IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. NO. 09-10426
	)	
Plaintiff-Appellee,	)	
	)	
	)	D.C. NO. CR. 06-00214-SOM-04
vs.	)	(District of Hawai`i)
	)	
JEROME VIERRA,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

The Honorable Susan Oki Mollway, Chief Judge.

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JURISDICTIONAL STATEMENT

The United States District Court Hawai`i ("district court" or "court") had jurisdiction of this matter pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review criminal sentences under 28 U.S.C. § 1291.

As to timeliness of the Notice of Appeal, the district court entered the Amended Judgment in a Criminal Case ("Judgment") on October 13, 2009. [ER-I: 3-10].[1] On October 14, 2009, Mr. Vierra filed the Notice of Appeal. [ER-I: 1]. Since Vierra filed the Notice of Appeal within 10 days of entry of the Judgment the appeal is timely pursuant to Fed.R.App.P. 4(b).

ISSUE PRESENTED

Whether the district court made numerous factual findings in clear error of the record in denying Vierra's motion for sentence below the advisory Sentencing Guidelines on the ground of sentencing entrapment?

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[1] As used herein: "ER-I:" and "ER-II:" refers to the two volumes of the excerpts of record; "CR" refers to the district court clerk's record, attached to the back of ER-II; "PSR" refers to the Presentence Investigation Report filed with this Court under seal pursuant to Circuit Rule 30-1.10.

STATEMENT OF THE CASE

A. Background to C.A. No. 07-10393.

This appeal stems from a sentencing hearing on October 8, 2009. That hearing was the result of this Court's decision on May 19, 2009, in C.A. No. 07-10393, wherein the Court vacated the sentence and remanded for resentencing.

The procedural history to C.A. No. 07-10393 began on April 13, 2006, when the plaintiff-appellee the United States of America ("Government") filed a 15-count indictment against seven defendants, including Mr. Vierra. [ER-II: 236.2]. The Government alleged that Vierra participated in six transactions involving the sale of one and two ounces of crystal methamphetamine from November 26, 2004 to September 9, 2005, as identified in Counts 3, 5, 6, 7, 8 and 10. [ER-II: 236.2-263.9]. On February 21, 2007, a four-day jury trial commenced, wherein Vierra admitted participation in the six transactions but relied on the defense of entrapment. [CR 214-230]. On February 27, 2007, the jury returned guilty verdicts against Vierra on all six counts. [CR 230].

On April 11, 2007, the United States Probation Office Hawai`i ("Probation") submitted the draft presentence investigation report ("PSR"). As to Count 3 alleging distribution of more than 50 grams of methamphetamine, pursuant to 21 U.S.C. § 841 (b)(1)(A) Probation found applicable the mandatory

minimum term of 10 years. [PSR ¶ 81].

Probation found Vierra responsible for distributing a total of 227.115 grams of methamphetamine and, therefore, pursuant to U.S.S.G. § 2D1.1 (c)(3), found a base offense level of 34. [PSR ¶ 42]. Probation found no mitigating or aggravating circumstances to adjust the base offense level of 34, which became the total offense level ("TOL") under the Sentencing Guidelines. [PSR ¶¶ 43- 51]. Probation noted that since 1994 Vierra had been consuming one-tenth of a gram of methamphetamine every other day until the time of his arrest on April 14, 2006. [PSR ¶ 66].

As to Vierra's criminal history, Probation found no adult criminal convictions, or pending criminal charges, or other reportable criminal conduct. [PSR ¶¶ 52-57]. His criminal history score of zero corresponded with the Criminal History Category ("CHC") of "I" under U.S.S.G. Chapter Five, Part A. [PSR ¶ 54]. Based on the TOL of 34 and the CHC of I, the Guidelines' range for imprisonment was 151-to-188 months pursuant to U.S.S.G. Chapter Five, Part A. [PSR ¶ 82].

Vierra objected to the draft PSR and sought reductions to his sentence based on:

- acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a) [PSR

Addendum 2A];

- minimal role, pursuant to U.S.S.G. § 2D1.1(a)(3) [PSR Addendum 2A];

- qualification for a two-level reduction under the "safety valve", pursuant to U.S.S.G. § 5C1.2(a)(1)-(5) on the ground that he met the necessary criteria [PSR Addendum 3A];

- mitigating factors pursuant to 18 U.S.C. § 3553(a), including the nature and circumstances of the offenses, his history and characteristics, and the need for the sentence [PSR Addendum 3A];

- the doctrine of sentencing entrapment, arguing that the uncontradicted evidence showed that prior to November 2004 and the first Government-controlled methamphetamine transaction, he had only engaged in methamphetamine deals involving half-gram amounts, and that he was not predisposed to engage in the 10-to-60 gram deals underlying Counts 3, 5, 6, 7, 8 and 10. [PSR Addendum 2, 1A].

As to the latter, rather than impose a sentence based upon the one and two

ounce amounts determined by an FBI field agent, under the theory of sentencing entrapment he asked the court to sentence him based upon the half-gram, user amounts he dealt in pre-November 2004. He argued that under sentencing entrapment the focus was the quantity of drugs he was predisposed to deal before the first Government-controlled deal on November 26, 2004. [PSR Addendum 3, 1A]. He requested a finding that before that date he only dealt in methamphetamine of a half-gram or less. He asked the court to exclude all methamphetamine amounts greater than a half-gram because those amounts were tainted by sentencing entrapment. [PSR Addendum 3, 1A].

While Government agreed that Vierra satisfied the safety valve requirements under U.S.S.G. § 5C1.2 and that the district court could impose a sentence below the mandatory minimum of 10 years, it objected to the sentencing entrapment theory on the ground that Vierra was a "middleman" who had brokered the six methamphetamine deals, had knowledge of the desired quantity and knowledge of the source of the drugs in each deal. [PSR Addendum 3, 1A].

At the final sentencing hearing on July 23, 2007, the court granted the safety valve[2], but denied the motions to be considered a minor player and for acceptance

[2] Probation applied the safety valve pursuant to U.S.S.G. § 5C1.2(a)(1)-(5) based upon Vierra's post-conviction debriefing with the Government wherein he acknowledged his involvement in Counts 3, 5, 6, 7, 8 and 10. [PSR Addendum 2,

of responsibility. [ER-II: 213, 217]. The court also denied the motion for sentencing entrapment on the ground that trial record contradicted Vierra's argument that pre-November 2004 he only engaged in small, user quantity transactions of no more than half-gram amounts. [ER-II: 225-226]. The court adopted the TOL of 32, which provided an imprisonment range of 121-to-151 months. [ER-II: 227].

The court acknowledged both aggravating and mitigating factors. With respect to the latter, the court acknowledged Vierra's rehabilitation efforts while on bail during the trial, as well as the issue of consistency in sentencing and consideration of the codefendants' sentences already imposed. [ER-II 228-229]. Exercising its discretion, the court determined a TOL of 29, a range of 87-to-108 months, and imposed punishment that included a 90-month prison term for each of the six counts to be served concurrently. [ER-II: 230]. The court permitted Vierra to self-surrender on or by September 5, 2007. [ER-II: 235].

Vierra appealed his sentence to this Court raising one issue: based on a theory of sentencing entrapment, whether the uncontradicted record demonstrated that he was entitled to a sentence below the Guidelines range? On May 19, 2009,

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2A]. With the safety valve credit, Probation calculated the new TOL at 32. [PSR Addendum 2, 3A].

this Court filed a memorandum decision ("Memorandum Decision") finding that :

> 1) "[t]he district court did not make express, specific findings as to Vierra's predisposition to make sales in the quantity he made at the request of the government's informant. [Footnote omitted]. It is not clear from the record whether the district court differentiated between the evidence defendant was required to tender to sustain a legal defense of entrapment from the evidence required to meet his burden of proof as to sentencing entrapment";
>
> 2) "In addition, it is not clear whether the district court considered the defendant's evidence that his prior drug deals involve the quantity of drugs significantly smaller than the quantity that he sold to the government's informant. Such evidence of a defendant's character prior to the government's inducement must be considered by the district court in determining whether to depart downward due to sentencing entrapment."

[ER-II:81-82]. Therefore, the Ninth Circuit vacated the sentence, and remanded the matter for the district court to make the appropriate findings regarding Mr. Vierra's sentencing entrapment claim. [ER-II: 79-82]. On June 10, 2009, the Ninth Circuit issued the mandate and jurisdiction returned to this court. [CR 337].

B. The Second Appeal, C.A. No 09-10426.

On July 10, 2009, Vierra filed in the district court a Motion for Sentence below Advisory Guidelines based on a theory of sentencing entrapment. In support of this motion, Vierra filed a memorandum ("Memorandum in Support") and Exhibits A through F, consisting of extensive excerpts from the original trial and sentencing transcripts. Vierra sought a prison term within the range of 37-to-46 months. [ER-II: 48]. On August 3, 2009, the Government responded in

opposition to Vierra's motion. [ER-II: 1].[3] Probation also objected. [PSR, Addendum No. 4].

On September 16, 2009, the Court granted Vierra's unopposed Motion to Waive His Presence at the Sentencing Hearing. [CR 351]. In lieu of appearing in person, the court permitted Mr. Vierra to telephonically attend the hearing. He read a statement to the court in which he accepted responsibility for the crime, demonstrated remorse and rehabilitation, and looked forward to a drug-free future with his family and working in the community. [ER-I: 42-43].

On October 8, 2009, the district court held the sentencing hearing at which time the court imposed the same sentence as previously imposed, including a 90-month prison term. [ER-I: 33-34]. On October 14, 2009, Vierra filed a Notice of Appeal. [ER-I: 1]. This opening brief is due on or before January 13, 2010.

BAIL STATUS

According the Federal Bureau of Prisons ("BOP") website (www.bop.gov), Mr. Vierra, BOP No. 95639-022, is currently in BOP custody at the Federal Prison

[3] The excerpts of record in this appeal include the written arguments the parties filed with the district court [ER-II:1-7; 48-76], and therefore preserved for appeal, as well as exhibits the parties attached to their memoranda. [ER-II: 9-47; 78-236].

Camp, in Lompoc, California. The inmate mailing address is: Federal Prison Camp; 3705 West Farm Rd.; Lompoc, CA 93436. According to the BOP website, his projected release date is January 7, 2014.

STATEMENT OF RELEVANT FACTS

The relevant facts is this case present a stark contrast between Mr. Vierra's involvement in the methamphetamine trade before, and his involvement after November 2004, when the Government's informant Simeon "Ipo" Segundo ("Segundo") manipulated and coerced him to assist in the six distribution-quantity methamphetamine deals.

A. Jerome Vierra.

Born in 1961, at the time of his arrest in this case on April 14, 2006, Mr. Vierra had spent his entire life in the rural, tightknit town of Waialua on O`ahu's North Shore. [ER-II:180; PSR ¶ 61]. He had never been arrested, let alone convicted of any criminal offense. [PSR ¶¶ 52-55]. He was considered a law-abiding citizen [ER-II: 180, 182] and a "good person". [ER-II: 150]. His employer testified at trial that he was an "honest individual", who provided "outstanding" work as a maintenance/janitorial supervisor. [ER-II: 182].

Vierra earned a modest income of $1,620 per month. [ER-II: 196]. With

his wife, he lived in a one-room cottage without a kitchen behind his father's house in Waialua. [PSR ¶ 62; ER-II: 109-110, 236]. His only assets were a 1985 Toyota truck and a 1997 Toyota car. [PSR ¶ 76]. He carried debt of $13,646.37 at the time of the first sentencing in 2007. [PSR ¶ 76, ¶ 77].

Vierra hid a dark secret. He was addicted to marijuana and to methamphetamine, testifying at the trial that he needed marijuana as much as he needed methamphetamine. [ER-II: 193, 203]. He had been smoking marijuana daily since the age of 19 [PSR ¶ 66], and he smoked it with Segundo every evening. [ER-II: 184-185]. In addition, since 1994 he had been smoking methamphetamine nearly every morning before going to work. [ER-II: 194, 204].

Vierra hid his addictions from his employer because he knew would get fired. [ER-II: 183, 194]. He hid his addiction from his family. [ER-II: 194]. His own brother who lived only 10 miles away from him and saw him on a weekly basis testified at trial that he was unaware of Vierra's methamphetamine addiction. [ER-II: 181].

Indeed, Vierra's entire adult life was plagued by addiction. He began using marijuana at the age of 19, smoking 1-to-2 joints a day until the time of his arrest. [PSR ¶ 66]. At the age of 20, he began drinking 4-6 beers, 2-3 nights per week until the age of 35. [PSR ¶ 66]. At the age of 21 he began snorting a 1/4 gram of

cocaine 5 times per week until 1994. [PSR ¶ 66]. In 1994, at the age of 33, he began smoking one-tenth of a gram of methamphetamine every other day until his arrest in this case. [ER-II: 155-159, 171, 173-174, 195; PSR ¶ 66].

Codefendant Kenneth Meyer was a methamphetamine trafficker from whom Vierra regularly purchased small, user amounts for $20 or $40. [ER-II: 195]. At trial Meyer testified that for two years prior to 2004, Vierra called him each morning to purchase "papers". [ER-II: 166-168]. A 'paper' is a half-gram of methamphetamine purchased for $20. [ER-II: 167, 171, 173]. Consumption of one 'paper' induces a daylong high. [ER-II: 174]. Codefendant David "Kawika" Moniz testified at the trial that he too regularly supplied Vierra with 'paper' amounts of methamphetamine. [ER-II: 155].

Vierra admitted at trial that pre-November 2004 he helped other methamphetamine-addict friends obtain small, daily-use amounts (papers), earning no profit from these transactions. [ER-II: 201-202]. He explained the addict's rationale: "If their dealers didn't have any at the time, they would see me. Or I would – I even used to see them if I couldn't find any, if my dealers didn't have – if Kenneth [Meyer] didn't have ..." [ER-II: 202]. Similarly, Moniz testified that if he had methamphetamine he would "share" it with Vierra and visa versa; if Vierra had methamphetamine he would "share" it with Moniz. [ER-II: 156]. Prior to

November 2004, Vierra never engaged in methamphetamine transactions greater than "papers", or half-gram amounts. [ER-II: 193, 202].

Vierra was never an original target of the Government's investigation. [ER-II: 119]. The Government's trial witness FBI Special Agent Timothy O'Malley testified that the Government's investigation known as Kama`aina Travel began in 2002 and focused upon drug trafficking on the O`ahu's North Shore, at which time Vierra was not a target. O'Malley testified that, "the investigation – this case was started in 2002. The investigation of Jerome Vierra, the portion of it that brought Mr. Vierra into it, did not start until 2004." [ER-II: 119].

The FBI supervising agent for the November 26, 2004, methamphetamine purchase (Count 3), Daniel P. Kelly, testified at trial that Vierra was not the target of the November 2004 transaction underlying Count 3. [ER-II: 124]. "Of that purchase, people we were purchasing from, was David Moniz; and then there was another individual who we did not know at the time. Jerome had a part in that, but the person we were looking at was David Moniz." [ER-II: 124].

The FBI used their informant's relationship with Vierra to contact Moniz: Moniz was the target. [ER-II: 124]. The informant Segundo knew that Vierra was both a marijuana addict and a methamphetamine addict, and that Moniz was one of Vierra's methamphetamine suppliers. Furthermore, Segundo knew that Vierra was

addicted to marijuana because he daily sold marijuana to Vierra, and "almost everybody that I was involved with." [ER-II: 135, 142].

B. The Government's Investigation.

Segundo was a North Shore methamphetamine manufacturer and trafficker who had a history of ripping off drug traffickers either by gun or by stealing the drugs outright. [ER-II: 117, 150, 189]. "He was sort of an outcast..." whom no one trusted, according to Vierra. [ER-II: 189]. Around 1997 Segundo was involved in a methamphetamine manufacturing lab that eventually burned down. [ER-II: 125, 145-147]. Eventually, Segundo's partners sought compensation from him for the loss. [ER-II: 147-148].

Threatened by his former drug partners, Segundo turned to the FBI for protection. [ER-II: 118, 126, 128-129, 148-149]. The FBI "resolved" the threat against Segundo so that "[w]ithin a matter of a few days that went away", according to Agent O'Malley. [ER-II: 118]. Thereafter, in 2002 the FBI began using Segundo in an undercover capacity and as a cooperating witness who engaged in controlled drug buys. [ER-II: 120].

For his work as a cooperating witness, the FBI paid cash to Segundo that

eventually totaled over $50,000.00 after six years.[4] [ER-II: 139, 141]. There were no checks or receipts, and Segundo never paid taxes on these cash payments. [ER-II: 127-128, 140]. Segundo testified that the cash amounts varied and were based upon, "how much I've done": "They paid me to provide them with information on crystal meth, and other things that they would instruct me on or ask me about." [ER-II: 139-140]. For reasons unexplained in the record, in 2003 the FBI temporarily stopped using Segundo, then on November 1, 2004, they put him in operation again. [ER-II: 120].

Using Segundo was problematic, however, for two key reasons. First, as he testified at the trial, Segundo had become an anti-drug crusader who hated illicit drugs and wanted to help the community – a transformation he publicized to the community. [ER-II: 118, 121, 150]. Therefore, the FBI concocted a story to explain why Segundo still needed to obtain distribution quantities of methamphetamine. [ER-II: 121, 122-123, 126-127]. According to the story, Segundo sought the methamphetamine on behalf of his methamphetamine-trafficker boss at an asbestos abatement company where he worked. [ER-II: 121]. To placate his boss and secure his job, he needed to help the boss obtain

[4] The total payments of $50,000 over six years resulted in a monthly average of $700.

methamphetamine. [ER-II: 121-123, 186].

Second, Segundo himself trafficked marijuana to the very targets of the Government's investigation with whom he engaged in controlled methamphetamine purchases. [ER-II: 114]. Segundo testified that he sold marijuana to, "almost everybody that I was involved with", many of whom had outstanding drug debts to him: "they owed me half the time." [ER-II: 135, 142]. While the FBI allegedly prohibited him from trafficking marijuana during his undercover work for them, when the FBI learned that he was still dealing they nonetheless continued using him. [ER-II: 115].

At trial Segundo defended his duplicitous behavior, defiantly characterizing his obligations to the FBI in the following manner: "I wasn't under no obligation to them, by them paying me money, that I had to listen to them; I am still my own person." [ER-II: 142]. While he admitted that the FBI prohibited him from trafficking marijuana, he testified that he never promised to comply but only that he would "try not to". [ER-II: 143]. From Segundo's perspective he considered his marijuana trafficking an asset to the Government's investigation. He testified at the trial that it was "a way for me to get close to them, by smoking with them and stuff." [ER-II: 135].

Whether or not the FBI agreed is not clear. The record is clear, however,

that the Government's agents continued to use Segundo notwithstanding his trafficking drugs to the very targets of their investigation, and even after learning that Segundo had stolen $200 from the controlled methamphetamine buy on March 9, 2005, upon which Count 10 was based. [ER-II: 114, 144]. It was not until February 19, 2007, two days before the trial in this matter commenced on February 21, 2007, that the FBI finally "deactivated" – or fired – Segundo. [ER-II: 114, 144; CR 214].

As to the six methamphetamine deals at issue, in early November 2004 Segundo asked his neighbor and friend Vierra to help him obtain large one-to-two ounce amounts of methamphetamine – a request he had never before made. [ER-II: 185, 192]. Relying upon the FBI's concocted story, Segundo told Vierra that to secure his job he needed to obtain methamphetamine for his boss at the asbestos company. [ER-II: 185]. The boss needed to supply methamphetamine to the company's workers on Hawai`i island where – according to the story – there was a methamphetamine shortage. [ER-II: 186].

Vierra repeatedly declined to help Segundo. [ER-II: 197].

Segundo was relentless however, and over the next three weeks engaged in a campaign of lies and manipulation designed to break Vierra's resistance when the two met after work and Segundo supplied Vierra with marijuana. [ER-II: 186-

187]. Segundo lied, stating that he had an opportunity to improve the quality of life for his young son by pleasing his boss [ER-II: 187] and that the transaction was a one-time deal. [ER-II: 191]. He manipulated Vierra, stating that he was a disappointment as a friend [ER-II: 188], that his (Vierra's) methamphetamine addiction was under control [ER-II: 186] and that the methamphetamine traffickers shunned him given his prior history of wrongdoing. [ER-II: 189]. Vierra testified that Segundo "portrayed somebody that was used and abused." [ER-II: 190].

Furthermore, Segundo pestered Vierra, stating that since he was going to get his daily methamphetamine supply from Kenneth Meyer, he could easily pick up the large amount for him. [ER-II: 192]. Segundo exploited Vierra's marijuana addiction by showing him marijuana and saying, "this could be yours if you help me out". [ER-II: 204].

As an addict, Vierra couldn't disappoint Segundo, his marijuana supplier. Vierra testified, "I felt in a way if I didn't do that, he [Segundo] would cut my line as far as the weed, he wouldn't sell me weed. Which I need it just as much as the ice." [ER-II: 193, 203].

1. Count 3: November 26, 2004, 60 Grams of Methamphetamine.

The FBI used Segundo's relationship with Vierra in order to make contact

with codefendant Moniz, who was the target. [ER-II: 92-93, 124]. Vierra referred Segundo to Moniz, who was one of Vierra's methamphetamine suppliers. [ER-II: 188-189]. Operating as the Government's undercover informant, Segundo met Moniz at the Mililani Burger King where Segundo blundered and gave Moniz $5,000 in prerecorded buy-money without receiving the methamphetamine first. [ER-II: 93-94].

According to Agent O'Malley, "[s]o [Moniz] was out there going to a supplier that we didn't know who it was, and we didn't have an eye on our money." [ER-II: 94]. At the Government's direction, Segundo called Vierra to learn Moniz' location, but Vierra did not know it. [ER-II: 95-96]. Eventually Moniz returned to Segundo with the methamphetamine. [ER-II: 130].

Moniz testified that Vierra brokered the deal on behalf of Segundo. [ER-II: 157]. Moniz, in turn, "... called [his] supplier and arranged the deal." [ER-II: 157]. Vierra testified that he had no knowledge of the deal, but rather, in response to Segundo's telephone inquiry, he simply placed a call to Moniz concerning his whereabouts. [ER-II: 207].

As a result of this deal, Segundo and Moniz received $300 each, and split one-eighth of an ounce of the methamphetamine. [ER-II: 160-161]. Moniz later met Vierra in Waialua and the two smoked methamphetamine. [ER-II: 159].

Moniz testified, "I never give [Vierra] money. I just smoke dope with him." [ER-II: 159].

Vierra acknowledged smoking methamphetamine that night with Moniz, but he did not know the origin of the methamphetamine. [ER-II: 198, 205]. "[M]any a nights they came over and smoked at my house, regardless what deals went down." [ER-II: 206]. "They never told me it was specifically from that sale. And he never said, this is your reward, or whatever. It was just, you like smoke? And I said, yes." [ER-II: 207].

2. Count 5, December 9, 2004, 10.55 Grams of Methamphetamine.

Agent O'Malley directed Segundo to purchase one ounce of methamphetamine. [ER-II: 97]. Segundo pestered Vierra to arrange another deal because he claimed that Moniz stole methamphetamine from the November 26, 2004 deal. [ER-II: 190]. Vierra reported that he could only obtain a half-ounce. [ER-II: 97]. Notwithstanding, Agent O'Malley provided Segundo with $2,500 to purchase one ounce if it became available. [ER-II: 97-98]. Segundo gave Vierra $1,300 in front of the Waialua Highschool. [ER-II: 131]. Vierra departed, obtained methamphetamine from a supplier, and then delivered the half-ounce to Segundo – oddly packaged in a blue latex glove. [ER-II: 99, 131-132].

3. Count 6, January 27, 2005, 48.539 Grams of Methamphetamine.

Agent O'Malley gave Segundo $5,400 in prerecorded buy-money to purchase two ounces of methamphetamine, and Segundo turned to Vierra. [ER-II: 100-103, 133-134]. Vierra contacted Kenneth Meyer, Vierra's daily supplier, who arranged to meet Vierra in Wahiawa near the "old folks' home" where Meyer worked. [ER-II: 163]. Vierra met Meyer for the exchange during which, Meyer testified, Vierra appeared to be nervous. [ER-II: 165].

Meyer testified that Vierra took a small amount of methamphetamine for himself and for Meyer. [ER-II: 164]. Vierra testified that this was a lie, however, and that he took nothing for himself. [ER-II: 200]. Rather, he believed Meyer had already taken some for himself, "[b]ecause everybody was doing that to Ipo [Segundo]." [ER-II: 199].

Vierra gave the methamphetamine to Segundo, who testified that Vierra appeared "paranoid". [ER-II: 134].

4. Count 10, March 9, 2005, 46.3 Grams of Methamphetamine.

The FBI sought to purchase two ounces of methamphetamine with $5,200 in prerecorded buy money. [ER-II: 104]. Segundo met codefendant William "Pee Wee" Militante in Mililani, the two drove to the Waipahu home of codefendant Dunstin Banaay, where Segundo purchased the methamphetamine. [ER-II: 105-108]. The two-ounce deal only cost $5,000, however, with Segundo stealing the

$200 difference. [ER-II: 135].

According to Militante's testimony, after this deal Segundo gave him cash and an eightball of methamphetamine. [ER-II: 175]. In Waialua, Militante, "shared some of the product with Jerome [Vierra] * * * because he was an acquaintance..." and he helped to make the sale. [ER-II:176-177].

But Vierra testified that he did not know the origin of the methamphetamine that night: "[Militante] . . . came my house more than just a few times and smoked me out. On deals that I was not even remotely involved in. . . . I wouldn't question him where the sale – where the profits came from or how he could turn me on. When he turned me on, I just accepted it." [ER-II: 207-208].

5. Count 7, August 20, 2005, 44.208 Grams of Methamphetamine.

The FBI directed Segundo to purchase two ounces of methamphetamine, and Segundo turned to Vierra. Meyer testified that Vierra called him that morning stating that he needed two ounces for Segundo. [ER-II: 168-169]. According to Meyer, Vierra turned to him because Vierra, "... didn't know where to get it [methamphetamine] from. So I could get it for him." [ER-II: 170].

Meyer testified that he delivered the methamphetamine to Vierra at Vierra's home, at which time Vierra gave some of the drugs to him and kept some for himself. [ER-II: 168, 170]. Again, Vierra testified that Meyer was lying. While

the two smoked methamphetamine at that time, it did not come from the two-ounce amount slated for Segundo. [ER-II: 200-201].

Later, Vierra met Segundo and delivered the methamphetamine. [ER-II: 136].

6. Count 8, September 9, 2005, 23.669 Grams of Methamphetamine.

The FBI sought to purchase one ounce of methamphetamine through Segundo, who turned to Vierra. Meyer testified that Vierra called him that morning seeking methamphetamine for Segundo. [ER-II: 170-172]. After work Meyer went to Vierra's house and delivered one ounce of methamphetamine. [ER-II: 171]. Meyer testified that Vierra gave Meyer a half-gram from the ounce and took some of the drugs for himself. [ER-II: 171]. Vierra again refuted this testimony. [ER-II: 205].

Meyer then smoked methamphetamine with Vierra. [ER-II: 172]. Later Vierra gave the ounce to Segundo – oddly packaged in a car-part box. [ER-II: 137-138.

C. The Memorandum Decision.

After conviction, Mr. Vierra appealed his sentence. He argued that he was entitled to a reduction in sentence based upon the theory of sentencing entrapment. In the May 19, 2009, Memorandum Decision, the Court instructed as follows:

"In calculating the applicable range for Vierra's sentence, the district court found Vierra was not a reluctant participant in the 'sting' sales set up by the government, and had a history of drug use and selling drugs in small amounts to friends. The district court then relied on those findings to deny Vierra's request for a downward departure based on sentencing entrapment.

The district court did not make express, specific findings as to Vierra's predisposition to make sales in the quantity he made at the request of the government's informant. It is not clear from the record whether the district court differentiated between the evidence defendant was required to tender to sustain a legal defense of entrapment from the evidence required to meet his burden of proof as to sentencing entrapment. In addition, it is not clear whether the district court considered defendant's evidence that his prior drug deals involved a quantity of drugs significantly smaller than the quantity that he sold to the government's informant. Such evidence of a defendant's character prior to the government's inducement must be considered by the district court in determining whether to depart downward due to sentencing entrapment. See McClelland, 72 F.3d at 723 (requiring that a defendant's 'character and reputation' be considered in evaluating the defendant's predisposition). Therefore, we vacate the sentence and remand so that the district court may make the appropriate findings regarding defendant's sentencing entrapment claim. See id. at 722-26 (describing various factors)."

[ER-II:80-82].

The Court issued its mandate on or about June 10, 2009, and jurisdiction returned to the district court. [CR 337].

D. Sentencing on October 8, 2009.

At the sentencing hearing, the district court clarified the distinction between the defense of entrapment, and sentencing entrapment.

"THE COURT: Well, it does seem to me that the Ninth Circuit is directing

> me to apply the McClelland factors, but those factors, of course, are in the context of a sentencing entrapment discussion, not in the context of an entrapment defense that might be raised and was raised here at trial. And I understand that McClelland also has to be viewed as clarified by later cases that, in fact, were in the context of sentencing entrapment, and I think the defense appropriately is looking at the Staufer and Naranjo cases in that regard.
>
> So I start with those sentencing factors in McClelland well aware that I have to apply them in the sentencing context -- not in the context of a defense but in the sentencing context where my focus has to be on whether the defendant could be said to have shown that he was not predisposed to be involved in drug deals of the magnitude that he claims he was induced to get involved with through the government. So I'm going to look at those McClelland factors through that lens of the sentencing issue of the magnitude and the defendant's predisposition to deal in amounts of the magnitude involved here."

[ER-xx].

The district court went on to discuss the factors set forth in McClelland, which discussion and court-finding we challenge below. Ultimately, the district court found that Vierra had not met his burden to support his motion for a sentence outside the advisory guidelines range on the ground of sentencing entrapment. [ER-I: 30-31]. The district court imposed the same sentence, including the 90-month prison term. [ER-I: 31].

SUMMARY OF ARGUMENT

The District Court Made Numerous Factual Findings in Clear Error of the Record in Denying Vierra's Motion for Sentence below the Advisory Guidelines on the Ground of Sentencing Entrapment.

Sentencing entrapment 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. Staufer, 38 F.3d 1103, 1106 (9th Cir. 1994) (*quoting* United States v. Stuart, 923 F.2d 607, 614 (8th Cir. 1991)).

At sentencing, Vierra argued that he was a victim of sentencing entrapment. He argued that the uncontradicted record showed that his predisposition before November 2004 was to engage in small half-gram transactions to fuel both his own methamphetamine addiction, and that of his friends and other addicts. He submitted that the record showed no predisposition from 1994 to early November 2004 to engage in the large, one and two ounce methamphetamine deals prompted by Segundo under the FBI's direction.

While defendant has the burden of proof to demonstrate sentencing entrapment, the district court is obligated to make express factual findings as to whether defendant met this burden. United States v. Conkins, 9 F.3d 1377, 1386-87 (9th Cir.1993) (*citing* United States v. Navarro, 979 F.2d 786, 788-89 (9th Cir. 1992). As set forth fully below, in denying the Motion for Sentence Below

Advisory Guidelines and imposing sentence on October 8, 2009, the district court made numerous factual findings in clear error of the record. The sentence must be vacated and the matter remanded.

ARGUMENT

The District Court Made Numerous Factual Findings in Clear Error of the Record in Denying Vierra's Motion for Sentence below the Advisory Guidelines on the Ground of Sentencing Entrapment.

A. Standard of Review.

"We review the interpretation and application of the Sentencing Guidelines de novo." United States v. Naranjo, 52 F.3d 245, 248 (9th Cir.1995). The Court reviews factual findings in the sentencing phase for clear error. Id.

B. Discussion.

Sentencing entrapment occurs when "a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment." Staufer, 38 F.3d at 1106. "In making a sentencing entrapment claim, the burden is on the defendant to demonstrate both the lack of intent to produce and the lack of the capability to produce the quantity of drugs at issue." United States v. Steward, 16 F.3d 317, 321-22 (9th Cir. 1994) (*citing* United States v. Barnes, 993 F.2d 680, 682 n. 1 (9th Cir. 1993), *cert. denied*, 513

U.S. 827 (1994)). Under this theory criminal defendants bear the burden of proving that they were predisposed only to commit a lesser crime, United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir.1997), by a preponderance of the evidence. United States v. Riewe, 165 F.3d 727, 729 (9th Cir. 1999). This Court has determined predisposition under sentencing entrapment by referring to the time period ***prior to the defendant's involvement in the offense of conviction***. Naranjo, 52 F.3d at 250-251; Staufer, 38 F.3d at 1108.

While defendant has the burden of proof, the district court is obligated to make express factual findings as to whether defendant met this burden. Conkins, 9 F.3d at 1386-87. The Guidelines tell us:

> "If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-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 intend to provide or purchase or was not reasonably capable of providing or purchasing."

U.S.S.G. § 2D1.1 Note 12 (emphasis added).[5]

Called imperfect entrapment, in contrast to the legal defense of perfect entrapment, the Court in McClelland noted the following:

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[5] As to all quoted material herein, unless otherwise noted ***bolded and italicized*** text has been added to emphasize the same.

> "In deciding whether a departure is warranted on the ground of imperfect entrapment, ***the amount of inducement, the level of reluctance on the defendant's part, and who acted first*** should all be relevant factors for the district court to weigh, just as they are in cases in which entrapment is a complete defense."

United States v. McClelland, 72 F.3d 717, 726 fn5 (9th Cir. 1995).

These factors are similar to the factors reviewed for perfect entrapment:

> "A defense of entrapment has two elements: government inducement of the crime and the absence of predisposition on the part of the defendant. If the defendant is found to be predisposed to commit a crime, an entrapment defense is unavailable regardless of the inducement. Predisposition is established only after analyzing five factors: 1) the character and reputation of the defendant; 2) whether the government made the initial suggestion of criminal activity; 3) whether the defendant engaged in the activity for profit; 4) whether the defendant showed any reluctance; and 5) the nature of the government's inducement. Although none of these factors is controlling, the defendant's reluctance to engage in the criminal activity is the most important."

Id., at 722 (citations, quotation marks and footnote omitted).

Relying on the Memorandum Decision and these five McClelland factors, the district court addressed Vierra's claim of sentencing entrapment at the sentencing hearing on October 8, 2009. We review each of the court's factual findings.

1. Character and Reputation.

The Memorandum Decision instructed the district court to pay attention to character and reputation, which it pointed out would be reflected in "evidence that

[Vierra's] prior drug deals involve the quantity of drugs significantly smaller than the quantity that he sold to the government's informant." [ER-II: 82]. Such evidence of a defendant's character prior to the government's inducement "must" be considered by the district court in determining whether to depart downward based upon sentencing entrapment. Id.

In this regard the district court made the following findings:

> "So the first factor is the character and reputation of the defendant. And what I have here is a record that the defendant was a long time and regular user of methamphetamine and marijuana, using these drugs frequently. Even before 2004 he was daily purchasing user amounts of marijuana and a paper or a quarter -- a half a gram of methamphetamine for himself and others from his suppliers and others. So that included co-defendants Kenneth Meyer and David Moniz. ***And he was selling, it appears, half gram or user amounts of methamphetamine before 2004.***
>
> * * *
>
> And when I look at that, that particular factor, and recognizing that the burden is on the defense in this, I have to keep in mind that using or selling smaller amounts before 2004 isn't necessarily dispositive of what predisposition the defendant had at the time of the offense. It is something I will consider, but I don't think that it closes the issue. ***So to the extent I have to determine whether on the first factor the defense has met its burden of establishing that the character and reputation of the defendant show a lack of predisposition to engage in deals with the magnitude of drug in issue here, I'm finding that that burden has not been met.*** There is evidence of smaller amounts than in issue here, but, as I say, the burden is on the defense. I'm finding that that burden hasn't been satisfied with respect to that first factor: the character and reputation."

[ER-I:26-28].

The court's finding that Vierra "was selling" methamphetamine before 2004 is in error. The record does not support a finding that Vierra was selling methamphetamine before 2004. David Moniz testified that: since 1994 he had consumed methamphetamine with Vierra "a lot" [ER-II: 155]; he "supplied" Vierra with 'paper' amounts, and Vierra "supplied" him with 'paper' amounts [ER-II: 155-156]; that 'paper' amounts are "small amounts". [ER-II: 156]. He never testified that Vierra 'sold' him methamphetamine.

Kenneth Meyer testified that: Vierra bought from Meyer "papers", or "20-cent bags", "every morning" for approximately two years before 2004. [ER-II: 166-168]. A 'paper' represented a half-gram amount of methamphetamine, cost $20 and provided the user a couple of hits that induced a daylong drug high. [ER-II: 173-174]. As to the large amounts Segundo wanted, Meyer testified that Vierra "didn't know where to get it [ice] from. So I could get it for him" [ER-II: 170].

Vierra admitted at trial that pre-November 2004 he helped other methamphetamine-addict friends obtain small, daily-use amounts (papers), earning no profit from these transactions. [ER-II: 201-202]. While initially he agreed that he "sold" others small user amounts for less than $100, he explained that these were not actual sales.

"Yes. But not really 'selling.' I mean, I would – for other addicts or friends

> of mine – not addicts, but friends of mine that, if their dealers didn't have any at the time, they would see me. Or I would – I even used to see them if I couldn't find any, if my dealers didn't have – if Kenneth [Meyer] didn't have, or anything like that, I would go and see other friends, and they would go and see their dealers to get some. So, the same thing: if their dealers didn't have, they would come and see me, and I would see Kenneth, if he had. And we would just kind of pick up, and – I wouldn't make money or nothing on them."

[ER-II:202]. Similarly, Moniz testified that if he had methamphetamine he would "share" it with Vierra; and if Vierra had methamphetamine he would "share" it with Moniz. [ER-II: 156]. Furthermore, Vierra had no prior criminal record and he was gainfully employed at the time of arrest. *See* United States v. Smith, 924 F.2d 889, 898 (9th Cir.1991) (noting that "prior criminal record" is relevant to the defendant's predisposition).

No evidence in the record supports the district court's determination that Vierra "was selling" user amounts prior to 2004. Thus court's finding is clearly erroneous.

The case is similar to Naranjo, a sentencing entrapment case in which this Court determined predisposition by referring to the time period ***prior to the defendant's involvement in the offense of conviction***, a five-kilogram cocaine transaction. Naranjo, 52 F.3d at 250-251. In Naranjo the Court acknowledged that the defendant had no previous arrests, and that the sentencing court appeared

to have merely adopted the DEA's theory that the defendant was involved in drug trafficking, which theory was based upon statements by a snitch who was working for the DEA in hopes of receiving a favorable sentence in his own prosecution. Id., at 251. The record, "confirm[ed] that Naranjo was not predisposed to dealing in quantities of cocaine beyond a single kilogram". Id.

Likewise, the Court in Staufer found that the defendant was a drug abuser and sometime dealer of LSD who, prior to the transaction for which he was convicted, only sold to friends. Staufer, 38 F.3d at 1108. He had never before engaged in deals approaching the magnitude of the transaction for which he was convicted. Id. "The [district] court recognized that although Staufer might have been predisposed to supply drugs 'only on a very small level for his friends,' he was not predisposed "to involve himself in what turned out to be, from the standpoint of the Sentencing Guidelines, an immense amount of drugs." Id. The Ninth Circuit concluded that Staufer was a victim of sentencing entrapment. Id.

Here, the uncontradicted record presented to the district court showed that prior to involvement with the Government's informant, Vierra was predisposed to deal only in half-gram amounts and that, like the defendant in Staufer, he had never before engaged in the deals approaching the amounts Segundo sought at the Government's behest. [*See* Memorandum in Support, ER-II: 67-68]. Pre-

November 2004, Vierra had a predisposition to the lesser crime, dealing in small user amounts and never in the 10-to-60 gram amounts sought by Segundo under the FBI's direction.

Nothing in the record supported the proposition that from 1994 when he began using methamphetamine, until November 2004, Vierra engaged in selling methamphetamine in amounts over one-half of a gram. It wasn't until the FBI reactivated Segundo as a cooperating witness on November 1, 2004 – as discussed in agent O'Malley's testimony [ER-II: 119-122] – that we suddenly see Vierra's engagement in one and two ounce methamphetamine transactions on behalf of his neighbor and friend, Segundo. This factor clearly should have been found in Vierra's favor.

2. The Initial Suggestion of Criminal Activity.

The district court considered the McClelland factor of "whether the government made the initial suggestion of criminal activity". [ER-I: 28].

> "[C]learly here a government informant did solicit Mr. Vierra's assistance in obtaining the drugs in question, ***but the defendant was familiar with the sources from which he could get drugs since he had obtained his user drug quantities from these same individuals, and it was his familiarity and past dealings with these individuals that enabled him to assist the government informant***. And so it's true that the government solicited the defendant's assistance, but to the extent I'm looking at whether the defense has met its burden of establishing that this proves a lack of predisposition on Mr. Vierra's fault -- part to engage in drug transactions of the magnitude

> in issue here, I don't think that that factor does go toward meeting the defendant's burden. Although I am finding, of course, the government did solicit his assistance, I don't think that that establishes that he wasn't predisposed to engage in drug deals of the magnitude in issue here."

[ER-I: 28].

The district court was correct that the Government initiated the criminal activity, an uncontroverted fact Vierra pointed this out in his Memorandum in Support. [ER-II: 60-63]. The court was incorrect however, in two key respects.

First, the court assumed that Vierra's knowledge of methamphetamine sources implied that he was predisposed to sell methamphetamine in the distribution amounts requested by Segundo. This assumption does not withstand scrutiny. There is no logical basis to conclude that an addict's knowledge of where he can purchase drugs necessarily implies that predisposition to distribute drugs. Following the court's logic, all addicts who purchase drugs from a source, and therefore have knowledge as to where to obtain drugs, would as well possess the predisposition to distribute drugs. This is not the case in general, and it is not the case here. Here, the record clearly shows that before 2004 Vierra did not sell drugs, but only consumed them and engaged in transactions to acquire small, daily- use amounts for himself and his addict/friends. Neither Vierra, nor Moniz, nor Meyer testified that Vierra ever made any profit on these transactions, or

'sold' methamphetamine.

Vierra's knowledge of methamphetamine sources in his community revealed his ten-year addiction to methamphetamine and his routine of purchasing and consuming a 'paper' before going to work each day. Otherwise he was clueless as to obtaining larger amounts. The Government's witness Kenneth Meyer testified that Vierra came to him in three of the six deals (Counts 6, 7 and 8) because Vierra did not know where to get the one and two ounce amounts sought by Segundo. [ER-II: 170].

Second, the district court failed to appreciate the significance of the Government's initiation of each of the six deals through its informant Segundo. To utilize Segundo, the Government had to come up with a story to legitimize (so to speak) Segundo's purchase of distribution amounts of methamphetamine, given Segundo's self-proclaimed anti-drug crusade. The story was that Segundo needed to obtain large amounts for his boss, who trafficked in methamphetamine. [ER-II: 121, 122-123, 186]. To lend an even greater air of legitimacy to the story, there was a purported shortage on the Hawai`i island, with the boss needing to supply methamphetamine to those workers as well. [ER-II: 186].

These fabrications show that the Government controlled every aspect of these deals, beyond initiating each purchase – which aspect they controlled as

well. The district court's conclusion that Vierra's knowledge of methamphetamine sources somehow overrode the obvious fact that all six deals were Government-initiated and controlled, was clearly an erroneous finding of fact. Vierra met his burden on this factor.

3. Whether Vierra Engaged in the Activity for Profit.

The third McClelland factor concerned whether Vierra engaged in the six deals for profit. The district court found:

> "I understand that there was not money involved, ***but there was here a substitute for money, as I understand the record, which was drugs that Mr. Vierra could then use himself because he was indeed a drug addict.*** So again, you know, if you're an addict, I don't think you're going to turn away a ***larger amount of drug*** that you may receive if you do a larger drug deal, and so I don't think that -- I am not finding that that factor weighs in favor of accepting a sentencing entrapment argument by the defense, again recognizing that the burden on each of these factors is on the defense."

[ER-I: 28-29].

The court correctly found that Vierra received no financial payments as a result of the six deals.[6] The court incorrectly found, however, that Vierra profited by receiving for each deal "a larger amount of drug" than the small half-gram amounts he daily purchased and consumed. The record does not support this finding.

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[6] The chief profiteer was Segundo, with the record showing that he earned over $50,000 in tax-free income while operating as an informant.

As to the Count 3 deal on November 26, 2004, Segundo and Moniz each earned $300 and 1/8 of an ounce of the methamphetamine that they split between themselves. [ER-II: 161-162]. In contrast, later that evening Moniz met Vierra and the two got high together. That was all Vierra got, an opportunity to smoke some drugs. As to the drugs he smoked, Vierra testified that there was no relation between them and the Count 3 deal: "[M]any a nights they came over and smoked at my house, regardless what deals went down." [ER-II: 206]. "They never told me it was specifically from that sale. And he never said, this is your reward, or whatever. It was just, you like smoke? And I said, yes." [ER-II: 207].

As to the Count 5 deal on December 9, 2004, there is no indication in the record that Vierra received any form of compensation for this deal, including no opportunity to get high. As to the Count 6 deal on January 27, 2005, while Kenneth Meyer testified that Vierra took a small amount of methamphetamine from the two ounces Segundo purchased, Vierra refuted this testimony [ER-II: 200], and there is no evidence otherwise in the record that Vierra smoked the drugs after the deal, or otherwise benefitted from it.

As to the Count 7 deal August 20, 2005, while Meyer said that Vierra took a small user amount for himself [ER-II: 168, 170], Vierra refuted this, admitting to getting high with Meyer but not with drugs from this transactions. [ER-II: 200-

201]. As to the Count 8 deal on September 9, 2005, Vierra again refuted taking any drugs from the one ounce purchased by Segundo. [ER-II: 205]. As to the Count 10 deal on March 9, 2005, Militante testified that after the deal he smoked methamphetamine with Vierra. [ER-II: 176-177]. But the record leaves unclear the amount smoked, and Vierra testified that he had no idea where the drugs came from that he smoked that night with Militante. [ER-II: 207-208].

Assuming for the sake of argument that Meyer was correct in testifying that Vierra took a small amount of methamphetamine in the deals for Counts 5, 7 and 8, there is no evidence that the amount Vierra took was "a larger amount of drug" (as the district court concluded, ER-II:29) than the small, daily-use amounts of no more than one-half of a gram that he consumed each day. Nothing in the record supports the conclusion on the district court's part that after each of the six deals, Vierra received as payment "a larger amount of drug" larger than the small, half-gram amounts he daily consumed. The record support the conclusion that Vierra did not engage in the transactions for profit, and this factor should have gone in his favor.

4. Whether Vierra Showed Reluctance.

The fourth factor under McClelland is whether the defendant showed any reluctance. The court found:

> "I did not see in the record reluctance, and so I also am finding that there is no showing of reluctance that supports a sentencing entrapment argument here with respect to the magnitude of drug and the defendant's predisposition to engage in drug transactions of the magnitude in issue here."

[ER-I: 29]. The court's finding of lack of reluctance is not supported by the record.

Using the cockeyed story that he needed to provide distribution amounts of methamphetamine to his boss, in early November 2004 Segundo began a daily campaign of implicating Vierra in criminal activity. [ER-II: 186-188].

Vierra testified that he resisted, repeatedly telling Segundo that he could not help him. [ER-II: 186-187]. Segundo was relentless, however, and over a three-week period engaged in a campaign of lies and manipulation designed to break Vierra's resistance:

- He lied, stating that he had an opportunity to improve the quality of life for his young son by pleasing his boss [ER-II: 185, 187];

- He humiliated Vierra, stating that he was a disappointment as a friend [ER-II: 188];

- He manipulated Vierra, stating that he was "not too bad of an ice addict",

and under control [ER-II: 186];

- He lied that the transaction was a one time deal [ER-II: 187, 191-193, 198];

- He pestered Vierra, stating that since he was going to get his daily methamphetamine supply from Meyer, he could easily pick up an amount for him, "he said, you going to pick up your supply, your $20 or $40 paper, so why don't you just go ahead and do that too" [ER-II: 192];

- He exploited Vierra's marijuana addiction by showing him marijuana and saying, "this could be yours if you help me out" [ER-II: 204];

- He manipulated Vierra by whining that the methamphetamine suppliers would not deal with him given his past misdeeds with them [ER-II: 189].

Vierra tried to get rid of Segundo by sending him to codefendant Moniz, one of Vierra's methamphetamine suppliers, with this referral resulting in the November 26, 2004 deal underlying Count 3. [ER-II: 188-189]. Vierra appears to have been implicated under Count 3 only because Segundo – operating under FBI Agent O'Malley's instructions – called Vierra in the middle of the transaction

when O'Malley believed Moniz had absconded with $5,000 in the Government's money without provided the methamphetamine. [ER-II: 94-95].

After that deal, Segundo pestered Vierra to arrange another deal because he claimed that Moniz stole methamphetamine from the November 26, 2004 deal. [ER-II: 190]. As a drug addict Vierra couldn't disappoint Segundo because Segundo was his marijuana supply. "I felt in a way if I didn't do that, he [Segundo] would cut my line as far as the weed, he wouldn't sell me weed. Which I need it just as much as the ice." [ER-II: 193].

Vierra's reluctance, as well as his inexperience in dealing with large distribution amounts of methamphetamine, is evident in Count 5, the deal on December 9, 2004, wherein he delivered the 10.55 grams in a blue latex glove, and in Count 8, the deal on September 9, 2005 wherein he delivered the 23 grams in an auto-parts box. [ER-II: 99, 132, 137]. It explains why Meyer testified that Vierra appeared to be nervous during the two-ounce deal on January 26, 2005 underlying Count 6 at the Wahiawa "old folks home" [ER-II: 165], an observation echoed by Segundo who testified that Vierra appeared "paranoid". [ER-II: 134]. Vierra had stepped out of his league and had it not been for the Government's informant Segundo, whom Vierra naively sought to help, he would not have been involved in these transactions. [ER-II: 193].

The district court failed to appreciate the coercive nature of Segundo's involvement in the operation, an aspect clearly pointed out to the court in the Memorandum in Support. [ER-II:59-60, 69-70]. Vierra was a drug addict who admitted to the jury that he needed the marijuana as much as he needed the methamphetamine, and Segundo was both Vierra's marijuana supplier and well as a supplier for other targets of the investigation. [ER-II: 135, 186, 193]. Using Vierra's addiction, Segundo hounded and manipulated him to get involved in the methamphetamine deals, by promising Vierra that he would get marijuana if he helped; by promising that it would be a one-time deal; and by telling Vierra that he was a disappointment as a friend for failing to help him. [ER-II: 185-193, 198, 204]. Vierra's addiction and reliance upon Segundo to satisfy his addiction to marijuana ultimately explains why he buckled under the daily pressure of Segundo's badgering. Vierra needed marijuana and, therefore, needed to keep his marijuana source happy. The district court's failure to take these facts into account, and it's finding that Vierra was not reluctant, was clearly erroneous.

5. The Nature of the Government's Inducement.

The fifth McClelland factor concerned the nature of the government's inducement.

"And [the fifth McClelland factor] is discussed in some detail in Miss

> Cushman's memorandum where she is talking about the government's interest in furthering its investigation. And as I said earlier, although the government informant did solicit the defendant's assistance, ***as I understand it there's no effort by the government informant or any law enforcement agent to increase the amount***. They didn't suggest a larger amount. ***The buys from Mr. Vierra previously had been roughly the same weight, about 50 grams,*** and I don't think the government suggesting, as may have been the case in some other sentencing entrapment cases, that let's go for a larger amount.
>
> And so when I take all of those -- and so with that fifth factor I am also finding that the defense has not met its burden of showing that that goes toward neglecting the predisposition on the defendant's part to deal in the magnitude of the drug deal in issue here."

[ER-I: 29-30].

The court's findings are in error. Prior to 2004 the uncontradicted record shows that Vierra was not engaged in selling methamphetamine in any quantity. Rather, the record shows that he acquired for himself and for his other addict/friends small, user amounts of no more than one-half of a gram. The Government alone determined the amounts to purchase, and those amounts were a significant increase over Vierra's small, half-gram dealing: Count 3, 60 grams; Count 5, 10.55 grams; Count 6, 48.54 grams; Count 10, 46.3 grams; Count 7, 44.21 grams; Count 8, 23.67 grams. The district court was notified of these facts in the Memorandum in Support. [ER-II:60-63]. Thus the court's finding that Vierra had previously dealt in 50-gram amounts is clearly erroneous, as was the

court's finding that the Government did not increase the amount of the methamphetamine over the small pre-2004 deals Vierra was involved in.

We note, again, that Vierra earned no financial profit from these deals. Therefore, we ask what was in these deals for him? The nature of the Government's inducement was drugs, drug debt and friendship. It worked in two key respects. First, it preyed upon Vierra's loyalty as a friend to Segundo. Segundo was Vierra's neighbor and a new father with a problem, or so the concocted story went. To secure his employment at the asbestos company, Segundo needed to acquire distribution amounts of methamphetamine for his boss. Vierra testified that no one in their close-knit town liked Segundo. "He was sort of an outcast..." whom no one trusted. [ER-II: 189]. Reluctant at first, Vierra felt sorry for his friend and neighbor. [ER-II: 190]. After approximately one month of refusing to assist Segundo, Vierra helped him with the belief that this would help to secure Segundo's job and his future. [ER-II: 187, 190].

Second, the Government's inducement preyed upon Vierra, the drug addict. Vierra testified that in addition to methamphetamine he was addicted to marijuana, and that Segundo was his marijuana supplier. [ER-II: 193, 203]. Thus, he needed to keep his supplier happy. [*See* ER-II:205].

Indeed, a troubling aspect of the Government's use of Segundo was his

marijuana trafficking. Segundo admitted at trial that despite FBI admonishments, he continued trafficking marijuana to Vierra and "almost everybody that I was involved with." [ER-II: 135, 142]. He justified his trafficking: "I wasn't under no obligation to them, by them paying me money, that I had to listen to them; I am still my own person." [ER-II: 142]. Further, Segundo testified that dealing marijuana to the targets of the investigation was a means of getting close to them. [ER-II: 135]. He acknowledged that his trafficking produced debt for those he supplied, including Vierra, Moniz and Militante: "I'm not too sure if they were current or not. They owed me half the time." [ER-II: 135]. He opined that the debt induced these people to assist him in obtaining the large quantities of methamphetamine: "they owed me half the time. Maybe that's why they did it." [ER-II: 135].

Segundo's theory makes sense given the record. Segundo was an "outcast" who had ripped off drug dealers; he suddenly became an anti-drug crusader and wanted to clean up his town from the plague of methamphetamine; yet he still sought large amounts of methamphetamine – not for himself, but for his boss. Why would Vierra and the codefendants deal with an outcast and liar like Segundo? Segundo provided an answer, testifying: "they owed me half the time. Maybe that's why they did it." [ER-II: 135].

Although the FBI prohibited Segundo from trafficking marijuana, it is clear that he continued to do so – which trafficking the FBI knew of or should have known of. But the Government did not stop using Segundo until February 19, 2007, two days before the trial in this matter. [ER-II: 114,144].

This case is similar to the circumstances presented in the case United States v. Martinez, a methamphetamine distribution case in which the defense was perfect entrapment. 122 F.3d 1161, 1166 (9th Cir. 1997). There, the Court noted that the Government's informant:

> "play[ed] on the weaknesses of an innocent party and beguile[d] him into committing crimes which he otherwise would not have attempted. [The government's agent's] efforts led to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law."

Martinez, 122 F.3d at 1166(citations and quotation marks omitted)(evidence was insufficient to establish predisposition by defendant prior to sales to paid informant, and thus established entrapment); *and see* United States v. Garza-Juarez, 992 F.2d 896 (9th Cir.1991) *cert. denied* 510 U.S. 1058 (1994) (on appeal from conviction for sale of firearms and possession of unregistered suppressors, court affirmed a downward departure based on the district court's finding that the government had engaged in aggressive encouragement that did not rise to the level of perfect entrapment).

6. Other Erroneous Findings.

After reviewing the McClelland factors, the district court found that Vierra did not carry his burden:

> "Now, I understand that, although I've taken these five factors apart because they're listed as five factors in the McClelland case, that I have to put them all back together and see what the picture is. And so when I do that, having first broken them down, but when I put them all together and merge the five factors, I'm finding that the defense has not met its burden of showing that he was not predisposed to deal in drug amounts of the magnitude in issue here.
>
> I'm taking into account a number of things, one of which is that, you know, ***most drug dealers don't start off in their first drug deal with as large an amount as they may work themselves up to, and, rather, the typical mode is that amounts may increase over time***. I'm taking into account ***that the defendant wasn't pressured, at least not from the record that I've reviewed, by Mr. Segundo to sell the requested amount of drugs*** to Mr. Segundo he knew who had methamphetamine for sale. He seemed to be willing to sell the amount in issue to Mr. Segundo. All of the drug buys from Mr. Vierra were roughly the same weight of ***approximately 50 grams*** of methamphetamine. I'm wrapping all of that up, and it doesn't -- I'm finding that there has not been a satisfaction of the defense burden of showing lack of predisposition that would justify my accepting the sentencing entrapment argument."

[ER-I: 30-31].

The court's findings concerning drug dealers, and that their transactions "increase over time", is mere speculation and has no basis in the record. The court's finding that Vierra "wasn't pressured" by Segundo is directly contradicted by the record, as set forth *supra*. The court's finding that Vierra's prior drug deals

involved "approximately 50 grams" is also contradicted by the record.

The record shows that from 1994 to November 2004, Vierra obtained one-half gram, user amounts of methamphetamine for his consumption and that of his addict/friends. This 10-year history, substantiated by the testimony of two key cooperating government witnesses, Kenneth Meyer and David Moniz, flies in the face of the Government's characterization of a "drug dealers" evolution from small amounts to large amounts. There is no evidence that prior to November 2004 Vierra transacted amounts over one-half of a gram and, therefore, no evidence of this imaginative drug dealer's evolution to selling larger amounts of drugs.

The uncontradicted record shows that Vierra engaged in these small-scale transactions to get high, and not to financially profit. Vierra possessed no material wealth indicated escalating distribution and financial profit. [*See* ER-II: 236; PSR ¶ 62, ¶ 76]. This explains why Meyer testified that Vierra did not know where to get the one and two-ounce amounts Segundo sought at the behest of the FBI beginning in November 2004. [ER-II: 170].

This case raises the concerns expressed by the Ninth Circuit in Staufer, wherein the Court acknowledged "the unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to

increase his or her sentence without regard for his predisposition, his capacity to commit the crime on his own". Staufer, 38 F.3d at 1107. This concern, coupled with the record showing a predisposition on Vierra's part before November 2004 to only engage in methamphetamine transactions involving small user amounts of no more than half a gram, leads to the inescapable conclusion that the court's imposition of the 90-month imprisonment term was based on erroneous findings of fact and must be vacated.

CONCLUSION

The district court's factual findings concerning sentencing entrapment were clearly erroneous. He asks this Court to vacate his sentence and remand for further proceedings in accordance with that decision.

DATED: Wailuku Maui, Hawai`i, January 08, 2010.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

STATEMENT OF RELATED CASES

Upon information and belief, there are no other cases in this Circuit, or elsewhere, relating to the defendant-appellant and the matters discussed herein.

DATED: Wailuku Maui, Hawai`i, January 08, 2010.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

C.A. No. 09-10426

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