

## How much power does an agent really have?

*By David Zapp, Esq.*

The tension between the U.S. and Russia over Snowden's presence in Russia reminds me of a cautionary tale about a federal agent who reluctantly had to double cross his informant because of shifting interests of his employer, the U.S. government. So Snowden should not get too comfortable. Snowden is the whistle-blower who revealed the extensive information gathering by the U.S.'s National Security Agency.

In an article in the New York Times, so-and so wrote that "Years ago, Luis Octavio Lopez Vega was a whistle-blower. Mr. Lopez played a leading role in what is widely considered the biggest drug-trafficking case in Mexican history. The episode — which inspired the 2000 movie "[Traffic](#)" — pitted the Mexican military against the United States Drug Enforcement

Administration. Throughout the 1990s, Mr. Lopez worked closely with them both. He served as a senior adviser to the powerful general who was appointed Mexico's drug czar who was later to be indicted. And he was an informant for the D.E.A.

"The D.E.A. secretly helped Mr. Lopez and his family escape across the border in exchange for his cooperation with its investigation. They promised him all sorts of goodies for him and his family through the agent who was handling his case. Dozens of hours of testimony from Mr. Lopez about links between the military and drug cartels proved to be explosive, setting off a dizzying chain reaction in which Mexico asked the United States for help capturing Mr. Lopez. Washington denied any knowledge of his whereabouts and the D.E.A. abruptly severed its ties with him.

"DEA Agent Villarruel, Mr. Lopez' handler was ordered to deliver the news. Agent Villarruel asked Mr. Lopez to meet him at a Denny's in San Diego. Mr. Lopez could tell something was amiss when Mr. Villarruel arrived alone and had a hard time looking Mr. Lopez in the

eye. "I told him I had orders from Washington that I couldn't have anything to do with him no more," Mr. Villarruel recalled. "I could tell there was some kind of pressure, but I couldn't tell if it was from Congress, or from Mexico, or where. All I knew was that if I had anything more to do with him, I could get in trouble." The order meant "from that moment, the agency wasn't going to protect me or my family," said Mr. Lopez, who was shocked and confused." New York Times, April 28, 2013, by Ginger Thompson.

He should not have felt "shocked and confused." Governments do this all the time and their agents can do nothing about it. Governments do what is in their interests to do which is another way of saying that they do what they want. With Native Americans, (Columbus called them "Indians" thinking he had reach the East Indies), the U.S. broke no less than 400 treaties. Thus when protecting Lopez was no longer in U.S. interests, the U.S. abandoned him. Maybe it was because the U.S. wanted to improve relations with Mexico. Maybe it was because it was running a particular operation with Mexico that it did not want compromised. Whatever it was, Lopez was thrown overboard.

Defendants sitting in custody right now have learned this lesson

the hard way: the defendant who was promised by the agent that he would be allowed to remain free while he cooperates only to be thrown into jail; the defendant who was promised he will remain in a hotel room to do his cooperating only to be thrown into jail; the defendant who was promised he will get bail or a plea to a misdemeanor if he surrendered only to be denied bail and charged with felonies. There is no point in relying on an agent's word because it may be unenforceable. It is not that agents are not honorable and are not acting in good faith. It is because they are at the mercy of their bosses, and case law excuses this: “[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.” U.S. Supreme Court, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). As a general rule, *the government is not bound by unauthorized promises made by government agents even when the defendant relies on the promise.* That is the law.

As for Mr. Lopez, he now lives “in a small hide-out that has no heat. Thieves ran off with the propane tanks on the camper that Mr. Lopez parks in an abandoned industrial park. “He is,” [or was], “down to his

last \$250.” Agent Villarruel, judging from his picture accompanying the New York Times article looks like a deer caught in the headlights, shell-shocked by what he was ordered to do by his superiors.

So Snowden, who thought he had found safe harbor in Russia, just today, (July 8, 2013) a spokesman for Russia's president tweeted that Venezuela's offer of asylum might be “the best solution.” What else is new?

## A word about Alleyne

*By David Zapp, Esq.*

In Alleyne v. United States, decided recently, the Court overturned the 2002 controlling precedent (Harris v. United States) and held that any “fact” that triggers a statutory mandatory minimum sentences -- and thus effectively increases a sentence by setting a “floor” - is an “element” of the offense. That “fact” must be submitted to a jury and found beyond a reasonable doubt or, in the alternative, admitted by the defendant. It cannot be determined merely by the judge. Whether Alleyne applies retroactively to those whose convictions were final

when the case was decided, remains to be seen. But it will be an uphill battle.

The ruling would also apply likewise to sentences that were imposed when the guidelines were found by a judge and were mandatory. The lower range of the judge-determined guideline was tantamount to the “floor” referred to in Alleyne. After all, what is the difference between a law that is required to be followed (mandatory minimum) and a guideline that is required to be followed? Given the court's rejection of retroactivity in Booker, it is unlikely that Alleyne will be retroactive.

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