Criminal History Category of V.

1
2 **II. STATEMENT OF FACTS**

3
4 1. Procedural Background.

5 Defendant Carlos Ivan Cuentas was indicted for two counts of violating 21
6 U.S.C. § 841(a)(1), specifically §841(a)(1) and (b)(1)(C), distribution of cocaine and
7 (b)(1)(B)(iii), distribution of more than 5 grams of cocaine base in the form of “crack”
8 cocaine.¹ The government then filed an Information for Sentence Enhancement under
9 21 U.S.C. §851 to increase the statutory mandatory minimum sentence in the case to
10 10 years.²

11 As the case was being prepared for trial, defense counsel and government
12 counsel discussed the possibility of resolving the case by plea agreement.
13 Government counsel asked defense counsel why Mr. Cuentas was going to trial.
14 Defense counsel informed the government that their initial plea agreement offered Mr.
15 Cuentas no incentive in that it subjected him to the 10-year mandatory minimum.
16 Defense counsel stated that the case would probably settle if the government
17 dismissed the §851 Information. Government counsel stated that such a plea
18 agreement was not possible.

19 Mr. Cuentas went to trial on April 1, 2008. The trial lasted four days. Mr.
20 Cuentas was found guilty on Count 1 and the jury could not reach a verdict on Count
21 2--the count that subjected Mr. Cuentas to the mandatory minimum.³ On April 21,
22 less than three-weeks later, the parties filed a plea agreement as to Count 2 in which
23 the government agreed to dismiss the § 851 Information and not prosecute Mr.

24 ¹ See Indictment filed 12/11/07, Docket No. 12.

25 ² See Information for Sentence Enhancement filed 2/7/08. Docket No. 26.

26 ³ See Minutes of Jury Trial, Day 4, 4/4/08. Docket No. 65.

1 Cuentas for any conduct relating to alleged possession of or sale of firearms.⁴ Under
2 the terms of the plea agreement, Mr. Cuentas would only be subject to the 5-year
3 mandatory minimum--the resolution that defense counsel had sought from the
4 government prior to trial.

5
6 2. Evidence At Trial.

7 As the Court is well-aware, the evidence adduced at trial was that the informant,
8 Osvaldo Guevara, approached Mr. Cuentas seeking to buy cocaine. There was no
9 evidence that Mr. Cuentas was actively engaged in trafficking at the time. After the
10 first transaction, the undercover recordings established that Mr. Cuentas resisted
11 selling the cocaine base to the informant Guevara, indicated that he could show
12 Guevara how to “cook” the cocaine base and make it more profitable for the him. It
13 was the informant Guevara who insisted time and time again that Mr. Cuentas sell the
14 cocaine base instead.

15 On one of the recorded conversations between informant Guevara and Mr.
16 Cuentas, while waiting for Mr. Cuentas, informant Guevara tells the agents that Mr.
17 Cuentas wanted him to buy powder and “cook” it.

18 CHS [Guevara]: Okay, I tell him, so I’ll wait for you at the
19 Burger King. When I came over here he called me. I was talking to
20 you, the call came in. That he’d be here at 4:00 on the dot. [Pause]
21 Uh-huh. Yes, and that’s when, all he told me. When [UI]. Look, he
22 told me, [UI] money, why don’t you cook it [UI] better. [UI] I tell
23
24
25

26 ⁴ See Plea Agreement, 4/21/08. Docket No. 68.

1 him, I don't know, I told him, because [UI] to cook it too [UI] Okay.
2 Okay.⁵

3 Later in the same recording, Mr. Cuentas again wants informant Guevara to buy
4 powder cocaine, but Guevara insists on buying crack.

5 CC [Cuentas]: But the guy told me that--that it's better if you get
6 some powder to cook it, because you get more per unit. With powder
7 yes, but well, it cooks fast, just put baking powder in it.

8 CHS [Guevara]: Well I'll let you know, anyway, let's see.

9 CC [Cuentas]: Uh-huh, okay. Because that's what the guy told me.

10 CHS [Guevara]: Okay. [UI] Tonito told me that he was around.

11 CC [Cuentas]: he came to talk to Whisper, but I don'tt know. But
12 that's what the guy told me. "You know what? . . . [UI] bu wholesale,
13 only if you buy in powder. Because the guy told me, "You know what
14 I do?"--because the guy is a wholsaler--he's a wholesaler of powder.⁶

15
16 In addition, it was shown at trial that informant Guevara was not credible. He
17 had received enormous benefits from the government. Guevara was in the United
18 States illegally. He was not only subject to deportation for his status, but he had been
19 convicted of criminal offenses that would subject him to deportation even if he was a
20 legal resident. He had been paid over \$44,000 by the government. He admitted on
21 the stand that he had not paid taxes on this money even though he knew he was
22 supposed to. While an active informant, Guevara continued to break the law by
23

24 ⁵ Government's trial exhibit 11(a), transcript of recorded conversation on July 10,
25 2007, at 5 (attached to Kaloyanides declaration as Exhibit 1).

26 ⁶ *Id.* at 8

1 carrying loaded and concealed firearms. Although his handlers did not interfere with
2 the Los Angeles County District Attorney's decision about whether to prosecute or
3 not, Guevara's federal law enforcement officer handlers interceded on his behalf by
4 alerting the Los Angeles County District Attorney that he was an active informant for
5 federal officers, that he was involved in on-going investigations, and that he had
6 provided material assistance to federal investigations.

7 Most glaringly, however, is Guevara's own perjury during Mr. Cuentas' trial
8 when he testified that government counsel had coached him by telling him to testify
9 that the drugs provided by Mr. Cuentas were "crack" cocaine.⁷ This is the source of
10 the information on which the government argues for the harshest sentence under the
11 advisory Guidelines.

12 **III. DISCUSSION.**

13 **A. OBJECTIONS TO THE PRESENTENCE REPORT AND** 14 **RECOMMENDATION**

15 Mr. Cuentas objects to the following paragraphs contained in the Presentence
16 Report and Recommendation ("PSR"):

17 1. Paragraphs 15 and 16. Mr. Cuentas acknowledges that these paragraphs
18 accurately summarize information provided by the government and what is contained
19 in some of the investigation reports. However, it is incomplete because it neglects to
20 include the information in the reports and on the tapes in which informant Guevara
21 insists that Mr. Cuentas provide the cocaine base where Mr. Cuentas tries on several

22 ⁷ Mr. Cuentas asserts this testimony was perjurious because he does not believe that
23 the Assistant United States Attorney in fact coached Guevara's testimony. Giving the
24 benefit of the doubt to government counsel, the only conclusion is that Guevara lied
25 on the stand. The other alternative conclusion would be far worse because it would
26 mean gross misconduct by government counsel.

1 occasions to convince Guevara to take powder cocaine and “cook” it to make cocaine
2 base so he could realize a greater profit.

3 2. Paragraph 31, 32, and 34. Mr. Cuentas objects to the PSR’s conclusion
4 that he should not receive any reduction for acceptance of responsibility. Mr. Cuentas
5 notified the government prior to the first trial that he would enter a plea agreement
6 that did not subject him to a mandatory minimum sentence of 10 years, which was the
7 result of the government’s filing the §851 Sentencing Enhancement Information. The
8 government was unable to prove its case to the jury. As a result, the parties reached
9 the very agreement Mr. Cuentas sought before trial, thereby saving the government
10 substantial resources in having to retry that count. Mr. Cuentas entered that plea
11 agreement approximately three weeks after the mistrial was declared. He should
12 receive a reduction of two-levels for acceptance of responsibility.

13 Application Note 2 to U.S.S.G. §3E1.1(a) states that “Conviction by trial,
14 however, does not automatically preclude a defendant from consideration for such a
15 reduction.” Contrary to the government’s position and that of Probation in the PSR,
16 Mr. Cuentas did not accept responsibility *after conviction*--he entered a plea
17 agreement after the government failed to prove its case at trial resulting in a mistrial.
18 Mr. Cuentas did not make the government try the case a second time. He entered the
19 plea agreement reached--the one he sought before the first trial--that did not subject
20 him to a 10-year mandatory minimum sentence.

21 Accordingly, he should receive the two-level reduction in offense level. His
22 total adjusted offense level should be 26.

23 3. Paragraphs 76 - 80. Mr. Cuentas does not dispute the information
24 contained in these paragraphs. However, Mr. Cuentas objects to the Court’s
25 consideration of any of this information in making its sentencing decision as the
26

1 information in these paragraphs relate to arrests that were not prosecuted. Such has no
2 bearing on the appropriate sentence for Mr. Cuentas arising out of his conduct in this
3 case.

4 5 **B. SECTION 3553(A) FACTORS.**

6 As the Court well-knows, the determination of sentence in any case must
7 include consideration of the Advisory Guidelines. But there is no requirement that the
8 Guidelines be the basis for the Court's sentence determination. The ultimate
9 determination of the appropriate sentence is whether it is reasonable under the
10 circumstances. *See United States v. Booker*, 543 U.S. 220 (2005). And the sentencing
11 Court may not apply the Advisory Guidelines as a "per se" standard of reasonableness.
12 *See United States v. Rita*, --- U.S. ---, 127 S.Ct. 2456, 2465 (2007). The Court, being
13 in a better position to evaluate the § 3553(a) factors for the defendant before it, may
14 determine that the Advisory Guideline sentencing range is greater than necessary and,
15 therefore, unreasonable in any particular case. *See Kimbrough v. United States*, ---
16 U.S. ---, 128 S.Ct. 558, 574-75, 169 L.Ed.2d 481 (2007).

17 Moreover, as the Guidelines are only advisory, the Court may consider factors
18 and circumstances in mitigation even if expressly precluded as bases for departures
19 under the Guidelines. *See United States v. Garcia*, 497 F.3d 964, 971-72 (9th Cir.
20 2007) (where defendant convicted of drug conspiracy, sentence vacated in part
21 because sentencing court erred in holding it had not power to consider as a mitigating
22 factor that which was expressly precluded as a departure basis by the Guidelines).
23 The sentencing Court may even reject the sentence under the Guidelines based solely
24 on policy considerations, including disagreements with the Guidelines. *See*
25 *Kimbrough, supra*, at 570.

1 1. The Crack Guidelines And The Statutory Mandatory Minimum For
2 Crack Lacks An Empirical Basis

3 The mandate for determining a sentence is that the district court must determine
4 what sentence is reasonable--one that is sufficient but not greater than necessary to
5 achieve the goals of sentencing. Principles of due process and fundamental fairness in
6 the criminal justice system demand that a sentence be appropriate and based on well-
7 reasoned analysis of the culpability of the defendant as well as the seriousness of the
8 offense. It is this fundamental fairness and the interests of justice that are achieved by
9 the reasoned consideration of the §3553(a) factors in determining the reasonable
10 sentence that is sufficient but not greater than necessary.

11 A district judge must include the Guidelines range in the array of
12 factors warranting consideration. The judge may determine, however,
13 that, in the particular case, a within-Guidelines sentence is “greater
14 than necessary” to serve the objectives of sentencing. 18 U.S.C.
15 §3553(a). In making that determination, the judge may consider the
16 disparity between the Guidelines’ treatment of crack and powder
17 cocaine offenses.

18 *Kimbrough v. United States, supra*, 128 S.Ct. at 564.

19 In *Kimbrough*, the district court noted that the case before it exemplified the
20 “disproportionate and unjust effect that crack cocaine guidelines have in sentencing”
21 as it compared the Guideline sentencing range for the quantity of crack cocaine
22 (228-270 months) to the sentencing range for the same quantity of powder cocaine
23 (97-106 months). *See Kimbrough, supra*, 128 S.Ct. at 565. The United States
24 Supreme Court in *Kimbrough* has made the “crack/powder” disparity in the
25 Guidelines advisory, determining that under *United States v. Booker*, 543 U.S. 220,

1 125 S.Ct. 738 (2005), the district court is not compelled to follow the 100:1 ratio of
2 crack to powder in sentencing. *Id.* at 575.

3 As the Supreme Court noted, the United States Sentencing Commission's
4 justification for the crack to powder disparity was not based on reliable data.

5 In formulating Guidelines ranges for crack cocaine offenses, as we
6 earlier noted, the Commission looked to the mandatory minimum
7 sentences set in the 1986 Act, and did not take account of "empirical
8 data and national experience."

9 *Kimbrough, supra* at 575.

10 Instead, the Commission relied on false data--assumptions about the relative
11 harmfulness of crack when compared with powder cocaine and assumptions about
12 harmful conduct associated with crack as compared with powder cocaine, assumptions
13 "that more recent research and data no longer support." *Id.* at 568. Moreover, the
14 Commission finally acknowledged that the crack/powder disparity was inconsistent
15 with the goal of the Anti-Drug Abuse Act of 1986 to punish major drug traffickers
16 more severely than low-level dealers. The crack/powder disparity punishes far more
17 harshly the smaller, street-level dealer who converts powder into crack than it
18 punishes the major supplier who imports significant quantities in powder form. *Id.*

19 The current version of the Guidelines, the 2007 Edition with the March 2008
20 Supplement, establishes Offense Level 28 (the range determined by the PSR in this
21 case) for crack cocaine in the amount of 35 grams to 50 grams. To achieve that same
22 Offense Level for powder cocaine requires an amount of 2,000 to 3,500 grams--a ratio
23 of powder to crack of just over 57:1 to 70:1.⁸ While the Commission has reduced the

24 _____
25 ⁸ The 2.0 kilograms (2,000 grams) of powder is 57.14 times more than the 35 grams of
26 crack for the same Offense level. The 3.5 kilograms of powder is 70 times more than
the 50 grams of crack for the same Offense level. U.S.S.G. §2D1.1(c)(7).

1 ratio from 100:1 to address the disparity between these two different forms of the
2 same drug, it still remains grossly disproportionate, is not based on any empirical data
3 or research to justify such a disparity, and continues to undermine the essential
4 purpose of the 1986 Act to punish the major trafficker more than the street-level
5 dealer.

6 Congressional enactment of the mandatory minimums for crack cocaine and
7 powder cocaine was also based on the 100:1 ratio in determining the quantity that
8 triggers the mandatory minimum for the drug. This 100:1 ratio for the mandatory
9 minimum was based on the same flawed and false information as the Guideline 100:1
10 ratio.

11 The legislative history for this gross disparity is scant. In fact, the 1986 Act was
12 pushed through Congress without any of the usual committee examination in a rush to
13 get the legislation passed. It was, in effect, rushed through without careful
14 consideration that the Constitution would demand.⁹ As a result, the legislative history
15 does not adequately explain the basis for the 100:1 ratio.

16 Some of the explanation for the mandatory minimum disparity of 100:1 is the
17 same that the Sentencing Commission relied upon: crack involved more systemic
18 crime, more violent crime, it is easier to manufacture, it is more addictive, and
19 accordingly, more destructive than powder cocaine.¹⁰ However, by 1997, despite
20

21 ⁹ The rush to passage was without careful consideration of the bill, as noted by
22 Senator Evan's remarks calling the process behind the push for the 1986 Act as "the
23 sanctimonious election stampede of the House of Representatives, a stampede that
24 trampled on the Constitution. In fact, at times the action over there resembled a
congressional lynch mod more than it did careful legislation." *See* 132 Cong. Rec.
S26,441 (1986).

25 ¹⁰ *See* U.S. Sentencing Commission Special Report to Congress: Cocaine and Federal
26 Sentencing Policy, at 4-10 (1997) (available at <http://www.ussc.gov>).

1 finding some differences in the two forms of the drug, the Sentencing Commission
2 backed off its 100:1 ratio and concluded that such a disparity both in the Guidelines
3 and in the statutory mandatory minimum could not be justified.¹¹ And more recently,
4 it has been noted that the justification for the disparate treatment between the two
5 forms of the drug have been found to be flawed in fact. *See Kimborough, supra*, at
6 568.

7 The only conclusion for any court when confronted with the question of the
8 appropriate sentence for the distribution of crack cocaine is that any substantial
9 disparity in sentence for crack when compared with the Guideline range for the
10 powder form of the drug is simply not justified--it creates an unwarranted disparity.

11 That is precisely the situation here in Mr. Cuentas' case.

12 Accordingly, the Court should reject the PSR's and the government's
13 recommended sentence based on this gross disparity between crack and powder.

14 But that does not end the inquiry. With the clear record that there is no
15 empirical data to justify such a disparate treatment of crack cocaine and powder
16 cocaine, the Court should ask itself whether or not the mandatory minimum of 60
17 months for the quantity of crack in this case is constitutional. In light of the clear
18 record that Congress's justification for the 100:1 ratio in the mandatory minimum was
19 based on flawed if not false information about the distinction between crack and
20 powder, it cannot be said that the mandatory minimum as currently applied to crack
21 cocaine comports with due process and fundamental fairness. There is no justification
22 for the 100:1 disparity in the application of the mandatory minimum to crack cocaine
23 as compared with powder cocaine.

24
25
26 ¹¹ *Id.*

1 If, the Court is inclined to agree with Mr. Cuentas that the mandatory minimum
2 for crack is unconstitutional, then taking the Guideline range for the equivalent
3 quantity of powder cocaine (45 grams), Mr. Cuentas' advisory Guideline range would
4 be 14. At his criminal history category of V, his advisory Guideline range would be
5 33-41 months.

6
7 2. The Continuing Crack/Powder Disparity In The Guidelines Does
8 Not Promote Respect For The Law; But The Opposite.

9 The Sentencing Commission's 1997 report to Congress also noted the
10 significant concern that the crack/powder disparity works to promote disrespect for
11 the law. Because there is no reasoned justification for the disparity either in the
12 Guidelines or in the application of the mandatory minimum, the disparate treatment
13 only promotes the view that the law is unnecessarily harsh..

14 [A] sentence of imprisonment may work to promote not respect, but
15 derision, of the law if the law is viewed as merely a means to dispense
16 harsh punishment without taking into account the real conduct and
17 circumstances involved in sentencing.

18 *Gall v. United States*, 128 S.Ct. 586, 599, n.9 (2007)

19 As the 1997 Report notes, the crack/powder disparity creates the appearance
20 that the law treats low-level street dealers more harshly than major drug traffickers
21 because the street dealer who sells crack is punished far more harshly than the major
22 drug importer who brings the drug into the country in its powder form.¹²

23
24 ¹² See footnote 10 *supra*. The 1997 report also notes that the disparity has also
25 promoted derision for the law because of society's perception that harsher punishment
26 is imposed for minorities who are more likely to be the street dealers of crack and not
27 the major cocaine powder importers.

1 Such conduct by the government is nothing more than sentencing by ambush.
2 When coupled with the fact that the government's entire case was built on the
3 information from Guevara, an informant who lacks any credibility, this latest tactic of
4 introducing unsubstantiated allegations by an investigating officer based on purported
5 discovery withheld from the defense demonstrates outrageous conduct by the
6 government in this case.

7 Accordingly, the Court should reject the declaration of Officer Flores and reject
8 the sentencing recommendation of the government.

9
10 4. Sentencing Entrapment

11 Although the offense herein is a serious offense, there is no evidence that Mr.
12 Cuentas had been selling or offering to sell cocaine in either the powder or base form
13 to Guevara on prior occasions. In fact, it was the government, through informant
14 Guevara, who initiated the drug deals in this case.

15 As the Court well knows from the evidence at trial, Guevara approached Mr.
16 Cuentas about purchasing powder cocaine. This was followed by another request for
17 crack. Mr. Cuentas' response, as captured on the recordings showed that Mr. Cuentas
18 did not want to provide crack, that it was harder to get, and that it made little sense
19 because Guevara could profit more if he "cooked" the powder and made his own
20 crack. But Guevara insisted on purchasing crack directly.

21 Here, the goal of the government's investigation was nothing more than to
22 secure a higher sentence for Mr. Cuentas by stepping up the type of drug before
23 arresting him. The government could have arrested him for the sale of the powder
24 cocaine. It didn't. Instead, it waited three months for Guevara to push Mr. Cuentas
25 for a crack deal.

1 The quantity of drugs for which a defendant is responsible is determined by the
2 court at sentencing. *United States v. Castaneda*, 94 F.3d 592, 594 (9th Cir. 1996).

3 "Sentencing entrapment or sentence factor manipulation occurs when a defendant,
4 although predisposed to commit a minor or lesser offense, is entrapped in committing
5 a greater offense subject to greater punishment." *United States v. Stauffer*, 38 F.3d
6 1103, 1106 (9th Cir. 1994).

7 There are two possible remedies for sentencing entrapment. First, a sentencing
8 court may decline to apply the statutory penalty provision for the greater offense that
9 the defendant was induced to commit, and instead apply the penalty provision for the
10 lesser offense that the defendant was predisposed to commit.

11 Alternatively, the sentencing court may grant a downward departure from the
12 sentencing range for the greater offense that the defendant was induced to commit. *Id.*
13 This procedure applies even in cases where a mandatory minimum is implicated.

14 In *United States v. Naranjo*, 52 F.3d 245, 246 (9th Cir. 1995), the Ninth Circuit
15 acknowledged that a district court may subtract the amount of drugs tainted by
16 sentencing entrapment from the total quantity of drugs attributable to the defendant for
17 purposes of establishing a mandatory minimum sentence. *Accord United States v.*
18 *Castaneda*, 94 F.3d 592 (9th Cir. 1996). As the Eighth Circuit noted in *United States*
19 *v. Barth*, 990 F.2d 422 (8th Cir. 1993), "the sentencing guidelines are causing courts
20 nationwide to rethink the long-established rule of entrapment." 990 F.2d at 424. In
21 *Barth*, the Eighth Circuit noted that prior to the enactment of the Guidelines, the only
22 discretion delegated to law enforcement agencies was over whom to investigate and
23 prosecute, and courts could adequately prevent government abuse by ensuring that
24 only defendants with a criminal predisposition were being targeted. By exercising
25

1 their discretion in sentencing, moreover, courts were able to ensure that defendants'
2 prison terms did not exceed their culpability.

3 With the advent of the Guidelines, and in particular, the mandatory minimum
4 requirements, however, the sentencing scheme moved from a discretionary process to
5 a determinate system based on the weight of the drugs involved in a transaction.

6 Thus, the entrapment doctrine, as previously determined, no longer adequately
7 protects against government abuse nor ensures that defendants will be sentenced on
8 the basis of the extent of their culpability. *See United States v. Calva*, 979 F.2d 119,
9 123 (8th Cir. 1992) (recognizing that "the Sentencing Guidelines' mechanism of
10 boosting sentences based on the cumulation of additional drug sales has the potential
11 for abuse by police").

12 Given the guideline regime, and the mandatory minimum scheme, government
13 abuse can be discouraged and corrected only if courts also are able to ensure that the
14 government has some reason to believe that defendants are predisposed to engage in a
15 drug deal of the magnitude for which they are prosecuted. In addition, sentencing
16 entrapment considerations can ensure that the sentences imposed reflect the
17 defendants' degree of culpability. If the total of the drugs appears inflated due to
18 government inducement versus a defendant's predisposition, the courts must reduce
19 the sentences of those defendants who are not predisposed to engage in deals as large
20 as those induced by the government.

21 [T]he present situation permits not only the prosecutor to decide what
22 the sentence will be by the charges that are filed and the way the case
23 is pursued, but actually the sentencing discretion is delegated all the
24 way down to the individual drug agent operating in the field. Drug
25 agents can decide, apparently without any supervision by anybody to

1 negotiate with somebody for an ounce, a pound, a kilo, 100 kilos, a
2 million kilos of a substance and, of course, if the defendant bites at the
3 bait, then that amount chosen by the drug agent will determine his
4 drug sentence.

5 *Stauffer, supra*, 38 F.3d 1107.

6 Sentencing entrapment applies in this case because the government, through
7 informant Guevara, targeted Mr. Cuentas, and convinced him to obtain cocaine for
8 Guevara. The government, through Guevara, pursued Mr. Cuentas for crack cocaine,
9 which carries a higher penalty than powder, manipulated the situation for the result
10 that Mr. Cuentas would be exposed to a guideline range, and a mandatory minimum
11 by statute, substantially higher than what would have resulted had the government
12 arrested Mr. Cuentas after the initial sale of powder cocaine.

13 14 **IV. CONCLUSION**

15 The Court should reject the recommendation of the government, reject the
16 declaration and other “evidence” presented by the government in support of its
17 sentencing position, and find that that crack/powder disparity under the Guidelines
18 and as applied to crack under the statutory mandatory minimum scheme to be
19 unconstitutional. The Court should apply a 1:1 ratio of crack to powder, find that Mr.
20 Cuentas’ offense level is the same as an equivalent quantity of powder cocaine
21 (namely Offense Level 14), and impose a sentence within that Guideline range, which
22 at Criminal History Category V is 33-41 months.

23 In the alternative, if the Court is not inclined to find the mandatory minimum as
24 applied to crack unconstitutional, then Mr. Cuentas submits that the appropriate
25 sentence in this case is the mandatory minimum. The Court should impose a sentence

1 no greater than 60 months as the reasonable sentence that is sufficient but not greater
2 than necessary to achieve the goals of sentencing.

3 Respectfully submitted,

4
5 Dated: August 18, 2008



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