14-50513

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

FABEL ROQUE,

Defendant-Appellant.

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
D.C. No.: 13-CR-00829-PA

BEFORE THE HONORABLE GEORGE H. KING
UNITED STATES DISTRICT JUDGE

GRETCHEN FUSILIER
Attorney at Law
P.O. Box 305
Carlsbad, CA 92018
Tel: (760) 728-5958
Fax: (760) 723-6681

Attorney for Defendant-Appellant
FABEL ROQUE

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ISSUE PRESENTED

A. Whether the district court reversibly erred by denying the motion for judgment of acquittal to vacate the drug quantity based on sentencing entrapment?

B. Whether the district court committed reversible erred by denying the defense request for a sentencing entrapment jury instruction and removing sentencing enhancement from jury determination where it was a relevant to the a determination of the element of drug quantity?

STATEMENT OF THE CASE

A. Jurisdiction, Timeliness, and Bail Status

The district court filed its final judgment on November 13, 2014. (ER 2; CR 136).

The district court exercised jurisdiction pursuant to 18 U.S.C. § 3231 and 18 U.S.C. § 3583(e)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1291, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Central District of California and 18 U.S.C. § 3782(a)(1) & (3) (review of a sentence-appeal by a defendant).

Appellant, Fabel Roque, filed his timely Notice of Appeal on November 14, 2014, in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure. (ER 1; CR 138).[1]

Appellant is currently serving the custodial portion of his sentence in the custody of the Bureau of Prison. According to the Bureau of Prison's

[1] "ER" refers to the Appellant's Excerpts of Record, followed by the chronological page number; "CR" refers to the Clerk's Record followed by reference to the docket control number; "RT" refers to the reporter's transcript followed by the chronological page number; "PSR" refers to the Probation Reports, Filed Under Seal, followed by the page number.

website, his release date is September 22, 2022.

B. Procedural History and Statement of Fact

1. Procedural History

On November 22, 2013, Appellant, Mr. Roque was indicted on one count of knowingly and intentionally distributing at least 50 grams, approximately 54.3 grams, of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841 (a)(1), (b)(1)(A)(viii). (ER 456; CR 1).

On August 29, 2014, after a four-day jury trial which began on August 26, 2014, (CR 95-98), a jury returned a guilty verdict against Mr. Roque convicting him as charged under the Indictment of one count of distributing methamphetamine consisting of a net weight of 50 grams or more, in violation of 21 U.S.C. § 841 (a)(1), (b)(1)(A)(viii). (ER 8; CR 107).

On November 10, 2014, Mr. Roque was sentenced under the mandatory minimum term of 121 months, upon release from imprisonment, he will be placed on supervised release for a term of five years under certain terms and condition imposed by the district court at the time of imposing the sentence. (ER 2; CR 136).

A timely notice of appeal was filed on November 14, 2014. (ER 1; CR 138).

2. Overview of the Facts

The conviction of Mr. Roque results from a government sting conducted by a Task Force of the Federal Bureau of Investigation (FBI) utilizing a confidential informant, aka, Jaguar, who for more than at least one month continuously placed telephone calls to Mr. Roque, went to his home, showed up at his place of employment and finally entrapped Mr. Roque in a transaction to deliver approximately 54.3 grams of methamphetamine to Jaguar, a quantity that Mr. Roque had neither the capability nor the resources to obtain on his own. The government's case consisted of more than fifteen intercepted recorded telephone calls and personal encounters between Jaguar and Mr. Roque. All of the pursuits of Mr. Roque by Jaguar and the telephone calls, except what appears to be just one, were initiated by Jaguar at the directions of his FBI handlers. During this sting, Jaguar had private visits with Mr. Roque which the task force neither knew about or were brief on. Moreover, Jaguar, was a known drug addict before his term as an informant and he continued to use drugs on at least two occasions during the time frame that he was pursuing Mr. Roque.

On one of those occasions, Jaguar used methamphetamine while being filmed on an FBI camera. No evidence was presented that suggested that Mr. Roque, prior to Jaguar's latching on to him, was predisposed to deal in drugs or had the resources to provide 2 ounces of methamphetamine as demanded by Jaguar. Mr. Roque ultimately located a source of the methamphetamine for Jaguar and it was delivered on April 21, 2010 by Mr. Roque. On the day of the delivery of the methamphetamine to Jaguar, Roque asked Jaguar what Jaguar charges for 1/8 of an ounce of methamphetamine.

3. Statement of Fact

FBI agent Glenn Hotema testified that in 2009 and 2010, the FBI task force used an informant with the code name Jaguar to assist in the investigation which ultimately targeted Appellant Mr. Roque in a methamphetamine sting operation ("the sting."). (RT 8-27-2014:300). Agent Hamilton was the designated handler of Jaguar and maintained the day-to-day contact with Jaguar. (RT 8-27-2014:340).

Jaguar was brought to the FBI by Los Angeles Police Officer Frank Flores and FBI Agent John Bowman who had cultivated Jaguar as an informant. (RT 8-27-2014:311). However, no evidence was presented to

explain the circumstances of Jaguar's cultivation as an informant or the basis for targeting Mr. Roque in the sting operation.

Agent Hotema was the training agent for Agent John Hamilton who, at the time of the sting, had recently completed his basic training at the FBI Academy at Quantico, Virginia. Neither Hotema nor Hamilton are Spanish speakers. (RT 8/27/2014:339-341, 376). Officer Frank Flores provided some assistance to Hamilton and Hotema. (RT 8/27/2014:339-341). Flores did not testify at trial.

When Jaguar was employed as an informant by the FBI and utilized in the sting, the agents knew that Jaguar had been "addicted or had used [methamphetamine] in the past. (RT 8/27/2014:343). Hotema learned that Jaguar continued his drug use while acting as the FBI informant. (RT 8-27-2014:344). On one occasion, the FBI camera recorded Jaguar using methamphetamine while he was wired and "involved in a transaction with a suspect." (RT8/27/2014:344). The camera recorded Jaguar purchasing methamphetamine and then using it. The entire episode of Jaguar using methamphetamine was visible on the FBI video.(RT 8/27/2014:345-346). Jaguar was never given a drug test while an active FBI informer. (RT 8/27/2014:344). They also knew that Jaguar was on active probation during

the sting. (RT 8/27/2014:354)

During the sting of Mr. Roque, Jaguar had "a number of meetings that were not recorded with suspects." (RT 8/27/2014:346). Jaguar was wired up with recording devices only "when we [the task force] were actually doing an evidence procurement." (RT 8-27-2014:384).

The FBI handlers were relaxed in their management of Jaguar. The FBI purchased the cell phone used by Jaguar as his personal phone. Strangely, the FBI did not maintain records of calls made and/or received by Jaguar on that cell phone. (RT 8/27/2014:346). Consequently, as Agent Hamilton testified, he lacked knowledge of how many unrecorded personal meetings occurred between Jaguar and Mr. Roque. (RT 8/27/2014:348). On May 28, 2010, Jaguar was closed out as an informant due to "erratic behavior" and failure to keep in contact with the task force. Jaguar failed to return the agents' telephone calls and for unknown reasons was not available to meet with the agents when the agents requested meetings. (RT 8/27/2014:346-348; 8/28/2014:462-464, 467, 477; ER 209-211; 214, 224).

Jaguar's Contacts with Mr. Roque Were Admitted Through Transcripts of Recordings

The main evidence of the government's case was presented through

recorded telephone conversations and recorded face-to-face contact between Jaguar and Mr. Roque in government exhibits 4 through 18 and 19. The transcripts of these recordings, which were originally in Spanish, were reviewed by FBI language analyst Conception Haro, who had been employed by the FBI for twenty-two years and is a native Spanish speaker, to verify that her colleagues had accurately translated the recordings.(RT 8/27/2014:360-364). The recordings cover a time frame from March 15, 2010 through April 21, 2010. Each of these recordings' transcription was admitted into evidence. (Gov Exh 4-18, 19; ER 325-451). The last transcript occurs on April 21, 2010, capturing Jaguar with methamphetamine.

Forensic Testimony

Retired Drug Enforcement Administration (DEA) forensic chemist, Harry Skinner, examined the methamphetamine seized in this case. (RT 8-28-2014:517; ER 264). His responsibilities while employed as a forensic chemist at the DEA included analyzing materials for the presence of controlled substances, "quantitating the controlled substances" and identifying any other material present in the samples. Quantitation involves the determination of "the actual purity of a particular substance in a

mixture" and determining what the substance is. (RT 8-28-2014:517-19; ER 264-266). Skinner testified that he determined that the methamphetamine referred to in government exhibit 1 was methamphetamine hydrochloride. The net weight of exhibit 1 was 55.1 grams and the purity was 98.6 percent pure. By multiplying the net weight by the purity allowed Skinner to determine that the actual amount of methamphetamine in exhibit 1 was 54.3 grams, or approximately 2 ounces, of actual methamphetamine with a margin of error of "plus or minus 1.9 grams." (RT 8-28-2014:527-530; ER 274-277).

Skinner testified that where the sample of methamphetamine weighs between 50 and 75 grams, he normally "would grind the whole material into a single sample." (RT 8-28-2014:521; ER 268). However, for some reason he did not grind the total methamphetamine composite to conduct the purity test in this case. Instead, he analyzed it by the "cone and quarter sampling and then ground the material." This process is also known as a "CNC." (RT 8-28-2014:540; ER 287). The CNC method involves putting " the sample on a piece of paper and you mix it together quite well, forming quarters and then you take random samples out of opposite quarters and that portion then was ground to 20 mesh." (RT 8-28-2014:540-541; ER 287-88). Because

Skinner did not grind the entire composite prior to taking the samples from the "four opposite corners," according to Skinner, parts of the methamphetamine sample which were not ground might have had different purity levels. (RT 8-28-2014:541; ER 288). Skinner testified that he "did not grind it [all of the methamphetamine] all up." Skinner did not grind 30 grams of the methamphetamine. (RT 8-28-2014:542; ER 289).

The government rested after Skinner's testimony. (RT 8-28-2014:543; ER 290).

Defense Rule 29 Motion Was Made When the Government Rested

After the government rested, the defense made a general Rule 29 motion based on the insufficiency of the evidence. The defense also argued that the evidence at trial was insufficient to conclude that "testing that was done on these particular - - on this particular item came from and was from the - - from this case." (RT 8-28-2014:544; ER 291).

The defense also argued as part of its Rule 29 motion the issue of sentencing entrapment and asked the district court to,

> strike the allegations of drug quantity because the evidence that in this case is insufficient to sustain a verdict on an amount in excess of 50 grams of pure methamphetamine. In particular, we have as part of the transcript some statement for example, 'have you purchased from this particular supplier before?'

> 'No' is the answer. You have the - - the Mr. Roque attempt - - stating that he would attempt to.

(8-28-2014:544; ER 291).

> The government failed to link the - - the specific evidence that we heard testimony about to seizure from Mr. Roque. They - - failed to lay a foundation sufficient to make that tie. It's one thing to - - to have a sufficient a chain of custody, a sufficient chain of custody and to accomplish that and it's another thing to just leave it to weight and we would suggest that what's on the record now is insufficient as a matter of law to establish that.
>
> In addition there - - as far as the drug quantity, we post a lane that the drug quantity is an element and subject to proof beyond a reasonable doubt. And we would suggest also subject to a Rule 29. And that the Government has failed to establish beyond a reasonable doubt that the amount that Mr. Roque was capable of dealing in was in excess of 50 grams under the circumstances in which you have evidence in which he's asking to do transactions for much smaller amounts. He states that he doesn't have the money and asking basically to be a runner for the informant Jaguar.
>
> For eight ball quantities which are 1/8th of an ounce quantities of - - of drugs.
>
> And based upon that, the Court can find that the Government has failed to meet their burden to establish that the amount of methamphetamine exceeded 50 grams and we would ask the Court to therefore strike the allegation of the drug amount and - - if the Court does not otherwise grant the Rule 29.
>
> And also we would offer that the - - that the transcripts that are on the record so far there are several mentions of guns by the informant. In Mr. Roque's presence including before he alleged

> actually turning over of drugs. The informant say, 'I'm going to - - 'I'm going to come back with a gun.'
>
> In addition on the video you don't actually see the handing or [sic] of drugs from Mr. Roque to the informant and - - but what you do see is the informant waiving the - - an object when Mr. Roque appears to have left the room.

(RT 8-28-2014:555-56; ER 302-303).

On August 29, 2014, the defense rested without calling any witnesses. (CR 98).

On August 29, 2010, the district court denied the defense's Rule 29 motion. (RT 8-29-2014:12).

During closing argument, the government told the jury the following:

> What did you hear from the defendant about this case? This case? This one right here? What did he say about this? He said nothing. Because there is nothing for him to say.

(RT 8-29-2014:51).

During settlement of the jury instructions, Mr. Roque requested an instruction on sentencing entrapment based on Mr. Roque's contention that he was not predisposed to engage in criminal conduct, especially for the quantity of methamphetamine involved in the government's sting operation. The district court denied his request. (RT 8/29/2014:15-16).

On August 29, 2010, the jury returned a guilty verdict against Mr.

Roque as charged in the indictment. (RT 8-29-2014:89; CR 98).

The October 27, 2014 Defense Motions

On October 27, 2014, the district court heard oral arguments on Mr. Roque's motion for a judgement of acquittal, Rule 29, or in the alternative for a new trial, Rule 33. He argued the insufficiency of the evidence to support a finding that the methamphetamine was obtained from Mr. Roque; the drug purity analysis was accurate; and, he argued that sentencing entrapment was proven. The defense informed the district court, as part of the motion for a new trial, to consider that Mr. Roque had moved to Kansas to distance himself from Jaguar and the gang and lied to the government informant concerning his whereabouts in an attempt to distance himself from him. (RT 10-27-2014:11; ER 47). The district court denied the motions and rejected sentencing entrapment. (RT 10/27/2014:4-19; ER 40-55).

Sentencing Hearing of November 10, 214

At the sentencing hearing, the defense objected to the 10-year mandatory minimum sentence because Mr. Roque was subjected to sentencing entrapment or manipulation. (RT 11/10/2014:6; ER 15). A portion of the video between Jaguar and Agent which occurred on April 21,

2010, prior to Jaguar's meeting with Mr. Roque, was played for the district court. The defense argued that Jaguar's comment to Hamilton, "Let it come out the way I want it," suggests that Jaguar is in control of "the way in which this is all playing out and it's - - he wants it to play out a certain way." (RT 11/10/2014:7; ER 16). The defense continued by arguing that,

> The other reason I would suggest that it's important is he's suggesting that he wants the drugs immediately, that if not, he's going to leave. But that's not the way it played out. The way, in fact, it played out was there was delivery of money in the morning and then a pickup in the afternoon.
>
> And all this goes to suggest that you don't have someone here who is a - regular dealer in that quantity, who has that amount on hand, but instead is more in the role of a runner. And because of that, and because the government decides through its informant how much they are going to ask to be purchased and how much they're going - - how much cash they're going to get, it's much more susceptible to sentencing manipulation, and that's what I'm suggesting happened here, that Mr. Roque was in essence acting as a runner.
>
> And when you look at the fact that Mr. Roque very early on said, I'll give you my connection, my connect," he, Mr. Roque, is attempting to cut himself out of the deal and not even be part of this transaction. And here you have somebody who in 2010 left the Los Angeles area where there were attempts to make further sales with him, and all of those were rebuffed by Mr. Roque. And now he faces a ten-year mandatory minimum even though there was a life that he left behind and became a very different person.
>
> And even looking at this transaction, you see the way in which

> both the government and the informant were involved in manipulating the quantity here. And based upon that, the Court can find that there was sentencing manipulation and therefore find that the amount that would have been involved is less than that - - than which would trigger the mandatory minimum.

(RT 11/10/2014:7-8; ER 16-17).

The district court rejected the defense argument and sentenced Mr. Roque to 121 months imprisonment. (RT 11/10/2014:14-17; ER 23-26).

SUMMARY OF ARGUMENT

The district court abused its discretion in rejecting the sentencing enhancement argument advanced by Mr. Roque because the defense proved by a preponderance of the evidence that Mr. Roque was relentlessly pursued by the government's informant at the direction of the government which ultimately resulted in Mr. Roque being entrapped to commit a greater offense, subject to greater punishment, than he had the capability or resources to commit.

The district court committed reversible error when it refused to instruct the jury on sentencing entrapment notwithstanding that it was an affirmative defense to the quantity element of the drug charge. He was entitled to a jury instruction concerning the theory of his defense even if the district court concludes that the evidence is weak, insufficient, or

inconsistent. Mr. Roque was prejudiced by the failure to instruct on sentencing entrapment because, depending on the jury's findings, the district court may have had to apply the lower mandatory minimum sentence or no mandatory minimum at all.

The district court also committed reversible error because it removed from the jury's determination one the essential elements of the offense. Sentencing enhancement qualifies as an element of the offense because it is relevant to facts which do not only increase the ceiling of a sentence choice, but also those that increase the floor. Because sentencing enhancement was relevant to a determination of the quantity of methamphetamine of which Mr. Roque was criminally culpable which, in turn, influenced the increase of the mandatory minimum, it was an element which should have been submitted for jury determination.

ARGUMENT

A. THE DISTRICT COURT REVERSIBLY ERRED BY DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL TO VACATE THE DRUG QUANTITY BASED ON SENTENCING ENTRAPMENT.

1. Standard of Review

The district court's rejection of a defendant's sentencing entrapment

argument is reviewed for an abuse of discretion. *United States v. Yuman-Hernandez* 712 F.3d 471, 473 (9th Cir. 2013). This Court reviews de novo the district court's interpretation of the Sentencing Guidelines. *United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013). "The district court's factual findings underlying its sentencing entrapment decision" is reviewed for clear error. *Black*, supra, 301-302 (citing *United States v. Ross*, 372 F.3d 1097, 1097-1113-14 (9th Cir. 2004).

The interpretation and application of the Sentencing Guidelines are reviewed de novo. *United States v. Riewe*, 165 F.3d 727, 728 (9th Cir. 1999). This Court reviews factual findingS in the sentencing phase for clear error. *Id.*, 728.

This Court reviews the district court's evidentiary ruling for an abuse of discretion. *United States v. Feingold*, 454 F.3d 1001, 1006 (9th Cir. 2006).

2. The District Court Abused its Discretion In Rejecting the Sentencing Entrapment Argument and Denying the Motion to Vacate the Drug Quantity for Which Mr. Roque Was Held Criminally Culpable.

"Sentencing entrapment or sentence factor manipulation occurs when a defendant, although predisposed to commit a minor or lesser offense, is

entrapped in committing a greater offense subject to greater punishment." *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999); *United States v. Biao Huang*, 687 F.3d 1197, 1202-1203 (9th Cir. 2012). *United States v. Yuman-Hernandez*, 712 F,3d 471, 474 (9th Cir. 2013). This defense "serves to prevent the government from 'structuring sting operations in such a way as to maximize the sentences imposed on defendants' without regard for the defendant's culpability or ability to commit the crime on his own." *Biao Huang*, Id., at 1203 (citing *United States v. Schafer*, 625 F.3d 629, 640 (9th Cir. 2010), quoting *United States v. Staufer*, 38 F.3d 1103, 1107 (9th Cir. 1994).

The defendant bears the burden during the trial of proving sentencing entrapment by a preponderance of the evidence. *United States v. Parrilla*, 114 F.3d 124, 127 (9th Cir. 1997). The defendant must show that he was predisposed to commit only a lesser crime. *Staufer,* supra, at 1108. "The district court is obligated to make express factual findings as to whether the defendant met this burden." *Parrill*a, Id., at 127.

3. Mr. Roque Proved By a Preponderance of the Evidence that He Lacked the Ability and the Resources to Supply the Two Grams of Methamphetamine Demanded by Jaguar.

Section 841 of the Sentencing Guidelines provides escalating

penalties for different types and quantities of controlled substances which include methamphetamine. Offenses involving "5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers, or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers" face a sentence of imprisonment which "may not be less than 5 years and not more than 40 years." *(21 U.S.C. § 841 (b)(1)(B) (viii)*). Offenses involving "50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers" face a sentence of imprisonment which "may not be less than 10 years or more than life." *(21 U.S.C. § 841 (b)(1)(A) (viii)*).

The district court denied the defense motion to find sentencing entrapment by stating:

> The evidence at trial establishes the defendant expressed no hesitation in selling the requested amount of methamphetamine.
>
> Sentencing entrapment occurs when a defendant, although predisposed to commit a minor lesser offense, is entrapped to committing a greater offense subject to greater punishment. And that just isn't supported by the evidence in this case.

(RT 11-10-2014:10; ER 19).

The district court denied the motion for sentencing entrapment also on October 27, 2014, stating that:

> And there is insufficient evidence in this case to establish sentencing entrapment. That occurs where defendant is predisposed to commit a lesser crime but is entrapped by the Government into committing a crime subject to more severe punishment.
>
> The evidence at trial establishes that the defendant expressed no hesitation in selling a requested amount of methamphetamine. And therefore the Court denies the motion for judgment of acquittal or a motion for a new trial.

(RT 10/27/2014:19; ER 55).

a. The District Court Failed to Expressly Find Whether The Preponderance of the Evidence Standard Was Considered in its Rejection of Mr. Roque's Sentencing Entrapment Argument.

The district court is required to make express factual findings as to whether the defendant met his burden. *Parrill*a, Id., at 127. In stating its reasons for rejecting both the sentencing entrapment jury instruction and the vacation of the quantity of methamphetamine at sentencing, the district court made statements relating only to the general state of the evidence. The district court failed to state whether it weighed the evidence of trial against a preponderance of the evidence burden of proof. This was error

under *Parrilla*, supra, and merits vacation of the sentencing and remand to the district court.

b. Sentencing Entrapment Was Proven by a Preponderance of the Evidence.

Sentencing entrapment was proven by a preponderance of the evidence. The transcripts are critical in revealing the efforts used by the government through its informant Jaguar to maximize the sentence imposed on Mr. Roque without regard for his ability to commit the crime on his own. See *Schafer*, supra, at 640.

A review of the transcripts of the pursuit of Mr. Roque by Jaguar establishes the relentless efforts to get Mr. Roque to obtain two ounces of methamphetamine.

Beginning at least in March 2010, the government through its informant Jaguar began a campaign of telephoning Mr. Roque insisting that he supply methamphetamine.

It was clear that Mr. Roque had no intent, predisposition, capability or financial resources to source two ounces of methamphetamine. Mr. Roque expressed his lack of intent and predisposition to participate in attempting to locate methamphetamine for Jaguar. He says to Jaguar that

"once and for all you [Jaguar] can go with [the person who is getting the drugs for Jaguar]." He also tells Jaguar, "I'm going to give you that connection [who Jaguar might get the drugs from]." (ER 347;Gov Exh 7, p 2). Even Agent Hamilton expressed that Mr. Roque could not supply the drugs and could not purchase the drugs by Hamilton's testimony, stating that:

> The defendant did not have the narcotics in his possession. It was going to contact a source of supply to see if they would be able to procure so he would - - to see if he would be able to supply our source with narcotics, and he offered to introduce the narcotic's source of supply to the informant.

(RT 8-28-2014:449; ER 196).

Government exhibits 9 and 10 are telephone calls in which Jaguar continued pushing to make sure that it was Roque and no one else who would hand over the methamphetamine. (RT 8-28-2014:449-450; ER 196-197). In Exhibit 10, Jaguar insisted that he was even going as far as to go to Roque's place of employment to deliver the money. Even when Roque told him not to come to his job, Jaguar did not listen and said I'm going to your job and insisted on giving Roque the money rather than the person who was supplying the drugs to Jaguar. (ER 362; Gov Ex 10, p 1).

Jaguar rejected the opportunity to buy 1 ounce of methamphetamine because the government required at least 2 ounces to support the ten-year mandatory minimum sentence. According to Agent Hamilton's testimony, government exhibit 11 depicts further contact between Jaguar and Mr. Roque. At that time, the agents "had given Jaguar buy-money to take to the meeting with the defendant."(RT 8-28-2014:450; ER 197). At the meeting with Mr. Roque, Jaguar had the opportunity to buy "one ounce" of methamphetamine (ER 374; Gov Exh 11, p. 8), however, that amount was too small for the sting operation. Agent Hamilton testified that the agents did not send Jaguar to buy 1 ounce because it was "small." (RT 8-28-2014:451; ER 198). Agent Hamilton's testimony is another clear indicator of the Task Force's objective - to get more than 1 ounce in order to drive higher the mandatory minimum sentence.

Government exhibit 11 also reveals that Mr. Roque did not have money to buy 1 ounce of methamphetamine for Jaguar, therefore, he was willing to give Jaguar the contact information of a possible source in order to deal directly with supplier Mac.(ER 374; Gov Exh 11, p. 8). However, because Mac was not the target of the sting coupled with the fact that 1 ounce was too small a quantity to result in the ten-year mandatory minimum

sentence, the agents were willing to wait for Mr. Roque to source 2 ounces, if he could.

On April 19, 2010, the Agents had Jaguar telephone Mr. Roque again. (ER 199, 378; RT 8-28-2014:452; Gov Exh 12). Again it was Jaguar who telephoned Mr. Roque. Mr. Roque was not chasing Jaguar to conduct any drug business. At the beginning of the call, Jaguar announced himself as "Doggie," Mr. Roque responded, "Who?" as though he wanted to avoid the call. (ER 378; Gov Ex 12, p. 5). It is also noteworthy that Mr. Roque did not initiate a conversation concerning drugs, Jaguar did. When Jaguar broached the drug subject, Mr. Roque's response was, "Huh?" (ER 379; Gov Exh 12, p. 6).

During the April 19, 2010 telephone conversation initiated by Jaguar, he plays on the emotion of Mr. Roque speaking about the delivery day of Roque's daughter and having to buy the baby's crib. Which leads to the following exchange:

CHS:	- - make some money. You know? You have to make money. . .
FR:	Huh? No, well, I would need 1,000 dollars for that, man, to buy her uh - - where by baby girl is going to sleep and the [UI]
CHS:	[OV] Man, then there's nothing else to say, the it's - - then you know it. You know

	what to do then, fool.
FR:	All right, then. So, [UI].
CHS:	[OV] I'm going to show you- - I'm going to show you . . .

(ER 383; Gov Exh 12, p. 10).

Jaguar tells him, "You have to make money. . ." During the conversation, Roque asked Jaguar how Roque could get money. (ER 380; Gov Exh 12, p 7). It was Jaguar who told Roque that Jaguar was going to show Jaguar how to make money. (ER 380; Gov Exh 12, p 7). If Mr. Roque had been experienced dealing drug, there would have been no need for Jaguar's comment.

In the second phone call by Jaguar to Roque on April 21, 2010, Roque appears to tell Jaguar that Roque is not going to get the drugs but Jaguar is. Jaguar said, "what. . . " (ER 392; Gov Exh 14, p 3). In government exhibit 15, the third phone call from Jaguar to Roque on April 21, 2010 (RT8-28-2014:453; ER 200), it is evident that Roque did not know whether the item they were talking about was "oil-based" or "water-based." Nor did Roque know what "color it burns" when asked by Jaguar. (ER 398; Gov Exh 15, p 7). Roque told Jaguar to talk to the person who was supplying it. (ER 398; Gov Exh 15, p 7). When Jaguar said he knew how to "cook rock," Roque indicated that he did not know how to cook rock and

was sounded stunned when he asked Jaguar, "[y]ou know how to cook rock?" (ER 405; Exh 15, p 14). Roque seemed to stall leaving his home with Jaguar in Mr. Roque's car and made the excuse that he did not "have any plates."(ER 408; Gov Exh 15, p 17).

Mr. Roque had no prior activity in the drug transaction which is evidenced by his response when Jaguar asked Roque, "You've never done deals with this fucker?" and Roque replied, "Nah." (ER 411; Gov Exh 15, p 20).

The long search to locate an avenue for methamphetamine for Jaguar belies a conclusion that Mr. Roque had previous experience participating in drug transactions at least for 2-ounce transactions.

Roque told Jaguar that he was looking for a source of good stuff. Roque admits that he has not done drug sales before, he says, "I also want to do business." Roque says he could call "an old son of a bitch" to bring something to his house but Roque "is not sure whether that shit is good or not." (ER 420-421; Gov Exh 16, p 28-29). When Jaguar asked Roque, "[h]ow do you test it?" Roque answered, "Huh?" then, after being asked the same question again, Roque said, "I have other people who go and tell you. . . . (ER 42-422; Gov Exh 16, p 29-30). The reliance on other people to

determine the quality of the product denotes inexperience.

In government exhibit 18, Jaguar's fourth contact of Mr. Roque on April 21, 2010, Jaguar wants to give the impression that he had received 56.9 ounces of methamphetamine from Mr. Roque. He weighed it and it weighed 56.9. (ER 447; Gov Exh 18, p 53). The video does not depict Mr. Roque handing anything to Jaguar, nor is Mr. Roque even in the photo at this time.

During this same contact, Mr. Roque asks Jaguar his costs for and "eight" which Hamilton testified in 1/8 of an ounce of methamphetamine, or, as Hamilton believes is 28.6 grams, almost half the quantity pursued in this sting. (ER 203-204, 454; RT 8-28-2014:456-457; Gov Exh 19, p 2). Roque also inquires whether Jaguar might be a supplier for the "eight" and indicates that he could be a runner for Jaguar because Mr. Roque does not have any money to participate in dealing even in this smaller quantity.(ER 454; Gov Exh 19, p. 2). The conversation suggests that the "eight" sells for about $200-$300 but Jaguar's price for the "eight" to $500.(ER 454; Gov Exh 19, p. 2).

Government exhibit 15 reflects that Mr. Roque lacked knowledge of "oil-based" or "water-based" and therefore refers Jaguar to the person with

that knowledge. This gesture contradicts the conduct of a person predisposed and intent to supply drugs. Part of the recorded conversation reveals the following exchange:

> FR: Which is the one that [UI][unintelligible]?
> CHS [confidential human source]: [OV] [overlapping voices] Oil-based. Yeah, I know which one's that.
> FR: [OV] Oil-based?
> CHS: or water based. But the oil-based is the good one, but it depends too, w-what color does it burn when-when you burn it?
> FR: [UI] to talk to him, and everything, you understand?

(ER 399; Gov. Exh 15, p.8).

This same telephone conversation reflects that Mr. Roque's naivete about "cooking rock."

> CHS: [OV] – of it was cut. Fool, I know it, dog, I– I'll clean it for you from speed to – to fucking crystal, man.
> FR: [laughs]
> CHS: That's [UI] - - that's on the hood, homie. I'll cook rock for you, brother.
> FR: [OV] [UI] It's cool. You know how to cook rock" [UI]
> CHS: [OV] I know- - I cook rock, homie, [UI], flat. Flat. I can make chunk too. If you want chunk, you put- - you put the little pot ot cook, you put the bot- - the bottle, boom-boom-boom. Once you- - when-when it's getting thick, when- - with baking soda, you start tossing chunks of ice in it, and you stir it, shooh-shooh. You understand? So it starts hardening, and it starts turning into the little ball.

> That's easy, dog. A 10-year old can do it, brother.
> FR: [yawns] [UI]
> CHS: Huh?
> FR: [UI]
> CHS: What?
> FR: [UI] [laughs]

(ER 405-406; Gov Exh 15, pp 14-15).

During the conversation between Jaguar that after Mr. Roque does his first deal more will follow:

> CHS: You understand? Once you begin with a first thing, then it's gonna lead to a lot of things, you understand? That's how I am too, homie, you understand? I've- - homie, I've been in the business, doggie. You understand? And- - and you- -you have to open doors for yourself, fool. You understand?

(ER 417; Gov Exh 15, p 26).

On April 14, 2010, when Mr. Roque tried to give Jaguar the contact information for the methamphetamine, Jaguar continued his insistence that he only wanted to deal with Roque. (ER 347; Gov Exh 7, p. 2).

The campaign to entrap Mr. Roque consisted of nearly daily telephone calls by Jaguar to Mr. Roque, showing up to Mr. Roque's home and his work even when asked not to come to his place of employment, and, rejecting Mr. Roque's offer to give Jaguar the contact information of a possible source with whom Jaguar could personally and directly work to

obtain methamphetamine. Mr. Roque was entrapped to obtain a quantity of methamphetamine which he could not financially afford to provide on his own.

This conduct which was handled, structured, overseen and facilitated by the government cannot be viewed as anything else but sentencing entrapment where it accomplished the plan to entangle Mr. Roque in an offense which carried the higher mandatory minimum sentence of ten years and the heightened statutory maximum sentence of life imprisonment.

As this Court emphasized in *United States v. Yuman-Hernandez*, 712 F.3d 471 (9th Cir. 2013), [t]he capability to sell a certain quantity of drugs has concrete contours; the defendant either can or cannot procure or produce the amount [of drugs] in question. Similarly, the capability to purchase a given amount often turns on the defendant's financial resources." *Id.*, at 474. The Court in *Staufer* recognized that often the government sets a selling price lower than market value to accommodate a larger quantity. *S*ee *Staufer*, 38 F.3d at 1107 "(quoting amended sentencing guidelines permitting downward departure where government sets price substantially below market value resulting in purchase of significantly greater quantity than available resources would otherwise allow)." *Yuman-Hernandez*,

supra, at 474.

Mr. Roque did not have money to procure or produce a 2 ounce quantity of methamphetamine. Mr. Roque did not realize any financial gain for his efforts with Jaguar. In fact, Mr. Roque asked Jaguar, if Jaguar is going to give him any money.(ER 449; Gov Exh 18, p 55). Mr. Roque had no resources to advance to buy methamphetamine for sale to Jaguar. We know this because Mr. Roque told Jaguar, "I don't have any money." (ER 433; Gov Exh 16, p 41).

Jaguar's control over Mr. Roque is demonstrated in government exhibit 10, where Jaguar drives the point home that he intends to give the money only to Roque, not directly to the supplier. Jaguar's control and intimidation is further evidenced by going to Roque's place of employment to deliver the money after Roque told him not to. If Roque had had control over the quantity, he would not have elected two ounces for it is clear that amount was not within his capability.

4. Remedy for Sentencing Entrapment

At the sentencing hearing, the district court should have recognized the sentencing entrapment and structured the sentence based on the remedies available. Specifically, Mr. Roque should have been sentenced

under *21 U.S.C. § 841(b)(1)(C)*, not using any quantity of methamphetamine.

"There are two possible remedies for sentencing entrapment. First, a sentencing court may decline to apply the statutory penalty provision for the greater offense that the defendant was induced to commit, and instead apply the penalty provision for the lesser offense that the defendant was predisposed to commit. Alternately, the sentencing court may grant a downward departure from the sentencing range for the greater offense that the defendant was induced to commit." *United States v. Riewe*, supra, at 729. "However, because a district court may not impose a sentence below a statutory minimum term, the only available remedy for sentencing entrapment where the defendant is faced with a mandatory minium term is to apply the penalty prevision for the lesser offense." *United States v. Castaneda*, 94 F.3d 592, 595 (9th Cir. 1996); *United States v. Naranjo*, 52 F.3d, 245, 251, n. 14 (9th Cir. 1995).

The district court had the discretion to completely vacate the drug quantity although all the elements of entrapment were not present but where the evidence established an "aggressive encourage[ment] of wrongdoing" by the informer. *United States v. Garza-Juarez*, 992 F.2d 896, 910-12, fn. 2

(9th Cir. 1993).

Sentencing Guidelines § 2D1.1 provided in part, "where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing." See *United States v. Naranjo*, 52 F.3d 245, 250 (9th Cir. 1995).

The government through its agent Jaguar forced Mr. Roque to find more methamphetamine than he was predisposed to do. Under this set of circumstances, the district court could have vacated the drug quantity and sentenced Mr. Roque based on no quantity of drugs or the district court "should have subtracted the amount of drugs tainted by the entrapment, and thereby reduced his mandatory minimum sentence to five years under *21 U.S.C. § 841(b)(1)(B)(viii)*." *Riewe*, supra, at 729. This Court in *Riewe* pointed out that "[s]ince the reduction in the quantity of drugs would result in the application of a different statutory penalty provision altogether, this remedy does not involve a departure from the applicable statutory minimum." *Riewe*, supra, at 729 (citing *Castaneda,* 94 F.3d at 595).

B. THE DISTRICT COURT COMMITTED REVERSIBLE

ERROR BY DENYING THE DEFENSE REQUEST FOR A SENTENCING ENTRAPMENT JURY INSTRUCTION AND REMOVING SENTENCING ENHANCEMENT FROM JURY DETERMINATION WHERE IT WAS A RELEVANT TO THE A DETERMINATION OF THE ELEMENT OF DRUG QUANTITY.

1. Standard of Review

This Court reviews the legal sufficiency of jury instructions de novo. *United States v. Romo-Romo*, 246 F.3d 1272, 1274 (9th Cir. 2001). "When there is a 'question whether the district court's instructions adequately presented the defendant's theory of the case,' the 'district court's denial of a proposed jury instruction' is reviewed de novo." *United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009).

"Whether the instructions, taken as a whole, adequately cover the defense theory is a question of law reviewed de novo." *United States v. Chao Fan Xu*, 706 F.3d 965, 988 (9th Cir. 2013). This Court reviews de novo "the denial of a jury instruction based on a question of law." *United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010). "The denial of a defendant's jury instruction due to an inadequate factual basis is reviewed for an abuse of discretion." *Chao Fan Xu*, supra, at 988.

"Where the error is the wholesale failure to give an instruction, we

must reverse if the evidence supports giving the instruction: a criminal defendant is entitled to jury instructions related to a defense theory so long as there is any foundation in the evidence." *United States v. Doe*, 705 F.3d 1134, 1144 (9th Cir. 2013).

2. Mr. Roque Was Entitled to a Sentencing Entrapment Jury Instruction.

The district court denied the defense request for a jury instruction for sentencing entrapment, stating:

> . . . the entrapment instruction will not be given.
>
> "And the Court, in any event, finds that there's a lack of evidence as to the lack of the defendant's intent or capability sufficient to warrant the instruction as proffered in Cortez. And, moreover, there is a failure of evidence to show that the defendant was induced to furnish a greater amount of drugs than he was capable of providing in this case. And therefore, the Court doesn't believe that a sentencing entrapment instruction is appropriate in this case. Nor is there sufficient evidence that the defendant lacked the capability to provide that. At most in this case there was an opportunity to commit a crime, and the defendant chose to participate in that - - take advantage of that opportunity.

(RT 8/29/2014:15).

Sentencing entrapment is a separate affirmative defense to the quantity element of the drug charge under 21 U.S.C. § 841. This Court in

United States v. Cortes, 757 F3d. 850 (9th Cir. 2013), recognized the United States Supreme Court's precedent and that of this Circuit require that "drug types and quantities triggering higher statutory maximum sentences under 21 U.S.C. § 841(b) are jury questions under *Apprendi v. New Jersey*, 530 U.S. 466 (2000)." *Cortes*, Id., at 861. The Cortes Court thus concluded that '[i]t therefore stands to reason that any defenses to those drug types and quantities must be submitted to the jury as well, when the proffered defense has the potential to change the statutory maximum and minimum sentences." *Cortez*, Id., at 861.

After the *Apprendi* decision, *Cortes'* "drug quantity is an element of the offense, not a sentencing enhancement or factor. A jury must decide whether the defendant would have sold, bought, or robbed that quantity but for the government manipulation or pressure." *Cortes,* supra, at 861.

The Sentencing Guidelines also provide for sentencing entrapment which "come into play only insofar as the Guidelines calculations are concerned, not as to substantive statutory elements that must be tried to a jury or in a bench trial." *Cortes*, Id., 861. If the jury rejects the defense of sentencing entrapment concerning the quantity of drugs, the advisory Guidelines allows the district court the discretion to incorporate its finding

of sentencing entrapment in determining the applicable sentencing range.

> If, . . . the defendant established that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agree-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intent to provide or purchase or was not reasonablely capable of providing or purchasing.

Appl. Note 12 U.S.S.G. Manual (2011) § 2D1.1.

Under the legal principles followed in this Circuit, Mr. Roque was entitled to a jury instruction on sentencing entrapment."A defendant is entitle to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Washington*, 819 F.2d 221, 225 (9th Cir. 1987).

"Sentencing entrapment occurs where a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment." *United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010). Mr. Roque was entitled to a jury instruction of sentencing entrapment if there were some foundation in the evidence, even if the district court found the evidence "weak, insufficient,

inconsistent, or of doubtful credibility." *Washington*, supra, 225. Sentencing entrapment would subject him to a lesser statutory minimum or maximum sentence if the sentencing entrapment defense were to succeed. The statutory sentence for the charged offense in Mr. Roque's case, distribution of at least 50 grams of methamphetamine *(21 U.S.C. § 841(a)(1), (b)(1)(A)(viii))*, is a mandatory minimum of 10 years and a maximum of life imprisonment. Under *21 U.S.C.§ 841(b)((1)(B)(viii)*, distribution of 5 grams or more of methamphetamine carries a mandatory minimum of 5 years and a maximum of 40 years imprisonment. Conviction for an unspecified amount of methamphetamine carries no mandatory minimum and a 20-year statutory maximum. *21 U.S.C. 841(b)(1)(C)*.

Mr. Roque's conviction under *21 U.S.C. § 841(a)(1), (b)(1)(A)(viii)* bearing a mandatory minimum of 10 years imprisonment would have been reduced to a mandatory minium of 5 years or no mandatory minimum imprisonment depending on the jury's findings. As stated by this Court, "the refusal to instruct on sentencing entrapment may have been prejudicial had the jury agreed he was entrapped as to the quantity, because the court might have had to apply a lower mandatory minium or none at all, depending on the quantity the jury found to have been improperly inflated."

Cortes, supra, at 863.

The decision in *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, eliminated any doubt that facts which increase the mandatory minimum sentence are elements of the charged offense to be tried to a jury.

> *Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. [internal citations omitted]. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.

Alleyne, 133 S.Ct. at 2158.

It is clear that the drug quantity structured by the government, two ounces, was not within his resources. It was clear he had no money or other alternative to front the controlled substances for Jaguar. If Mr. Roque had any predisposition, it would have been for 1/8 of an ounce of methamphetamine (or 3.5436 grams) well below even the 5 gram quantity exposing a defendant to a 5 year mandatory minimum.

3. <u>The District Court Committed Reversible Error By Failing to Submit the Issue of Sentencing Entrapment to the Jury.</u>

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364 (1970).

"The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476-477 (1999).

Under *Alleyne,* supra, and the other cases cited immediately above, the existence, or not, of sentencing entrapment influenced which mandatory minimum sentence applied, if at all.

As noted hereinbove, the removal of sentencing enhancement from jury determination was prejudicial because it may have deprived Mr. Roque of a substantially lower application of the sentencing regime. See *Cortes*, supra, 862.

Consequently, it was reversible error for the district court not to have submitted this to the jury.

CONCLUSION

For the foregoing reasons and legal arguments, Appellant's conviction should be vacated and the matter remanded to the district court.

Appellant further requests that this Court find that the district court committed reversible error by failing to vacate the drug quantity, removing the sentencing entrapment from jury determination, failing to instruct the jury on sentencing entrapment, and failing to apply sentencing entrapment during the sentencing.

DATED: October 29, 2015

Respectfully submitted,
*s/*Gretchen Fusilier
GRETCHEN FUSILIER
Attorney for Defendant-Appellant
Fabel Roque

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Counsel for appellant is unaware of any cases related to this appeal.

Dated: October 30, 2015

Respectfully submitted,

s/*Gretchen Fusilier*
Gretchen Fusilier

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Ninth Circuit Rule 32(a)(7)(B)(i), I certify that the attached Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 8381 words.

Date: October 30, 2015

s/ Gretchen Fusilier
GRETCHEN FUSILIER

CERTIFICATE OF SERVICE

I, Gretchen Fusilier, hereby certify that on October 30, 2015, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. For the participants in the case who are not registered CM/ECF users, I have mailed the foregoing document by First Class Mail, postage prepaid.

Dated: October 30, 2015

s/ Gretchen Fusilier
GRETCHEN FUSILIER