**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**
**SOUTHERN DIVISION**

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| **THE UNITED STATES OF AMERICA** | | |
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| **v.** | | **Criminal No. AW-00-0501** |
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| **DEZELL STEWART** | | |
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## MOTION TO DISMISS INDICTMENT

The defendant herein, Dezell Stewart, through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Michael T. CitaraManis, Assistant Federal Public Defender, hereby moves this Court to dismiss the indictment herein on the grounds that Mr. Stewart's right to due process, guaranteed him under the Fifth Amendment to the United States Constitution, has been violated. In support of this motion, undersigned defense counsel states as follows:

## I. INTRODUCTION.

Dezell Stewart is charged in a four count indictment with conspiracy to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §846 (Count One) and three counts of distributing cocaine base (Counts Two through Four), in violation of 21 U.S.C. §841.

These charges are the result of three alleged deliveries of suspected cocaine base by Stewart to an undercover agent of the Drug Enforcement Administration (DEA). These deliveries occurred on March 28, 2000, April 12, 2000, and June 6, 2000. The deliveries were made to an undercover agent from the Drug Enforcement Administration (DEA).

The defense contends that Stewart's right to due process under the Fifth Amendment to the United States Constitution was violated.

In particular, undersigned defense counsel believes that the evidence in this case will show that:

(1) the informant utilized by government agents herein capitalized on defendant's drug addiction in persuading him deliver packages containing drugs, knowing that money offered the defendant might be used to buy drugs for defendant's own use;

(2) the drugs delivered by defendant to the undercover officer were given to him by a government agent, and in particular, the informant (who had himself obtained them from a drug dealer);

(3) one package given defendant by the informant and delivered to the undercover agent contained a non-controlled substance; and

(4) the informant intentionally "cut" drugs with a sizeable quantity of non-controlled substance in order to unfairly exaggerate the weight of what was delivered to the undercover agent.

It is under these circumstances that the indictment herein must be dismissed.

## II. ARGUMENT.

### A. CRIMINAL CHARGES WHICH ARE THE RESULT OF OUTRAGEOUS GOVERNMENT CONDUCT, SUCH AS HERE, VIOLATE DUE PROCESS AND MUST BE DISMISSED.

When the conduct of government agents is sufficiently outrageous, federal courts have recognized that the prosecution of any charges resulting therefrom cannot be allowed to proceed. In such an event, the charges must be dismissed. Such action is predicated on the Due Process Clause of the Fifth Amendment to the United States Constitution and has generally been characterized as the defense of "outrageous government conduct."

This defense was first recognized by the United States Supreme Court in *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643 (1973), in which the Court observed: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . ."

Later, in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct.1646 (1976), a majority of the Justices recognized that an outrageous government conduct defense based on the Due Process Clause might be viable even if an entrapment defense is unavailable because of the defendant's predisposition to commit the charged crime. *Id.* at 495, 96 S.Ct. at 1653 (Powell, J., with Blackmun, J., concurring); *id.* at 496-97, 96 S.Ct. at 1653 (Brennan, J., with Stewart and Marshall, JJ., dissenting).

All Circuit Courts of Appeal have recognized the defense of outrageous government conduct, including the Fourth Circuit. *See, e.g., United States v. Chavis*, 880 F.2d 788, 793-94 (4th Cir. 1989); *United States v. Goodwin*, 854 F.2d 33, 36-37 (4th Cir. 1988); *United States v. Akinseye*, 802 F.2d 740, 743, n.2 (4th Cir. 1986).

Whether or not government conduct is so offensive so as to amount to a due process violation and require dismissal of a case depends on the particular facts of each case. Although cases have variously stated how offensive government conduct must be to amount to "outrageous government conduct," the basic premise is that outrageous conduct violates "'fundamental unfairness'" or "'shock[] the universal sense of justice.'" *See Russell*, 411 U.S. at 432, 93 S.Ct. at 1643 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 80 S.Ct 297 (1960)).

In cases in which the defense of outrageous government conduct has been rejected, the courts have frequently pointed out that the defense is rarely successful. However, dismissals based on outrageous government conduct are not so rare when one considers the fact that the claim of outrageous government conduct is not commonly raised in the first place, the vast majority of *all* reported decisions in criminal cases are decided against defendants, and there are numerous *reported* decisions where government conduct has resulted in dismissals. *See, e.g.*, *United States v. Twigg*, 588 F.2d 373(3rd Cir. 1978); *United States v. West*, 511 F.2d 1083 (3rd Cir. 1975); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Marshank*, 777 F.Supp. 1507 (N.D. Cal. 1991); *United States v. Gardner*, 658 F.Supp. 1573 (W.D. Pa. 1987); *United States v. Batres-Santolino*, 521 F.Supp. 744 (N.D. Cal. 1981); *Cf. also United States v. Silva*, 180 F.Supp. 557 (S.D.N.Y. 1959) (directing verdict for defendant due to government conduct).

In the instant case, the combination of the informant's enticement of defendant into delivering sizeable quantities of apparent crack cocaine, the informant providing the crack cocaine to defendant for the deliveries, and the informant's use of fake drugs and substantially "cut" drugs to artificially bolster the apparent drug quantities indicate that the informant orchestrated the offenses charged herein and amount to fundamentally unfair and outrageous conduct on the part of a government agent. *See Chavis*, 880 F.2d at 793-94 (where the Fourth Circuit, in rejecting a claim of outrageous government conduct, distinguished the case from that in *West*, stating, "The reverse sting in this case is in no way comparable to the full loop transaction in [*West*], where one government agent supplied narcotics to the defendant and persuaded him to sell them, as had been prearranged, to another government agent.")

Certainly, these allegations are dependant on what defendant says. However, the government may have knowledge unto itself regarding these allegations. Moreover, there is objective evidence supporting defendant's position, at least with respect to the artificial bolstering of the apparent drug quantities.

In Count Two of the indictment, it is alleged that on March 28, 2000, defendant distributed more than 5 grams of cocaine base. In Count Three, it is alleged that on April 12, 2000, defendant distributed more than 50 grams of cocaine base. And, in Count Four, it is alleged that on June 6, 2000, defendant again distributed more than 5 grams of cocaine base.

According to DEA-7 laboratory reports provided by the government, the net weight of the substance delivered to the undercover agent on March 28, 2000, was 29.0 grams. The purity of this substance, however, was only 14 %. Likewise, the net weight of the substance delivered on

April 12, 2000, was 104.1 grams but the purity was only 21 %.[1]

With respect to the alleged crack cocaine substance delivered on June 6, 2000, it was packaged in two plastic bags. One bag contained 42.1 grams of a substance with a purity of 30% cocaine base. The other bag contained 25.9 grams of a substance in which no controlled substance was detected.

Another factor supporting the claim of outrageous government conduct is that while the informant was working for the government, he was allowed to engage in other criminal conduct, This includes (but is not limited to) the possession with intent to distribute crack cocaine.

According to charging documents, the informant was observed engaging in what appeared to be a drug transaction ,and upon his vehicle being stopped (which appears to have been the same vehicle used by the informant in the instant case), approximately 40 grams of crack cocaine was found inside. For this, the informant was arrested, charged in federal court, and provided appointed counsel. Curiously, the charge against him was soon dropped and he still is on the streets, possibly committing further crimes.

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[1] Although the discovery reveals that the substance delivered to the undercover agent on this occasion was found to contain cocaine base and caffeine, it was packaged in 7 plastic bags which were contained in a larger plastic bag, and there is no indication in the DEA-7 whether each of the 7 bags was tested or just one sample from the seven smaller bags.

### B. THE MANIPULATION OF THE DRUG AMOUNTS BY THE INFORMANT REQUIRE THE DISMISSAL OF COUNTS TWO AND FOUR.

As this Court is aware, in light of *Apprendi v. New Jersey*, ___ U.S. ___, 2000 WL 807189 (June 26, 2000), the government has alleged in the indictment specific amounts in the various counts of the indictment. Defendant believes this is appropriate since his position is that the drug quantities necessary to invoke mandatory minimum sentences are elements of the drug offenses charged.

However, in view of the fact of the informant's outrageous conduct in artificially bolstering or manipulating the quantities of the apparent drugs delivered to the undercover agent, the Due Process Clause of the Fifth Amendment compels at a minimum the dismissal of Counts One through Three. The reason is that this artificial bolstering or manipulation elevated the weight of the drug quantities above the amounts required to invoke the mandatory minimum sentences possible under these Counts.

Specifically, the amount of cocaine base used in the 29.0 gram quantity of a substance delivered on March 28, 2000, charged in Count Two, was only 4.0 grams, and thus, less than the 5 gram "threshold" quantity alleged. In addition, the amount of cocaine base used in the 104.1 gram quantity of a substance delivered on April 12, 2000, charged in Count Three, was only 21.8 grams, and thus, less than the 50 gram threshold quantity alleged.

Finally, the total amount of cocaine base used in the various quantities delivered to the undercover agent (totaling 175.2 grams, not including the 25.9 grams of a non-controlled substance delivered on June 6, 2000) was 38.4 grams. This is below the 50 gram threshold quantity alleged in Count One, the conspiracy count.

Various federal courts have recognized that increasing the amount of drugs in a drug deal in order to increase the possible sentence amounts to impermissible "sentencing entrapment" or "sentencing manipulation," and thus, justifies a reduced sentence. *See, e.g., United States v. Connell*, 960 F.2d 191 (1st Cir. 1992); *United States v. Shephard*, 4 F.3d 647 (8th Cir. 1993); *United States v. Barth*, 990 F.2d 422, 424-25 (8th Cir. 1993). *Also see United States v. Jones*, 18 F.3d 1145, 1152-55 (4th Cir. 1994) (in which the Fourth Circuit discussed sentencing manipulation but did not decide whether it constituted a viable legal challenge because on the facts presented it would have been inapplicable).

In view of *Apprendi*, this now requires dismissal of the offending charges, Counts One through Three.

## III. CONCLUSION.

Appropriate here are the observations of Justice Brandeis in his dissent in *Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 575 (1928), *majority opinion overruled on other grounds by Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512 (1967):

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes the lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Wherefore, defendant and his counsel respectfully requests this Court to dismiss the indictment herein against him, or in the alternative, to either dismiss Counts One through Three.

Respectfully submitted,

JAMES WYDA
Federal Public Defender
for the District of Maryland

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## REQUEST FOR HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District Court for the District of Maryland, a hearing is requested on the Defendant's Motion.

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MICHAEL T. CITARAMANIS
Assistant Federal Public Defender

## CERTIFICATE OF SERVICE

_____I HEREBY CERTIFY that on this 13th day of November 2000, a copy of the foregoing Motion to Suppress Statements was delivered to the office of Deborah Johnston, Assistant United States Attorney, 6500 Cherrywood Lane, Suite 400, Greenbelt, Maryland 20770.

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MICHAEL T. CITARAMANIS
Assistant Federal Public Defender