CA NO. 11-10036

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	DC# CR 09-01040–004-MHM
)	District of Arizona
Plaintiff-Appellee,)	Phoenix
vs.)	
)	
CORDAE L. BLACK,)	
)	
Defendant-Appellant.)	
_____)	

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APPELLANT'S OPENING BRIEF

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
HONORABLE MARY H. MURGIA
United States District Judge

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DATE ELECTRONICALLY FILED: November 1, 2011

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UNITED STATES OF AMERICA,)	U.S.C.A. No. 11-10036
)	U.S.D.C. No. 09-01040-004-MHM
Plaintiff-Appellee,)	
)	
-vs-)	
)	
CORDAE L. BLACK,)	
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF JURISDICTION

Cordae L. Black appeals his conviction for conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(ii)(II), 846 (count one)[1] and use of a firearm in furtherance of a drug trafficking offense, aid and abet, in violation of §§ 924(c)(1)(A)(1) and 2 (count two)[2]. (CR 41; ER7.) The district court had jurisdiction under 18 U.S.C. 3231 and entered the judgment and commitment on January 26, 2011. (CR 404;

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[1] There is a statutory mandatory minimum of ten years and a statutory maximum punishment of life for count one. 21 U.S.C. §§ 841, 846.

[2] The statutory mandatory sentence is five years to run consecutive to any other count of conviction for count two. 21 U.S. C. 924(c); *Abbott v. United States*, 131 S.Ct. 18, 23 (2010).

ER 5.)[3] Mr. Black filed his notice of appeal on January 27, 2011, within the ten-day period set out in Rule 4(b) of the Federal Rules of Appellate Procedure. F.R.A.P., Rule 4, subd. (b). (CR 397, 407; ER 4.) Consequently, this Court has jurisdiction to review appellant's final conviction pursuant to 28 U.S.C. § 1291. Venue is proper under Fed. R. Crim. P. 18.

BAIL STATUS

Mr. Black is currently serving the custodial portion of his 198 month sentence at the Federal Correctional Institution in Adelanto, California. Appellant's projected release date is December 10, 2023[4].

STATEMENT OF THE CASE

On August 18, 2009, an Indictment was filed charging appellant with one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(ii)(II), 846 and use of a firearm in furtherance of a drug trafficking offense, aid and abet, in violation of §§ 924(c)(1)(A)(I) and 2. (CR 41; ER7.) Appellant was arraigned on August 19, 2009 and pleaded not guilty. (CR 44; ER 8.)

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[3] CR = Clerk's Record with appropriate docket control number.
ER = Excerpts of Record with appropriate tab number.

[4] Bureau of Prisons information as of October 31, 2011.

On May 07, 2010, appellant was convicted as charged by a jury. (CR 270, 275; ER 8.)

On January 21, 2011, the district court found appellant's offense level to be 32, his criminal history category to IV, and his advisory guideline range to be 168 to 210 months.[5] The court considered the presentence report, arguments of counsel, the advisory guidelines, the sentences of the other co-defendants and "the statutory factors under 18 U.S.C. § 3553, including the nature and circumstances of the offense and the history and characteristics of this defendant" and sentenced appellant to 138 months on count one and 68 months on count two to run consecutively for a total term of imprisonment of 198 months. The court further ordered appellant to pay a special assessment in the amount of $200. The court also ordered that upon release from prison that appellant would be placed on supervised release for a period of five years. The court finally ordered that during the period of community supervision, appellant comply with all the standard terms and conditions of supervision. (CR 395, 404; ER 1, 8.)

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[5] The court ordered a downward departure of 2 levels for proportionality with the sentences of appellant's co-defendants.

STATEMENT OF FACTS

Relevant Facts Adduced at Trial

Shavor Simpson testified that in early July, 2009, Kemford Alexander told him if he ever came across anyone with some kilos to make sure he contacted him first. Later that month Simpson's girlfriend's uncle, Curtis introduced him to two men named Alex and Richard. Simpson realized much later, that Richard was an undercover ATF Agent named Richard Zayas and Alex was a confidential informant for the ATF. In the meantime, Simpson got a hold of Alexander by phone and told him about the job. Alexander wanted to know if the job entailed just robbery or murder. On July, 16, 2009, Simpson met with Agent Zayas and told him he spoke to his "goons" (meaning Alexander) about the job, and that he could get the guns the Agent wanted. Simpson did not meet with Zayas again until July 26, 2009. (RT 4/28/10, pp. 255-262.) Earlier that day however, appellant Black came to Simpson's house with Simpson's girlfriend. Simpson told Black that Curtis' homeboy knew some Mexican who had some kilos & he (the homeboy) wanted to put a team together to rob the Mexican of the kilos. Simpson decided to tell Black about the plan to "see if he do those type of things" and because Black was at Simpson's house when Alexander was calling his phone. Simpson told Black that the homeboy was at 51st Avenue and Baseline

waiting for Simpson. Simpson and Black rode over to find Zayas waiting for them. After they met with Zayas, the two went to Alexander's house to discuss the home invasion. Black told Simpson that he had done home invasions a couple of times before with Alexander. Simpson also overheard Alexander say he had done it before and got the money for the cocaine through his people in New York. Two other guys named Angel Mahon and Marsh were also at Alexander's house. Alexander asked Black and Simpson if Richie was "police" or if Simpson was trying to set him up because he had heard Simpson was a snitch. Simpson told Alexander that he knew Zayas for about two to three months and that he was not a snitch. (*Id* at pp. 263-272; RT 4/29/10, pp. 435, 439.) Simpson told Alexander they would be trying to steal cocaine and Zayas wanted a team for a home invasion. Simpson saw Black talking to Alexander but did not know what about. (RT 4/28/10, pp. 273-274.)

On July 27, 2009, Simpson, Black, Alexander, Marsh and Mahon met with Agent Zayas at 51st Avenue and Baseline. After the meeting, they went to Alexander's house to discuss the home invasion. This time there were about 14 guys there. Alexander did most of the talking, picking who was going to go into the house and who was going to have guns. Alexander asked his brother-in-law Javoni to get guns for him (Alexander), Black, Mahon and Marsh. Simpson never

saw the guns, but heard Alexander mention a shotgun. Timmons and Holden were going to be drivers. (Id at pp. 274-278.) Simpson said he would send his share of the cocaine to his people in New York and pay his bills with the money he received. Black said he was going to use the money to rent a house and buy a car. Black did not respond to the assignments, but it seemed like he "was cool." (Id at pp. 294-298.)

During this time, Simpson was using marijuana regularly to help him think better. After the meeting, Simpson stayed overnight at his girlfriend's house instead of at his mother's, where Black was supposed to pick him up the next day, because he suspected Zayas was a cop. In fact, during the meeting with Zayas at 51st and Baseline on July 27, 2009, Simpson saw people across the street taking pictures and Zayas was trying to rush everyone. Therefore, Simpson made himself unavailable to be picked up by Black on the morning of September 28, 2009. (Id at pp. 298-301.)

On cross-examination, Simpson admitted he had three or four prior convictions for theft and drug offenses and had violated the terms of his probation. Simpson also admitted being a member of the "Jamaican Mafia," but that he quit a few years prior to the instant trial. He also admitted lying to Zayas when he told him that he had a crew and that he had done home invasions before. (Id at pp. 321-

329.) After Simpson met with Zayas on July 16, 2009, he contacted Alexander, then he contacted a guy named Mac who declined to get involved. He did not contact Black until July 26, 2009. Black did not even own a pistol. At the meeting with Zayas on July 26. 2009, Zayas was surprised that Simpson and Black did not have any guns and he told them he needed people to have guns. Agent Zayas wanted to hurry up and get the job over with. (Id at pp. 327-335.) Simpson was facing life imprisonment with a mandatory minimum of 15 years in the present case, but he pleaded guilty in exchange for what he expected to be a six month sentence. (Id at pp. 335-336.)

ATF Agent Zayas testified that he and other agents had developed a new technique for working home invasions that was safer than previous techniques. The new technique involved arresting the suspects before the robbery occurs so the ATF can control the environment. (RT4/29/10, pp. 455-460.) The ATF tells the suspects that 22-39 kilograms of cocaine will be located in a neighborhood "stash house," plus six to seven kilos which would go to the Agent. The ATF tells the suspects that there will at least be two men in the house, that at least one of them will be armed and that there is a back room which may or may not contain additional drugs and/or individuals who could potentially be armed. (Id. at pp. 460-461, 470-471.) The ATF uses the stash house scenario because it's the most

dangerous type of drug house and the level of violence is much higher, that way they are more likely to get suspects who are involved in this type of crime. They use confidential informants because they can go out to different locations and engage people in conversations, then when they find someone engaged in criminal activity, they introduce them to an undercover agent like Zayas. The ATF uses the fictional amounts of drugs it does because those amounts are consistent with trafficking, not just personal use. (Id at pp. 462-464, 471, 473, 778.)

The confidential informant here was named Alex. Zayas instructed him to go out and find people engaged in crime, then report to Zayas what type of crime he believed they were into. Alex would then be instructed to introduce the suspect to Zayas. Zayas would then meet with the suspect(s) and determine whether or not they are actually involved in that type of crime. (Id at pp. 464-465.)

In this case, Agent Zayas met Simpson on July 16, 2009 and again on July 26, 2009 with Mr. Black. Alex was at both meetings but just sat in the car and did not engage in conversation. On July 16, 2009, the meeting between Agent Zayas and Simpson was at a restaurant. Zayas gave Simpson a scenario identical to the one described above. Simpson told Zayas that he had done this before, he had people to help him and that he was willing to kill. (Id. at pp. RT 465-467, 472.) On July 26, 2009, Agent Zayas and the informant met with Simpson and Black in

Zayas' car in the parking lot of a McDonalds. Black told Zayas he had done this a few times, the he had a sure-fire plan and that they would use the element of surprise. Black also mentioned taking a hostage and that the people can either keep breathing or it can end like "Scarface." Black and Simpson asked Zayas if he could provide a gun, but Zayas declined. Zayas testified that it is ATF policy to not provide anything other than the "stage." (Id. at pp. 474-480.)

Zayas met with Simpson a third time on July 27, 2009 with the confidential informant, Black, Alexander, Mahon and Marsh. This meeting occurred outside in the parking lot adjacent to the McDonalds, but then moved inside a restaurant. Zayas gave the men the scenario which included Zayas going into the stash house first and bringing out seven kilos that he was supposed to transport to another location. Zayas repeatedly confirms with Alexander that they're "cool" to go through with it so that the men have a chance to back out. Zayas told them he would get a phone call the next day with the location of the stash house and he would then have 15 minutes to pick up the cocaine. (Id at pp. 465-467, 481-482, 496-499.)

On July 28, 2009 he met with the same men, plus Holden and Timmons, except Simpson was absent. Zayas had arranged for the men to meet him at the same location at Noon. The suspects arrived late in two cars, a white Checy

Impala and a green Isuzu. Agent Zayas had them follow him and the informant to a storage unit inside a warehouse that he said he wanted them to deposit his portion of money and cocaine into after the robbery. Zayas drove his Mercedes into the warehouse and the white Impala followed him inside, while the green Isuzu stayed outside. Once inside the warehouse, Zayas gave the arrest signal. A special ATF team arrested the suspects inside the warehouse and a special Phoenix Police Department team arrested the suspects in the vehicle outside the warehouse. Kemford Alexander made a run for it, but was tackled by an agent and arrested. (Id at pp. 465-467, 500-502, 512-513, 515; RT 4/30/10, pp. 746-749, 783-784.)

On cross-examination. Zayas admitted that the confidential informant Alex had been previously convicted of larceny. Zayas did not monitor or record the phone calls between Alex and Simpson and had no idea how many there might be. (RT 4/29/10, pp. 570-574; RT 4/30/10, p. 687.) After Zayas' first meeting with Black on July 26, 2009, he ran his plates to identify him and find out as much as he could for his own safety. He did not dust his own vehicle for prints after they met inside of it. After that meeting, no one conducted any further surveillance of Mr. Black. (RT 4/29/10, pp. 574-579; RT 4/30/10, pp. 679-684.) Zayas did not know who Black was prior to that first meeting. Black told Zayas he did not have a gun, but that he thought he could trade some drugs for one. Rather than this

indicating to Zayas that Black was unprepared to commit such a crime, it indicated to Zayas that Black was seasoned because he does not keep firearms around. (RT 4/29/10, pp. 588-589; RT 4/30/10, p. 684.) Similarly, no further surveillance was done on Simpson after Zayas first meeting with him on July 16, 2009. (RT 4/29/10, p. 580.) The confidential informant was originally placed in the Maryvale area, a predominantly Hispanic area, in which to reside and use as a base of operations. If he met someone and deiced to goto another area, that would be okay. The informant would be paid up to $100 per day and bonuses based upon Zayas' discretion and final approval by the ATF.(RT 4/29/10, pp. 579-580; RT 4/30/10, p. 772.)

Although it is ATF policy to allow about 10 days as an opportunity for the suspects to withdraw, this period was given only to Simpson. Black was only involved for two days from start to finish. (RT 4/29/10, pp. 581-582.) However, even after Simpson withdrew on the 28th, he was still arrested and charged along with everyone else. (Id. at pp. 590-591.) Zayas was the first person to bring up the subject of guns with the suspects when he told them that there would be guns present in the stash house. (Id at pp. 582-586.) Zayas admitted that there was never any cocaine, a stash house, nor any Mexicans or any other people from which to steal it. (Id at pp. 587-588.) ATF's policy is that they do not use an

actual stash house. (RT 4/30/10, p. 775.)

ATF Special Agent Mario Atencio was the case agent overseeing the instant case. Atencio testified that the only suspect identified before the date of the arrest was Simpson. On the date of the arrest, Atencio was in charge of identifying the suspects in each of the two cars and collecting evidence from each car. (RT 4/29/10, pp. 632-638.) The white Chevy Impala was an Enterprise Rental car and the green Isuzu was registered to Terrence Timmons. Inside the Isuzu, officers found a shotgun wrapped in a towel, a Colt revolver, a Bryco pistol and a Ruger 9mm pistol. All of the guns were tested and operable but none had any fingerprints. (Id. at pp. 638-645.)

I. APPELLANT'S RIGHT TO DUE PROCESS WAS VIOLATED AFTER THE DISTRICT COURT DENIED APPELLANTS' MOTION TO DISMISS THE INDICTMENT FOR OUTRAGEOUS GOVERNMENT CONDUCT.

A. Introduction

Prior to trial, co-defendant Alexander filed a Motion to Dismiss the Indictment for Outrageous Government Conduct in which appellant Black joined. (CR 110, 131; ER 8.) The Government filed a Response. (CR 128; ER 8.) After a lengthy multi-day hearing on the motions[6], argument from the government and the defense, the trial court issued a 25-page written order denying the motions. (CR 216; ER 3.) The relevant facts testified to at the motion hearing were substantially the same as those facts testified to at trial by Agent Zayas.

B. Standard of Review

The district court's denial of the pretrial motion to dismiss the indictment due to outrageous government conduct is reviewed de novo. *United States v. Gurolla,* 333 F.3d 944, 950 (9th Cir.2003). A district court's decision not to use its supervisory powers to dismiss an indictment is reviewed for abuse of discretion. *Id.; United States v. Stinson* 647 F.3d 1196, 1209 (9th Cir. 2011). Factual findings upon which the decision was based are reviewed for clear error. *United States v.*

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[6] (RT 3/17/10 1-51; RT 3/23/10 1-192; 4/7/10 1-187); Co-defendant Holden filed a similar motion. (CR 134.)

Restrepo, 930 F.2d 705, 712 (9th Cir. 1991).

C. The District Court Abused Its Discretion in Denying the Motion to Dismiss the Indictment Due To Outrageous Government Conduct.

This is a case in which the government went too far. The ATF engineered and directed a fictional criminal enterprise purposely including a fictitious amount of drugs to require a mandatory ten-year minimum prison sentence as well as a fictitious need for guns raising the stakes to a fifteen-year minimum prison sentence for anyone involved. (21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(ii)(II), 846, 924(c)(1)(A)(1) and 2; RT 4/7/10 pp. 133-141; RT 1/21/11, pp. 92-95.)

In order to show outrageous government conduct, appellant must show conduct that violates due process in such a way that it is "so grossly shocking and so outrageous as to violate the universal sense of justice." *Restrepo at* 712, quoting *United States v. O'Connor,* 737 F.2d 814, 817 (9th Cir.1984). The defense is therefore "limited to extreme cases in which the government's conduct violates fundamental fairness." *Stinson* at 1209, quoting *Gurolla,* 333 F.3d at 950. The dismissal of an indictment because of outrageous government conduct may be predicated on alternative grounds: a violation of due process or the court's supervisory powers. *United States v. Luttrell,* 889 F.2d 806, 811 (9th Cir.1989). Here, the court abused its supervisory powers in failing to dismiss the case due to

outrageous government conduct and in so doing, appellant's due process rights were violated by being forced to a trial based upon such conduct.

The argument that an indictment must be dismissed because of outrageous government conduct is derived from a comment by the Supreme Court in *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). In *Russell,* the Court stated that there may be situations "in which the conduct of law enforcement officials is so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction." *Id.* at 431-32, 93 S.Ct. at 1642-43. The court may exercise its inherent, supervisory powers to dismiss an indictment because of outrageous government conduct. *Simpson,* 813 F.2d at 1465 n. 2. *See also Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1975) (Powell, J. concurring).

A claim of outrageous government conduct differs from the defense of entrapment. The issue of entrapment "focus[es] on the intent or predisposition of the defendant to commit the crime." *Russell,* 411 U.S. at 429, 93 S.Ct. at 1641. See Argument II, *post*. The concept of outrageous government conduct focuses on the Government's actions. An indictment may be set aside because of outrageous

government conduct whether or not the defendant was predisposed to engage in criminal activity. *United States v. Gonzalez,* 539 F.2d 1238, 1239-40 (9th Cir.1976).

" 'Outrageous government conduct is not a defense, but rather a claim that government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed.' " *United States v. Holler,* 411 F.3d 1061, 1065 (9th Cir.2005), quoting *United States v. Montoya,* 45 F.3d 1286, 1300 (9th Cir.1995). This claim requires meeting a "high standard," *id.* at 1066, with a showing that "the government's conduct violates fundamental fairness and is 'shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment.' " *Gurolla* at 950, quoting *Russell,* 411 U.S. at 431-32, 93 S.Ct. 1637). This Court explained in *Gurolla* that "[t]his standard is met when the government engineers and directs a criminal enterprise from start to finish," but "is not met when the government merely infiltrates an existing organization, approaches persons it believes to be already engaged in or planning to participate in the conspiracy, or provides valuable and necessary items to the venture." *Id.* (internal quotation marks and citations omitted).

In *United States v. Williams*, 547 F.3d 1187 (9th Cir. 2008), the Ninth

Circuit approved the government's use of a fictional stash house robbery in fighting crime, however, it also noted that in *United States v. Bonanno,* 852 F.2d 434 (9th Cir.1988), the Court set forth five factors that, when satisfied, indicate that the governmental conduct was acceptable. The five factors are:

> "(1) the defendant was already involved in a continuing series of similar crimes, or the charged criminal enterprise was already in process at the time the government agent became involved; (2) the agent's participation was not necessary to enable the defendants to continue the criminal activity; (3) the agent used artifice and stratagem to ferret out criminal activity; (4) the agent infiltrated a criminal organization; (5) the agent approached persons already contemplating or engaged in criminal activity."

Williams at 1199-1200, quoting *Bonanno* at 437-438.

Here, the government cannot even get past the first factor, let alone all five: (1) Appellant Black was not already involved in a series of similar crimes nor was the charged criminal enterprise in process involving appellant when the CI Alex or Agent Zayas became involved. In fact, the agent's were not even aware of appellant's existence; (2) Zayas participation was integral to enabling the defendants to carry out the criminal enterprise since they did not have any independent information on the fictional stash house, not even an address; (3) While Agent Zayas' testimony was replete with the use of artifice and stratagem, it was not to ferret out criminal activity per se, but instead to create criminal activity;

(4) Zayas did not infiltrate an existing criminal organization, but created one out of whole cloth with the help of CI Alex and Simpson; and finally (5) there was no evidence that appellant was already contemplating or engaged in criminal activity. Rather, the government concocted, directed, and supervised the criminal enterprise from start to finish, and thus, the conduct falls within the prohibition on outrageous government conduct imposed by the Due Process Clause of the Fifth Amendment. *See United States v. Russell,* 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Thus, appellant's convictions must be reversed.

II. APPELLANT'S CASE MUST BE REVERSED SINCE THE JURY WAS MISINSTRUCTED AS TO HIS SOLE THEORY OF DEFENSE.

A. Introduction

Appellant raised the defense of entrapment at trial. Initially, appellant requested substantially the same model jury instructions which the trial court ultimately gave. However, during discussions on jury instructions, appellant rescinded the request for those instructions and joined in co-defendant Alexander's request regarding the instructions on entrapment. (RT 837-838.)

B. Standard of Review

Whether a jury instruction was an accurate statement of the law de novo. *United States v. Terry,* 911 F.2d 272, 278 (9th Cir.1990).

C. Appellant's Convictions Must Be Reversed Because The Court Erroneously Instructed the Jury on the Defense of Entrapment.

"It is well-established that a criminal defendant is entitled to have a jury instruction on any legal defense to the charge against him which has some foundation in the evidence." *United States v. Chen,* 933 F.2d 793, 796 (9th Cir.1991). "A failure to give such instruction is reversible error; but it is not reversible error to reject a defendant's proposed instruction on his theory of the case if other instructions, in their entirety, adequately cover that defense theory." *United States v. Mason,* 902 F.2d 1434, 1438 (9th Cir.1990). "So long as the instructions fairly and adequately cover the issues presented, the judge's formulation of those instructions or choice of language is a matter of discretion." *United States v. Echeverry,* 759 F.2d 1451, 1455 (9th Cir.1985) (citation omitted); *see United States v. Torres-Rodriguez,* 930 F.2d 1375, 1388 (9th Cir.1991). "The availability of a better instruction is not a ground for reversal." *United States v. Ward,* 914 F.2d 1340, 1344 (9th Cir.1990).

Here, appellant's sole defense was entrapment, as was co-defendant Alexander's. Alexander's proposed instruction on entrapment required the jury to conclude beyond a reasonable doubt that: (1) the defendant was predisposed to commit the crime before being contacted by the government agent; *and* (2) that the

government agent did not induce the defendant to commit the crime. (CR 251, p.4.) Ninth Circuit case law is in accord. Acquittal based on entrapment requires finding that (1) the government induced him to commit the crime, *and* (2) he was not predisposed to commit the crime prior to his interactions with law enforcement. *United States v. Thickstun,* 110 F.3d 1394, 1396 (9th Cir.1997). Indeed, to prove that he was entrapped as a matter of law, appellant must have shown that, "viewing the evidence in the light most favorable to the government, no reasonable jury could have found in favor of the government as to inducement *or* lack of predisposition." *United States v. Poehlman,* 217 F.3d 692, 698 (9th Cir. 2000).

Here, the district court rejected Alexander's proposed instruction which correctly stated the law of entrapment in the conjunctive and erroneously gave a modified version of the "model" instruction on entrapment which listed the two elements required to be proved by the government in the disjunctive. (RT 835-841; CR 67, pp. 35-36.) The district court's jury instructions thus failed to adequately cover appellant's defense theory by allowing the jury to disregard the defense without having found all the elements of entrapment as required by law. Therefore, appellant's convictions must be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO 198 MONTHS OVER MULTIPLE DEFENSE OBJECTIONS.

A. Introduction

Appellant was convicted of conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(ii)(II), 846 (count one)[7] and use of a firearm in furtherance of a drug trafficking offense, aid and abet, in violation of §§ 924(c)(1)(A)(1) and 2 (count two)[8]. (CR 41; ER 5, 7.) Appellant filed two sentencing memorandums and supplemental objections to the drug offense level and mandatory minimum calculations as found by the presentence report. Specifically, appellant argued that he should receive a downward departure for acceptance of responsibility and be sentenced below the purported mandatory minimum because both the amount of drugs involved and the presence of guns were the product of sentencing entrapment. (18 U.S.C. § 3553(a); CR 344, 369; ER 8.)

The district court refused to adjust appellant's sentence based upon sentence entrapment (RT 1/21/11, pp. 1-15); declined to depart downward for acceptance of

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[7] There is a statutory mandatory minimum of ten years and a statutory maximum punishment of life for count one. 21 U.S.C. §§ 841, 846.

[8] The statutory mandatory sentence is five years to run consecutive to any other count of conviction for count two. 21 U.S. C. 924(c); *Abbott v. United States*, 131 S.Ct. 18, 23 (2010).

responsibility (RT 1/21/11, pp. 85-88); and refused to analyze appellant's sentence under the robbery Guidelines rather than the drug possession Guidelines (RT 1/21/11, pp. 89-90) and refused to give a four level downward departure based upon the nature and circumstances of the case (RT 1/21/11, pp. 96, 103-105). (ER 1.)

B. Standard of Review

The district court's interpretation of the Sentencing Guidelines is reviewed de novo. *United States v. Mix*, 457 F.3d 906, 911 (9th Cir. 2006). Although the Sentencing Guidelines are advisory only, a sentencing court shall consult them in helping determine an appropriate sentence. *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Cantrell*, 433 F.3d 1269, 1278-1279 (9th Cir. 2006). The district court's application of the Sentencing Guidelines to the facts of the case is subject to an abuse of discretion analysis and the district court's factual findings are reviewed for clear error. *Mix* at 911; *United States v. Ellsworth*, 456 F.3d 1146, 1149 (9th Cir. 2006).

C. Remand For Resentencing Is Required For The District Court To Reduce Appellant's Sentence Based Upon Sentencing Entrapment and/or Manipulation by the Government And/Or Apply The Sentencing Guidelines Applicable to Conspiracy to Commit Robbery.

A district court has great latitude regarding sentencing entrapment and in its

discretion, may change the base offense level and alternatively grant a downward departure for sentencing entrapment. See U.S.S.G. § 2D1.1 Application Note 12 ["the court shall excluded from the [base] offense level determination the amount of controlled substance that the defendant did not intent to provide or purchase or was not reasonably capable of providing or purchasing"] and Application Note 14 [Downward departure may be warranted where the amount of controlled substance was inflated by the government.].

The defense has the burden of proving sentencing entrapment by a preponderance of evidence. Sentencing entrapment can occur either subjectively (a defendant's predisposition to be entrapped) or objectively (the government's manipulation of the drug amount to obtain a greater sentence). There is no distinction between sentencing entrapment and sentencing manipulation, both occur 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); see also *United States v. Mejia*, 559 F.3d 1113, 1118 (9th Cir. 2009). "In those cases where sentencing entrapment occurs, the amount of drugs used in calculating the defendant's sentence should be reduced by the amount that 'flow[s] from [the] entrapment.' *United States v. Naranjo*, 52 F.3d 245, 250 (9th Cir. 1995); see also

U.S.S.G. § 2D1.1, app.n. 12 (2007)." *United States v. Briggs*, 623 F.3d 724 (2010). Sentencing entrapment is not limited to drug cases, but, by extension, also other crimes, such as firearms offenses. See *Naranjo* at 251.

Typically, sentencing entrapment occurs when a government agent convinces a drug dealer to purchase or sell more drugs than he is otherwise inclined to deal in. *Briggs* at 729. The Ninth Circuit has addressed sentencing entrapment in less typical cases, specifically expressing concerns about the government's conduct in cases such as appellant's.

> "In fictional stash house operations like the one at issue here, the government has virtually unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant. In fact, not only is the government free to set the amount of drugs in a fictional stash house at an arbitrarily high level, it can also minimize the obstacles that a defendant must overcome to obtain the drugs. *See, e.g., United States v. Williams,* 547 F.3d 1187, 1193 (9th Cir.2008) ("[The ATF Agent] said that in a few days, the stash house would contain one hundred kilograms of cocaine and between fifty and sixty thousand dollars in currency, guarded only by the two women who count the money and a single guard with a sawed off shotgun."). The ease with which the government can manipulate these factors makes us wary of such operations in general, and inclined to take a hard look to ensure that the proposed stash-house robbery was within the scope of Briggs' ambition and means."

Briggs at 729-730.

Here, appellant alleged and provided a factual basis that the government engaged in outrageous conduct causing him to commit a more significant crime

than he was predisposed and able to commit. The fictional stash-house scenario implicated sentencing entrapment because the government exercised complete control over the facts of the scenario. Zayas inflated the amount of drugs in the fictional stash house and minimized the obstacles appellant would have had to overcome to obtain the drugs by telling appellant and the others how many people would be in the stash house and that only one would likely be armed, as well as pretending to act as an advance team by purportedly going to the stash house first to retrieve a portion of the drugs and then providing a storage unit in which to hide them. Moreover, Zayas induce appellant, who admitted not even owning a gun, and the others to bring guns. It is clear that the crime with which appellant was convicted and induced into committing by Zayas, i.e. drug trafficking, was not within the scope of appellant's ambition or means since his only prior crimes had been theft-related and there was no evidence that appellant was either a drug trafficker or had the ambition or means to do so. But for Agent Zayas' involvement, appellant would not have had the capacity to commit a crime of such huge proportions. The underlying principle of mitigating a sentence based upon sentencing entrapment is that it is impermissible for the government to "structure 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. *United States v. Schafer*, 625 F.3d 629, 639-640 (9th Cir. 2010), quoting *Staufer* at 1107. This is such a case. Therefore, the district court erred in rejecting appellant's sentencing entrapment defense for purposes of sentencing appellant to a lower term.

Moreover, having analyzed appellant's sentencing entrapment defense under a theory of his purported predisposition to commit the *robbery* rather than under a theory of his predisposition to possess and distribute large quantities of drugs, the district court abused its discretion in sentencing appellant over his objections based upon the Guidelines applicable to drug trafficking rather than the Guidelines applicable to robbery since the attempted robbery more closely matched appellant's history and actions in the present case. See U.S.S.G. § 2B1.1; see also *United States v. Staufer*, 38 F.3d 1103 (9th Cir. 1994). It was fundamentally unfair to refuse to reduce appellant's sentence based upon his predisposition to commit the stash house robbery and then refuse to reduce his sentence and hold him to a mandatory ten-year minimum because he conspired to commit not a robbery, but rather, a drug offense.

CONCLUSION

Based upon the foregoing, appellant respectfully requests that this court reverse his convictions or remand for resentencing.

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CERTIFICATE OF RELATED CASES

Counsel for appellant is unaware of any related cases pending before the United States Court of Appeals for the Ninth Circuit.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1 and FRAP 32, I certify that the Appellant's Opening Brief is:

_X_ Proportionately spaced, has a typeface of 14 points or more, Double spaced text, and contains 6,329 words.

November 30, 2011

/s/ Tara K. Hoveland

Signature of Filing Party

9th Circuit Case Number(s) 11-10036

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