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 REPLY 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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INTRODUCTION [1]

In the opening brief, appellant-defendant Jerome Vierra argues that the United States District Court Hawai`i made numerous factual findings in clear error of the record in denying his Motion for Sentence Below Advisory Guidelines on the ground of sentencing entrapment (the "Sentencing Motion").

The plaintiff-appellee the United States of America (Government) has responded, arguing that the district court's factual findings that Vierra failed to prove sentencing entrapment were based on the record and not clearly erroneous, and that the District Court imposed a reasonable sentence. For the reasons set forth below, Vierra argues that the Government is wrong. Like the district court, the Government's arguments to affirm the sentence are based upon misstatements of the record, and should not be followed by this Court.

In this reply brief Vierra adopts, as if set forth fully herein, his opening brief's Statement of the Case and Statement of Relevant Facts.

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[1] As used here in this reply brief: "ER-I:" and "ER-II respectively refer to Mr. Vierra's Excerpts of Record submitted in two volumes, and filed with this Court on January 11, 2010; "OB" refers to Vierra's opening brief filed with this Court on January 12, 2010; "AB" refers to the Government's answering brief filed on April 7, 2010; "SER" refers to the Government's Supplemental Excerpts of Record, filed on April 5, 2010.

ARGUMENTS

A. The Government Repeats the District Court's Misstatement of the Record That All of Vierra's Methamphetamine Transactions Involved Amounts of Around 50 Grams.

At sentencing on October 8, 2009, the district court denied Vierra's Sentencing Motion based in part on its erroneous finding that all of Vierra's previous methamphetamine deals involved amounts of "the same weight, about 50 grams". [ER-I: 29-30]. Hence, the district court found that there was no effort on the Government's part to increase the amount of drugs for which Vierra would be criminally responsible and, therefore, engage in sentence manipulation or sentencing entrapment. [ER-I: 29-30]. Vierra argues in his opening brief that the court's finding that he was involved in 50-gram deals is clearly erroneous, as seen in the record. [OB 43].

In its answering brief, the Government repeats the district court's flagrant misstatement of the record: that all of the Vierra's methamphetamine transactions, both before 2004 and after 2004, involved approximately 50 grams. [AB 21]. The Government uses this misstatement to support its argument that: "[n]o efforts were ever made by law enforcement to increase the amount of methamphetamine." [AB 24].

The record plainly shows that from 1994 when Vierra began smoking

methamphetamine until November 2004, he engaged in transactions involving no more than half a gram in order to fuel his own addiction. [ER-II: 193, 202]. The Government's key witnesses said so. 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]. Likewise, Government witness David "Kawika" Moniz testified at the trial that he too regularly supplied Vierra with 'paper' amounts of methamphetamine. [ER-II: 155].

Vierra himself admitted at trial that before 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].

Clearly the Government, like the district court, is wrong to argue that the

record shows that Vierra's methamphetamine transactions before November 2004 involved amounts around 50 grams. Furthermore, with respect to the six transactions that were the basis for the counts of conviction, the amounts were not around 50 grams, but varied and ranged from 10.55 to 60 grams of methamphetamine:

- Count 3, November 26, 2004, ***60 grams***;
- Count 5, December 9, 2004, ***10.55 grams***;
- Count 6, January 27, 2005, ***48.539 grams***;
- Count 10, March 9, 2005, ***46.3 grams***;
- Count 7, August 20, 2005, ***44.208 grams***;
- Count 8, September 9, 2005, ***23.669 grams***.

[See ER-II 236.2].

Hence, the Government's representation that all of the transactions for which Vierra was convicted involved methamphetamine amounts "in the range of 50 grams" [AB 27] represents a flagrant misstatement of the record. Furthermore, the district court's error in interpreting the record is sufficient to remand this matter for rehearing, inasmuch as the court relied on this erroneous factual finding to deny Vierra's Sentencing Motion.

B. The Government's Specious Argument That Vierra Financially Profited from Three Transactions Is Baseless.

The Government argues for the first time in this case that Vierra somehow gained monetary compensation from three of the transactions, each of which involved the methamphetamine supplier and Government trial witness, Kenneth Meyer:

> (1) concerning the transaction on January 27, 2005, the Government argues that the FBI provided the confidential informant Simeon "Ipo" Segundo with $5,400 that Segundo, in turn, paid to Vierra for two ounces of methamphetamine; Vierra paid the supplier Kenneth Meyer only $4,800 for the drugs, plus a $100 tip; the discrepancy implies that Vierra received money from the deal [AB 8-9, 19];
>
> (2) concerning the transaction on August 20, 2005, the Government argues that the FBI provided Segundo $5,100 that he paid to Vierra for two ounces of methamphetamine; Vierra paid Kenneth Meyer only $4,800, plus a $100 tip; the discrepancy implies that Vierra received money from the deal [AB 10, 19-20];

(3) concerning the transaction on September 9, 2005, the Government argues that the FBI provided Segundo with $2,700 that he paid to Vierra for one ounce of methamphetamine; Vierra paid Kenneth Meyer only $2,400 for the drugs; the discrepancy implies that Vierra received money from the deal. [AB 11, 20].

For each of these three transactions the Government argues, "it appears that Vierra received ... money ... for this sale." [AB 19-20]. This argument is nothing more than innuendo and is, otherwise, baseless. There was no surveillance and/or direct monitoring of the funds the FBI supplied to Segundo in these transactions once the money left the FBI field agent's hands and was given to Segundo. There is no way of knowing what Segundo did with the money between the time he received it and the time he paid Vierra. Further, other than Kenneth Meyer's self-serving testimony, there is no conclusive proof as to the amount of money Vierra actually paid Kenneth Meyer in these transactions.[2]

This sloppy management of the field operation is dramatically seen in the November 26, 2004 transaction. There, not only did the FBI fail to keep

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[2] Kenneth Meyer was major drug trafficker on the North Shore. He testified at the trial pursuant to a cooperation agreement, the result of which was a sentence of 70 months. According to the Federal Bureau of Prisons website, his projected date of release is September 30, 2011.

surveillance of the tax-payer funds used to purchase the drugs, but for a period of time they actually lost the money. As FBI agent Timothy O'Malley testified, Segundo paid the drug supplier David Moniz for two ounces of methamphetamine without receiving the drugs in return: "So [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. So the money was gone." [ER-II: 94].

As to the three transactions in which the Government is now arguing for the first time that Vierra received financial compensation, neither Segundo nor Kenneth Meyer ever testified that Vierra took financial payment for himself. Indeed, during the trial in this matter in February 2007, the Government never suggested that Vierra pocketed money during these three 2005 transactions on January 27, August 20 and September 9, or during any of the other transactions.

It was with good reason the Government did not make this suggestion during the jury trial. While no evidence showed that Vierra received monetary payment from these transactions, trial testimony clearly showed that Segundo not only received payment, but that he stole money during one of the transactions.

Concerning the deal on March 9, 2005, upon which Count 10 was based, the FBI provided Segundo with $5,200 to purchase two ounces of methamphetamine. [ER-II: 104]. Segundo met codefendant William "Pee Wee" Militante in Mililani

and the two drove to the Waipahu home of codefendant Dunstin Banaay, where Segundo purchased the methamphetamine. [ER-II: 105-108]. FBI agent O'Malley testified that Segundo stole from $200 to $300 from the funds, which theft Segundo himself admitted during his trial testimony. [ER-II: 116, 135, 144]. Segundo's admitted theft suggests that if any person in these transactions was stealing funds, it was Segundo. In contrast, no allegations were ever made that Vierra either pocketed or stole funds, or otherwise financially profited from any of the transactions underlying the indictment.

C. The Government Misstates the Record.

In the answering brief the Government makes the following misstatements.

1. "[T]he FBI decided to use Segundo as a cooperating witness because he already knew Vierra. SER 3, 4, 20." [AB 5].

The Government's citations to the record do not support this statement. The cited pages merely show that:

- Segundo became a cooperating witness for the FBI in 2002;
- the Government believed Segundo had broad knowledge of drug traffickers on O`ahu.

[See SER 3, 4 & 20].

The implication in this misstatement is that Vierra was a North Shore drug trafficker and an original target of the Government's investigation, hence a proper subject for prosecution and punishment, and not entitled to benefit from the theory of sentencing entrapment. However, the record clearly shows that the FBI's focus in the investigation was the North Shore drug trafficker David Moniz. 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 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].

2. The Government Erroneously Implies That David Moniz Compensated Vierra for the November 26, 2004, Transaction. [AB 7].

The Government's citations to the record do not support the implication that David Moniz paid Vierra in drugs after the November 26, 2004 deal. [AB 7]. Rather, Moniz explained in his testimony that after this deal he smoked methamphetamine with Vierra. [See SER 61-62]. Nowhere on these two pages relied upon by the Government does Moniz characterize this encounter as a form of compensation.

3. The Government Misstates Segundo's Testimony Concerning the January 27, 2005 Deal.

The Government argues that Segundo told Vierra that he (Segundo) was feeling paranoid during this deal. [AB 9]. The Government's citation to the record, however, clearly sets forth the converse. Segundo testified that Vierra – not himself – was "paranoid": "I guess because we were doing a drug deal, ***he*** was paranoid, you know?" [SER 37]. Had Segundo meant to refer to himself, he would have said "***I*** was paranoid..." But he didn't. He stated that "he" was paranoid, in reference to Vierra.

4. Concerning the Deal on November 26, 2004, the Government Misstates the Record by Arguing That Vierra "updated Segundo over the telephone as to the status of his order". [AB 17].

Nowhere in the Government's citations to the record do we find any suggestion that Vierra's role in this deal was to "update" Segundo concerning the status of this transaction. To the contrary, the record clearly shows that Segundo and the FBI field agents blundered into paying David Moniz over $5,000, without getting the drugs. [ER-II: 94]. At that point the FBI agents directed Segundo to phone Vierra for information as to Moniz' whereabouts. In that telephone call Vierra stated that he did not know Moniz' whereabouts. [ER-II: 95-96]. Eventually, Moniz delivered the drugs to Segundo that night. [ER-II: 130]. Nothing in the record suggests that Vierra was monitoring this deal from afar, or somehow acting as a dispatcher of information to successfully complete the

transaction.

5. The Government Misstates the Record That Vierra Showed No Reluctance to Participate in the Six Transactions.

Vierra will not repeat the arguments set forth in the opening brief except to point out that the record clearly shows his reluctance to get involved with Segundo's acquisition of one and two-ounce amounts of methamphetamine in the first place. [See OB 16-17; ER-II: 186-193, 197, 203-204]. Further, the record clearly shows that during the January 27, 2005 transaction Vierra was nervous and apprehensive, as testified to by both Segundo and Kenneth Meyer. [OB 20; ER-II 134, 165].

His reluctance is also seen in the December 9, 2004, and September 9, 2005, deals, wherein Vierra awkwardly delivered the drugs packaged in a blue latex glove and an auto-parts box, respectively. [ER-II: 99, 132, 137]. Vierra's clumsy, naïve efforts to disguise these transactions show reluctance to engage in such large amounts after years of only transacting in small, half-gram amounts.

D. The Within-Guidelines Sentence Does Not Render Harmless the Court's Clearly Erroneous Findings of Fact with Respect to its Decision to Deny the Sentencing Motion.

The Government essentially argues that no matter the merits of Vierra's

argument, since the district court imposed a sentence within the applicable sentencing guidelines range, the sentence was reasonable and should be affirmed. [AB 25-27].

This Court should not be sidetracked by this argument. Within-guidelines sentences do not defeat legitimate appellate challenges as to their validity on the ground of sentencing entrapment. If they somehow could, then a defendant's right to argue sentencing entrapment would be moot.

It is not moot. As clearly set forth in the opening brief [OB 26-27], this Court has a history of reviewing sentencing challenges based on a theory of sentencing entrapment. 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); 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)); United States v. Naranjo, 52 F.3d 245, 248 (9th Cir.1995); United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir.1997); United States v. Riewe, 165 F.3d 727, 729 (9th Cir. 1999). The Court should do so as well here and, for all the reasons stated herein and in the opening brief, vacate the sentence and remand for further proceedings.

CONCLUSION

The district court made numerous factual findings in clear error of the record in denying Vierra's Sentencing Motion. The Government's answering brief is unpersuasive in arguing to affirm the district court's decision. This Court should vacate Vierra's sentence and remand for further proceedings.

DATED: Wailuku Maui, Hawai`i, May 21, 2010.

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

C.A. NO. 09-10426

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32 (a) (7) (c) and 9th Cir. R. 32-1, the attached reply brief is:

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DATE: Wailuku Maui, Hawai`i, May 21, 2010.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
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