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 REPLY BRIEF

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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

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### A. IT WAS UNNECESSARY FOR MR. ROQUE TO TESTIFY CONCERNING HIS LACK OF PREDISPOSITION AND COULD RELY SOLELY ON THE WEAKNESS OF THE GOVERNMENT'S CASE BASED ON THE RECORDED TELEPHONE CALLS BETWEEN HIM AND THE GOVERNMENT'S INFORMANT, JAGUAR.

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *United States v. Gurolla*, 333 F.3d 944, 957 (9th Cir.2003), quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988). This general proposition is applicable to the defense of entrapment. *Gurolla*, supra, at 956-957 at 62, (" a criminal defendant who has not introduced affirmative evidence of entrapment may nevertheless be entitled to a jury instruction on that defense should the government's evidence justify such an instruction . . ."), *Sherman v. United States*, 356 U.S. 369 (1958); *Mathews,* supra at 62.

The recordings introduced as evidence at trial constituted a significant portion of the government's case. Mr. Roque was able to rely solely on the government's case to establish sentencing entrapment. As the Court instructed in *Sherman*, supra, the defense need not call any witnesses

and may solely rely on the government's evidence. *Id*., at 373.

The government argues that "because defendant [Mr. Roque] chose not to testify at trial, there is no statement from defendant that he was reluctant or had any inability to provide the methamphetamine requested by Jaguar." The government continues by stating that, "defendant never expressly stated any reluctance or inability to provide the requested quantity." (GAB 36). The cases cited immediately hereinabove demonstrate that Mr. Roque was constitutionally entitled to rest his defense of sentencing entrapment solely on the government's case without testifying himself on the issue of entrapment. *Sherman*, supra; *Mathews*, supra.

Consequently, this Court may review the district court's denial of Mr. Roque's request for a sentencing entrapment jury instruction notwithstanding his choice to invoke his Fifth Amendment right not to testify. Mr. Roque submits that an objective review of the recorded telephone calls between Mr. Roque and Jaguar meet the "slight evidence" standard entitling him to a sentencing entrapment jury instruction.

## B. THE RECORDED TELEPHONE CALLS BETWEEN JAGUAR AND MR. ROQUE REVEAL THAT MR. ROQUE WAS NOT PREDISPOSED TO SUPPLY TWO OUNCES OF METHAMPHETAMINE.

There was no individualized suspicion that Mr. Roque was supplying methamphetamine and/or any drugs in any specific quantities prior to the government's paid informant Jaguar's implication of him into the sting operation conducted by the Task Force. The government argues that Mr. Roque "agreed to do the deal in the very first call, on March 15, 2010." (GAB 37). However, it is obvious that this was not the first phone conversation between Jaguar and Mr. Roque. Jaguar, who had a known criminal history, began working as an informant for the Task Force in 2009. (ER II:420, 431). It is also clear from the evidence that Jaguar and Mr. Roque had several common acquaintances - Coqui, Jaguar's cousin (ER II:430); Little One (ER II:425, 428); Plucky (ER II:426), and that Jaguar was allowed by the Task Force to have unrecorded contact with his acquaintances.

It is also irrefutable that Jaguar proved to be an unreliable informant and terminated as an informant being found by the Agents as unsuitable as an informant. The Agents of the Task Force learned that Jaguar continued to use drugs while ensnaring Mr. Roque and prior to the supply of the drugs by Mr. Roque. Jaguar was recorded on the FBI video camera using drugs during a transaction as an informant prior to Mr. Roque supplying the two

ounces to Jaguar. Notwithstanding the video footage, Jaguar's handler, Agent Hamilton, did not view Jaguar's use of drugs but was informed by another Agent. Moreover, Jaguar was not drug tested while acting on behalf of the government in the sting involving Mr. Roque.(ER II:210-216). Beside Jaguar's use of drugs during the sting operation, he was terminated as an informant for other reasons including his failure to maintain contact with the Agents. (ER II:219, 221).

A rational trier of fact knows that Jaguar had some history with Mr. Roque prior to March 15, 2010, and consequently that recorded telephone call was not "the very first call" as characterized by the government. Nothing in the evidence meets the standard of proof to support a finding that Mr. Roque had been supplying Jaguar or anyone with any type of drugs prior to the Task Force's targeting Mr. Roque through the drug abuser Jaguar.

Consequently, the government's assessment that Mr. Roque agreed to the drug transaction in "the very first call" on March 15, 2010 is without foundation. (GAB 29, 37).

Moreover, the content of the March 15, 2010 recorded call does not indicate what might happen on Wednesday, the day mentioned in this

recorded call. Nothing was said about drugs or money. Consequently, a reasonable person could only speculate that the parties expected to consummate a drug deal on Wednesday.

In this same conversation, Jaguar mentions that he has "the small house running well right now." (ER 327). The only evidence pertaining to his "house" is in another recorded phone call where Jaguar and Roque discuss Jaguar's "little house." Jaguar states that he has to "pick up some" [women to work in his house]. . . because some that came, were ugly." (ER 401). It appears that the "little house" refers to a prostitution run by Jaguar. Left with an interpretative uncertainty of this brief conversation, it would not be unreasonable to conclude that the expectation for Wednesday was related to the "little house" and not drugs.

In the second recorded phone conversation between Jaguar and Mr. Roque about "stuff," Mr. Roque indicates that he is not sure about how much "stuff," he can get by saying, "but listen, because the guy is. . . Because I went to bring it once and- - and stuff, and then the dude lowers it. You know." Jaguar responds, " . . . as long as the material is good, you know, I won't have a problem.. . . ." (ER II:334). This indicates that Mr. Roque did not have the ability to deliver a specific quantity of

methamphetamine.

Jaguar, during his pursuit of Roque for methamphetamine, even called Roque while he was working causing Roque to tell Jaguar that "they [presumably supervisors] can pull me out." (ER 382).

The government rests part of its argument of Appellant's predisposition to supply two ounce quantities of methamphetamine on an unreasonable and unproven conclusion that Mr. Roque had bought "drugs" previously from a "supplier." (GAB 29, 38). Yet the government does not support this accusation with the identity of the parties involved, the supplier or when this so-called event occurred. The vagueness of this accusation against Mr. Roque is insufficient to establish his predisposition to supply methamphetamine in any amount especially three or two ounces of it.

In *United States v. Skarie*, 971 F.2d 317 (9th Cir.1992), the defendant's admission to "having used methamphetamine in the past, and . . . testimony [by an accusing witness] that [the witness] had sold an unknown quantity of drugs for [defendant] to an unknown third party at some undefined point in the past" was held to be prior acts which did not support defendant's predisposition. (*Id*., at 320-321).

Additionally, the government argues that Mr. Roque's predisposition

to "deal in quantities of two ounces or more," is proven when "shortly before the drug deal between defendant and Jaguar, defendant ordered three ounces of methamphetamine. . . even though Jaguar had only asked for two." (GAB 29). The government is clearly wrong as shown by Jaguar's unsolicited statement in the April 14, 2010 recorded telephone call, played to the jury and labeled government exhibit 11. (ER II:370). In this call, Jaguars asks Mr. Roque: "does he have the three ounces?" Mr. Roque answers: " No, he doesn't have them, fool." (ER II:370). Jaguar initiated the three ounces and not Mr. Roque, as the government stated. It is unequivocal that it was Jaguar, not Mr. Roque, who requested three ounces.

Moreover Agent Hamilton testified that he wrote in his debriefing report about Jaguar's April 14, 2010 meeting with Mr. Roque and wrote therein that "Roque told CHS [Jaguar] that Perez had an ounce of methamphetamine but not the 3 ounces that CHS requested." (ER II:257-258).

From the recorded conversation coupled with the Agent's testimony, it appears that the sting targeting Mr. Roque was initially for three ounces of methamphetamine. When it became clear that Mr. Roque lacked the ability to supply three ounces, the government reduced the quantity to two ounces.

However, the Task Force knew at least by April 14, 2010 that Mr. Roque might be able to supply only one ounce.

The critical temporal evaluation of Mr. Roque's predisposition is prior to the efforts of Jaguar to obtain three ounces of methamphetamine from Mr. Roque. There was no evidence that Mr. Roque was actively supplying at that time. It is also important to note that there is no evidence that Mr. Roque prior to Jaguar's ensnaring him had the ability to obtain and supply three ounces or even two ounces.

Mr. Roque's lack of predisposition prior to the pursuit of him by Jaguar is gleaned from the facts that he was gainfully employed at a mall to support his family and the baby whom he and his wife were expecting in April 2010. (ER 363, 383).

During the April 14, 2010 recorded telephone conversation, Jaguar and Mr. Roque talked about a possible source obtained from Tijuana but Mr. Roque did not know the price per pound. (ER II:373). Moreover, when Mr. Roque unequivocally refused to test the quality of the drug for Jaguar (ERII:374), Jaguar was apparently more interested in obtaining the drug for the Task Force and said, ". . . fuck the testing, I'll just buy the shit, you know." (ER II:374).

The government's argument that Mr. Roque never made statements "that he was reluctant or unable to broker delivery of two ounces. . ." in order to cast doubt on his ability to deliver two ounces is parallel to the government's failure to call Jaguar to testify at trial. (GAB 45). Mr. Roque's inability to readily supply two ounces of methamphetamine, his inability during Jaguar's pursuit to quote a specific quantity that he could deliver and the price per pound, and Mr. Roque's ultimate supplying of the drug without any agreement of payment to himself reflects his lack of predisposition to engage in drug activity. It was not until the delivery on April 21, 2010, that Mr. Roque asked if he would get some money, (ER 449), which indicates that he did not act for financial gain.

The totality of the circumstances reflects an unreliable informant Jaguar who continued to abuse illicit drugs, including at least one such use on the FBI video camera, had unrecorded contact with Mr. Roque and other acquaintances, and at one point became difficult to contact by the Task Force. Jaguar asked for three ounces of methamphetamine and when Mr. Roque was unable to locate that amount it was reduced to two ounces. That the Task Force knew that Mr. Roque was unable to obtain three ounces of methamphetamine was reflected in Agent Hamilton's debriefing report of

the April 14, 2010 meeting of Jaguar and Mr. Roque.

1. Unreliable Informant's Information Should Have Been Corroborated.

Jaguar was proven to be deceitful and unreliable and was ultimately terminated as an informant. The government did not call Jaguar as a witness perhaps knowing that his dishonesty would be amplified on cross-examination. The failings of Jaguar as developed through the testimony of Hotema and Hamilton reflect an informant whose accusatory information which caused Mr. Roque to be targeted in the sting operation were never corroborated and should have been more carefully scrutinized and managed.

When Jaguar became a government informant and directed the Task Force's investigation to Mr. Roque, Jaguar knew that he would receive money from the government. Indeed, Jaguar did receive money from the government, including his rent payment and utilities. (ER II:229-230).

2. The Requisite Elements of Sentencing Entrapment are Present Justifying a Sentencing Entrapment Jury Instruction.

(1) There is no evidence that Mr. Roque was selling methamphetamine or other drugs prior to Jaguar causing him to be targeted by the government. (2) The government initiated the criminal scheme and suggested the type of drug and the quantity. The quantity was reduced from

three ounces to two ounces of methamphetamine when it became apparent that Mr. Roque could not provide it. (3) The evidence indicates that Mr. Roque did not engage in the activity for profit. He never negotiated or requested any monetary quid pro quo in return for the drugs. Only after the delivery did he ask if he were going to get any money and he was given $20.00.

Mr. Roque was the victim of the government creating the criminal scheme based on unreliable information from an unreliable and deceitful informant. It is clear that the government was the pursuer by causing Jaguar to continuously make telephone calls to Mr. Roque evidencing further that Mr. Roque lacked the predisposition to pursue a drug deal. Moreover, Mr. Roque never made any on-recorded statement that he expected any money from Jaguar. Thus, the government has no argument that Mr. Roque acted for financial gain. The only comment about money was broached by Mr. Roque only after the delivery on April 21, 2010, when Mr. Roque asked Jaguar, "What are you going to give me?" Jaguar replied, "I'll give you 20 bucks," and Mr. Roque said, "All right." [sic]. (ER II:449). This pittance is contrary to a person with a predisposition of continuously supplying drugs to buyers.

Jaguar, a dishonest government informant, induced Mr. Roque into criminal conduct all the while knowing that he, Jaguar, would be enriched through government payments. Jaguar eventually began to avoid the government's attempts to contact him and ceased reporting to the Task Force while personally continuing to abuse drugs. He failed to divulge to the Task Force or his handler his continued drug abuse while he was cooperating in the government sting implicating Mr. Roque. Jaguar admitted his continued used of drugs to his FBI handlers on May 28, 2010, when he was terminated as an informant. The deceitful and untrustworthy character of Jaguar necessitated a sentencing entrapment jury instruction. The district court was apprised of this information which provided more than "slight evidence" to justify an entrapment and sentencing entrapment jury instruction.

The Task Force's failure to manage Jaguar- failing to administer drug tests, failure to watch the video that recorded Jaguar using drugs during a government buy transaction, casts extreme doubt on the integrity of the information on which the sting operation was based resulting in a sting operation that can only be characterized as a complete breakdown of its management and nullifies all the information received from Jaguar.

Knowing that Jaguar was a rogue informant, it became more incumbent on the district court to give the sentencing entrapment jury instruction.

Jaguar's proven unreliable and dishonest character should destroy any reliable basis for targeting Mr. Roque. Jaguar's conduct was deplorable and his handlers' failure to even catch him using drugs on the FBI's own video recording is inexcusable. Mr. Roque committed the solicited crime "only after the government had devoted considerable time and effort" pursuing him. Under these circumstances, Mr. Roque met the requisite "slight evidence" standard of proof to justify a sentencing enhancement jury instruction. *Skarie*, supra, at 321, citing *Jacobson* v. *United States*, 503 U.S. 540, 553 (1992).

## CONCLUSION

For the foregoing reasons and legal arguments and those advanced in the Appellant's Opening Brief previously filed herein, the judgment of the district court should be reversed, the conviction vacated and the matter remanded to the district court for further action.

DATED: April 25, 2016

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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(A), the appellant's reply brief complies with the page limitation consisting of 13 pages.

Date: April 25, 2016

*s/ Gretchen Fusilier*
GRETCHEN FUSILIER

## CERTIFICATE OF RELATED CASES

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

Dated: April 25, 2016

Respectfully submitted,

s/*Gretchen Fusilier*
Gretchen Fusilier

**CERTIFICATE OF SERVICE**

I, Gretchen Fusilier, hereby certify that on April 25, 2016, I electronically filed the foregoing Appellant's Reply 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 to the following:

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Dated: April 25, 2016

*s/ Gretchen Fusilier*
GRETCHEN FUSILIER