No. 15-14787-AA

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK JOSEPH UNREIN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:14-cr-262, Hon. Elizabeth A. Kovachevich

REPLY BRIEF OF MARK JOSEPH UNREIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

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December 16, 2016

/s/ Thomas Burns
Thomas A. Burns

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ARGUMENT AND CITATIONS OF AUTHORITY

I. THE GOVERNMENT CANNOT DEFEND THE DISTRICT COURT'S DENIAL OF UNREIN'S ENTRAPMENT DEFENSE OR ITS PROHIBITION OF HIS ENTRAPMENT STORY AT TRIAL

It was legal error when the District Court denied Unrein's entrapment defense, and it was structural error when the District Court prevented Unrein from presenting his entrapment story.[1]

A. Sufficient Evidence Supported Unrein's Request For An Entrapment Instruction

The Government argues Unrein did not satisfy his featherweight burden of production on his entrapment defense. U.S. Br. 26-38. It is mistaken.

At the outset, the Government suggests it was improper for Unrein to refrain from producing his own evidence of inducement. *E.g.*, U.S. Br. 26 (Unrein "presented no affirmative evidence" and "relied exclusively on evidence submitted by the United States"). But there is no such requirement. Instead, sufficient inducement evidence can "arise[]

[1] The litigants have already explained their positions with respect to the impropriety of the prosecutor's closing argument (*compare* Unrein Br. 47-56, *with* U.S. Br. 50-60) and the denial of Unrein's motion to sever (*compare* Unrein Br. 56-62, *with* U.S. Br. 41-45). Those issues are now for the Court to resolve.

from the prosecution's presentation." *United States* v. *Hill*, 626 F.2d 1301, 1304 (5th Cir. 1980).[2]

Next, the Government pays lip service to the extraordinarily light burden of production regarding government inducement Unrein had to meet before the extraordinarily heavy burden of persuasion—i.e., proof beyond a reasonable doubt—shifted to the Government. *See* U.S. Br. 27. But the Government's analysis takes a wrong turn at the outset, because it does not hew to that standard.

For example, the parties agree that predisposition evidence "must be viewed in the light most favorable to the defendant." *United States* v. *Ryan*, 289 F.3d 1339, 1344 (11th Cir. 2002). In doing so, a district court must therefore draw all reasonable inferences in favor of the defendant. *See id.* That latter requirement, however, is precisely what the Government fails to do.

Specifically, claiming to apply the *Ryan* standard, the Government relies on *United States* v. *Brown* for the proposition that a defendant does not produce sufficient evidence of government inducement unless

[2] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

he shows it provided him "opportunity plus something like excessive pressure or manipulation of a non-criminal motive." *United States* v. *Brown*, 43 F.3d 618, 623 (11th Cir. 1995). But the Government's reliance on *Brown* is misplaced because those defendants, unlike Unrein, obtained not one but two entrapment instructions. *Id.* at 623. Accordingly, *Brown* was merely a sufficiency case as it pertained to a jury verdict, not a sufficiency case as it pertained to the denial of an entrapment instruction. As such, *Brown* is inapposite.

Moreover, contrary to *Ryan*'s standard of review, the Government disregards the excessive pressure it placed on Unrein and minimizes how it manipulated his noncriminal motive precisely because it does not review the evidence and all inferences therefrom in the light most favorable to Unrein. As Unrein previously explained, a reasonable jury could find in his favor on government inducement. *See* Unrein Br. 32-35. For example, the Government placed excessive pressure on Unrein and manipulated his noncriminal motive to serve as a father figure when it repeatedly assuaged his concerns regarding legality and feigned distress (by crying) that the fictitious daughter would suffer if he backed out. *See* Unrein Br. 33.

And even if *Brown* were not factually distinguishable, its improvident dicta regarding "excessive pressure" is not even the prior panel precedent. *See Smith* v. *GTE Corp.*, 236 F.3d 1292, 1302-03 & n.11 (11th Cir. 2001) (describing prior-panel-precedent rule). Instead, to satisfy his burden of production on inducement, a defendant need only show "'*mild* persuasion or coercion' on the part of the government before he is entitled to an entrapment instruction." *United States* v. *Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982) (emphasis added) (citations omitted).

For similar reasons, the Government's argument (U.S. Br. 29) that it did not induce Unrein's crime because it provided him "exits" also fails. The Government does not cite, and Unrein cannot locate, any Eleventh Circuit case that holds a government agent's provision of one or more opportunities to back out of committing a crime means, as a matter of law, that a defendant cannot satisfy his burden of production on inducement. Indeed, such a case would be unlikely, because it would contradict the requirement that defendant must only produce evidence of "'mild persuasion or coercion.'" *Bagnell*, 679 F.2d at 835.

Next, the Government misplaces its reliance (U.S. Br. 31-32) on sufficiency-of-the-evidence cases regarding attempted child enticement,

such as *United States* v. *Lee*, 603 F.3d 904, 913-16 (11th Cir. 2010), and *United States* v. *Farley*, 607 F.3d 1294, 1333-35 (11th Cir. 2010). But to argue the evidence was sufficient to prove attempted child enticement is to ask and answer the wrong question. (Indeed, Unrein's appellant's brief did not raise any sufficiency argument.)

The question is not whether the evidence was sufficient for a reasonable jury to convict Unrein of attempted child enticement. Rather, the question is whether the evidence was sufficient for a reasonable jury, if correctly instructed on Unrein's theory of entrapment, to find that the Government induced him to commit the crimes. As with *Brown*, neither *Lee* nor *Farley* concerned a defendant's entitlement to an entrapment instruction. Instead, *Lee* and *Farley* were both run-of-the-mill sufficiency cases. As such, they do not (indeed, cannot) illuminate the analysis here.

The Government claims *United States* v. *Ventura*, 936 F.2d 1228, 1233 (11th Cir. 1991), "affirm[ed the] denial of [an] entrapment defense." U.S. Br. 32. The Government is mistaken. *Ventura* involved a defendant who was convicted despite obtaining an entrapment instruction. In other words, once again, the issue was whether "the evidence at

trial was insufficient for a jury to conclude beyond a reasonable doubt that he was predisposed to commit the crime charged." *Ventura*, 936 F.2d at 1230. Because that is a different issue from Unrein's issue, just like *Brown*, *Lee*, and *Farley*, *Ventura* is also inapposite.

The Government does eventually cite a few actual entrapment cases. U.S. Br. 32, 34-35. But its reliance on this Court's holdings in those cases does not help it. For example, *United States* v. *Alston* involved government inducement that was "'almost rather mild.'" 895 F.2d 1362, 1368-69 (11th Cir. 1990). *Ryan* involved an agent who supposedly induced a defendant by offering marijuana at a very good price. 289 F.3d at 1344-45. *United States* v. *Parr* involved an agent who approached a defendant, who then merely expressed a few doubts before committing the crime. 716 F.2d 796, 803 (11th Cir. 1983). And *United States* v. *Hill* involved a defendant who was eager to commit the crime at the first meeting. 626 F.2d 1301, 1304-06 (5th Cir. 1980). Here, however, a reasonable jury could have believed that Unrein wished to act as a father figure, but was induced to commit the crime of attempted child enticement.

In this regard, the Government mischaracterizes Unrein's argument as limited exclusively to Agent McAteer's crying and emotional ploys. U.S. Br. 32-33. But entrapment is always a totality of the circumstances analysis. *See, e.g.*, *United States* v. *Martinez*, 776 F.2d 1481, 1485 (10th Cir. 1985) (affirming conviction when entrapment instruction explained government inducement depended on "totality of the circumstances"). Accordingly, Unrein's argument is not so limited, and the Court must review the entirety of the intercepted calls and determine whether any reasonable jury could have found government inducement.

In a footnote (U.S. Br. 38 n.1), the Government contends remand for an evidentiary hearing is unnecessary. But, once again, it has misconstrued Unrein's argument. Unrein does not request remand so he can introduce additional inducement evidence. Instead, he contends that because the evidence of inducement was sufficient, the District Court needs to perform the second step of the entrapment analysis.

Specifically, the District Court must complete its analysis by determining whether the Government carried its burden of proving beyond a reasonable doubt that he was predisposed to commit the crime. And additional evidence may be necessary for the District Court to

make that determination. Indeed, that predisposition analysis is precisely why remand is necessary: predisposition depends on the credibility of Agent McAteer, which only the District Court could assess. *See United States* v. *Bay*, 852 F.2d 702, 705 (3d Cir. 1988) (remanding for evidentiary hearing on predisposition).

As final backstops, the Government contends the denial of an entrapment instruction was harmless and suggests Unrein argued entrapment anyways. U.S. Br. 36-37. As an initial matter, it is important to frame this issue by recalling that a juror on the venire panel asked whether sting operations "come under the category of entrapment," and the District Court advised it would instruct the jury on that issue because it is a "legal point." Doc. 173 at 164-65. Having been deprived of the jury instruction it expected, it is difficult to say the least for the Government to carry its burden of proving the error was harmless beyond a reasonable doubt: "under harmless-error review, the government has the burden of establishing harmlessness beyond a reasonable doubt." *United States* v. *Turner*, 474 F.3d 1265, 1276 (11th Cir. 2007). Moreover, "[h]armless error review, unlike a determination of the sufficiency of the evidence, does not require us to view witnesses' credibility

in the light most favorable to the government." *United States* v. *Hands*, 184 F.3d 1322, 1330 n.23 (11th Cir. 1999).

B. The District Court Committed Structural Error When It Precluded Unrein's Entrapment Story

In precluding Unrein's entrapment affirmative defense, the District Court also prevented him from presenting an "entrapment story" to the jury. Because this stifled Unrein's ability to negate an element of the crime, it was a structural error.

1. The Entrapment Story Issue Is Reviewed De Novo, Not For Plain Error, Because Unrein Preserved It Below

At the outset, the Government contends (U.S. Br. 23, 25, 38) Unrein's "entrapment story" issue is reviewed for plain error because Unrein did not preserve it below. The Government is mistaken. Indeed, the Government overstates the clarity and specificity with which a defendant must present an argument below:

> Plain talk by lawyers is necessary for clear understanding by judges. "Whenever a litigant has a meritorious proposition of law which he is seriously pressing upon the attention of the trial court, he should raise that point in such clear and simple language that the trial court may not misunderstand it, and if his point is so obscurely hinted at that the trial court quite excusably may fail to grasp it, it will avail naught to disturb the judgment on appeal."

United States v. *Reyes-Vasquez*, 905 F.2d 1497, 1500 (11th Cir. 1990) (citation omitted).

Here, Unrein stated his opposition to the Government's motion in limine with sufficient clarity and specificity to preserve his argument that the denial of his entrapment defense caused a structural error. Specifically, in opposing the motion in limine, Unrein demanded "a meaningful opportunity to present a complete defense" by "present[ing] his own version of events in his own words." Doc. 100 at 1. Accordingly, Unrein explained the grant of the Government's motion in limine would deny him a "meaningful opportunity to present his own version of events, in his own words." Doc. 100 at 4.

Again, at the hearing, Unrein's counsel explained the grant of the motion "would prevent my client from obtaining a fair trial" because "to now say all of a sudden our hands are tied going into trying to defend somebody accused of a very serious crime, it just wouldn't result in an outcome that's really supportable, Judge, for us to now have to stand up and be afraid of entrapment because there's some pretrial order on it." Doc. 173 at 229, 231. Indeed, Unrein's counsel reiterated that "tying our hands behind our backs before we even go into trial isn't going to pro-

duce a fair outcome for Mr. Unrein." Doc. 173 at 240. Unrein also explained how his entrapment defense overlapped with the elements of attempted child enticement: "Well, Judge, but the problem is when you're talking about an inducement case, I mean we get to talk about what is the definition of inducement and whether or not the government induced him." Doc. 173 at 242.

Accordingly, although Unrein never expressly uttered the phrase "structural error," he nevertheless put the District Court on sufficient notice of the basis for his argument. *E.g.*, *Juris* v. *Inamed Corp.*, 685 F.3d 1294, 1324 (11th Cir. 2012) (to preserve argument, appellant needs to state it "in such a way as to afford the district court an opportunity to recognize and rule on it"). For preservation purposes, the incantation of magic words is unnecessary. *Aills* v. *Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010) ("While no magic words are required to make a proper objection, we reiterate here that the concern articulated in the objection must be sufficiently specific to inform the court of the perceived error.").

Accordingly, this Court's review of the "entrapment story" issue is not plain error, but de novo. *United States* v. *Anton*, 546 F.3d 1355, 1357 (11th Cir. 2008).

2. The Government Mischaracterizes The Structural Error As A *Gaudin* Error

The Government mischaracterizes the "entrapment story" argument as asserting a "*Gaudin*-type error." U.S. Br. 40. It is mistaken.

In *United States* v. *Gaudin*, the Supreme Court held it violated the Fifth Amendment when a district court determined the element of materiality in a false statement case as a matter of law and refused to submit it to a jury. 515 U.S. 506, 523-24 (1995). Instead, the Supreme Court held, "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.*

Nevertheless, although the Government in *Gaudin* had conceded that district court's error was both structural and plain, in a concurrence, Chief Justice Rehnquist and Associate Justices O'Connor and Breyer suggested *Gaudin* errors could be reviewed for harmlessness. *Id.* at 526-27 (Rehnquist, C.J., and O'Connor and Breyer, J.J., concurring). Ultimately, this Court ruled *Gaudin* errors are not structural and therefore are reviewed for harmlessness. *United States* v. *Johnson*, 139 F.3d 1359, 1363 (11th Cir. 1998).

But Unrein does not assert, and never has asserted, a *Gaudin* error. Instead of asserting that the District Court treated an element of the crime of attempted child enticement as a matter of law that is not properly submitted to the jury, Unrein contends that the effect of the grant of the Government's motion in limine was to prevent him from contesting that element in court. *See* Unrein Br. 42-45. Or, as Unrein's counsel described the problem below, the District Court's ruling tied his hands, denied him a "meaningful opportunity to present his own version of events, in his own words," prevented him from contesting an element of attempted child enticement, and ultimately "prevented him from obtaining a fair trial." Docs. 100 at 1, 4; 173 at 229. 231, 240, 242.

That fits well within the classic definition of a structural error, which is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). Indeed, even in a *Gaudin* situation, a defendant would have the opportunity to tell his story to *a* fact finder (i.e., the judge), even if it happened not to be the *correct* fact finder (i.e., the jury). Here, however, Unrein did not get to tell his entrapment story to *any* fact finder. That is a critical difference, and it ex-

plains why Unrein's trial was infected by structural error. *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973) (denial of a defendant's right to present a defense strips him of "the fair opportunity to defend against the [Government's] accusations"); *see also United States* v. *Yearty*, 2009 U.S. Dist. LEXIS 105606, at *3 (N.D. Fla. Oct. 28, 2009) ("To foreclose the Defendants from mentioning the issue of entrapment during the opening statement would be to transform a light evidentiary burden for entitlement to a jury instruction at the close of evidence into a significant impairment in the presentation of one's defense.").

Because the error Unrein asserts is structural, the Government's harmless error analysis (U.S. Br. 41) is misplaced. Structural errors are not subject to harmless error analysis. *Arizona*, 499 U.S. at 309. Rather, because they fundamentally affect the structure of the judicial proceedings, *id.*, they require automatic reversal, *Judd* v. *Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001).

II. THE GOVERNMENT MISCONCEIVES THE EVIDENTIARY ANALYSIS WHEN IT OVERSTATES THE CRAIGSLIST ADS' PROBATIVE VALUE AND UNDERSTATES THEIR UNDUE PREJUDICE

In defending the District Court's evidentiary rulings, the Government overstates the probative value of the Craigslist advertisements and understates their undue prejudice.

Indeed, relying on *United States* v. *Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993), and *United States* v. *Veltmann*, 6 F.3d 1483, 1495 (11th Cir. 1993), the Government contends the exclusion of these ads would have been an abuse of discretion. The Government is mistaken.

Gaskell involved the exclusion as cumulative of an expert witness for the defendant's central theory of defense that he was not aware of shaken baby syndrome. *Veltmann* involved the exclusion as hearsay of evidence that went to a victim's state of mind when the defendant's central theory of defense was that the victim committed suicide. Neither case establishes, as the Government contends, it would be an abuse of discretion to exclude cumulative and unduly prejudicial evidence regarding a defendant's highly unusual sexual peccadillos (which included solicitations for and responses to requests for nipple sucking and biting, toplessness, nudism, swinging, adult movies, casual sex, mutual blow

jobs, and mutual masturbation from consenting men and women, including transvestites) when he is charged with a sex crime.

Moreover, although the Government claims those activities are "not particularly explicit or deviant" and simply "reveal more sexually diverse interests" (U.S. Br. 49), Unrein submits they are well beyond the common experience of ordinary jurors. As such, their introduction into evidence quite obviously heightened the danger that a jury might give in to the evidence's "undue tendency to suggest decision on an improper [emotional] basis," *Old Chief* v. *United States*, 519 U.S. 172, 180 (1997), and was "likely to incite a jury to an irrational decision," *United States* v. *Church*, 955 F.2d 688, 702 (11th Cir. 1992).

Ultimately, Federal Rule of Evidence 403 exists to "exclud[e] matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States* v. *King*, 713 F.2d 627, 631 (11th Cir. 1983). That is precisely why the prosecutor sought to introduce the advertisements, and it unnecessarily led to cumulative, collateral, and unduly prejudicial side trials regarding them. *See* Unrein Br. 67-68.

Finally, these evidentiary errors were harmful. *E.g.*, *Hands*, 184 F.3d at 1329 (reversing "introduction of the domestic violence evidence" because it was "unfairly prejudicial" and "not harmless").

CONCLUSION

For the foregoing reasons, the Court should reverse or vacate the judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 3,196 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

December 16, 2016

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 16th day of December, 2016, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 16th day of December, 2016, to:

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