

II.

MR. * MUST BE ALLOWED TO PRESENT EVIDENCE OF DURESS

Mr. * was arrested at the * on *, driving a * which contained approximately *. The only reason Mr. * was driving the truck to the border on * was because he was under duress.

A. The Elements of Duress

Duress will excuse the commission of a criminal act if there is: (1) an immediate threat of death or serious injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to avoid violating the law without danger. See United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984); United States v. Atencio, 586 F.2d 744, 746 (9th Cir. 1978).

A fourth element is required in prison escape cases: the defendant must show that he or she submitted to proper authorities after attaining a position of safety. United States v. Bailey, 444 U.S. 394, 399-402 (1980); Contento-Pachon, 723 F.2d at 693. The rationale for this fourth element is that escape is a continuing offense. Bailey, 444 U.S. at 413. Therefore, an escapee must present evidence of coercion to justify his or her continued absence from custody, as well as his or her initial departure from custody. Id. at 401. Failure to turn oneself in after escaping the coercive conditions of prison defeats the defense of duress because the escapee's continued absence from custody constitutes a crime for which there is no longer a justification. Duress remains a defense, even in escape cases, unless the defendant fails to make an effort to surrender *after* threat of harm has passed and the claimed duress has lost its coercive force. Id. at 400-13.

The self-surrender element is only required in prison escape cases. United States v.

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Solano, 10 F.3d 682 (9th Cir. 1993); Contento-Pachon, 723 F.2d at 694. The Ninth Circuit has refused to extend the self-surrender requirement beyond escape cases - even to other continuing offenses. Solano, 10 F.3d at 683. Therefore, a defendant is not required to self-surrender to authorities in order to assert duress as a defense to charges of importation of marijuana or possession of marijuana with intent to distribute.

B. Mr. * Must Be Allowed to Present Evidence of Duress

The constitutional right to testify is found in the Due Process Clause, the Fifth Amendment's guarantee against compelled testimony, and the Sixth Amendment. Rock v. Arkansas, 483 U.S. 44, 51-53 (1987); United States v. Moreno, 102 F.3d 994, 998 (9th Cir. 1996). The right to testify guarantees the right to present relevant testimony. If evidence of a defense is insufficient as a matter of law, the district court may exclude the evidence during trial as irrelevant. Moreno, 102 F.3d at 998. However, fact-finding is usually a function of the jury, and the trial court should rarely rule on a defense as a matter of law. Sandstrom v. Montana, 442 U.S. 510, 523 (1979); Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984). If there is any triable issue of fact, no matter how weak, the court must allow the jury to decide. Contento-Pachon, 723 F.2d at 693. A district court "is not free to dismiss logically relevant evidence as speculative." United States v. Stever, 603 F.3d 747, 754 (9th Cir. 2010); see also United States v. Sotelo-Murillo, 887 F.2d 176, 178 (9th Cir. 1989) ("It is well-settled that a criminal defendant is entitled to a jury instruction on any defense which provides a legal defense to the charge against him and which has some foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility"). Failure to give an instruction on the defendant's theory of the case implicates fundamental constitutional guarantees and is *per se* reversible error. Id. at 180.

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Likewise, failure to allow the defendant to present evidence of his theory of the case implicates fundamental constitutional guarantees.

In an importation case, the defendant has the burden of proving duress by a preponderance of the evidence because the only mental state required is knowledge of the act. United States v. Dominguez-Mestas, 929 F.2d 1379, 1382-83 (9th Cir. 1991). The fact that the defendant is forced to bring merchandise into the country does not negate his or her knowledge of the merchandise. Id. In such cases, duress is a legal excuse for the crime. See Ninth Circuit Model Jury Instruction 6.6 (2000). However, the government retains its traditional burden of proving all of the elements of the crime beyond a reasonable doubt, and the jury in rendering its decision may consider evidence of duress to the extent that it is relevant to the government's burden. Dominguez-Mestas, 929 F.2d at 1380.

Here, Mr. * has been charged with both importation of marijuana and possession of marijuana with intent to distribute; therefore, evidence of duress is relevant to negate Mr. *'s mental state on the possession-with-intent charge. The burden of proof is on the government to disprove duress with respect to the charge of possession with intent to distribute. See Ninth Circuit Model Jury Instruction 6.5 (2000) ("The defendant does not act intentionally if the defendant acts under duress at the time of the offense charged"). A defendant is entitled to a jury instruction on any legal defense which has some foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. Sotelo-Murillo, 887 F.2d at 178. Therefore, even if the Court believes that Mr. *'s proffer is insufficient, evidence of duress cannot be excluded because it is relevant to the government's burden.

Finally, Mr. * should not be prevented from presenting evidence of duress because there is no rule that requires a defendant to disclose his or her intent to rely on a duress defense. The only

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rules of criminal procedure requiring notice of a defense are Fed. R. Crim. P. 12.1 (regarding alibi defense), Fed. R. Crim. P. 12.2 (regarding insanity defense and expert evidence of a mental condition), and Fed. R. Crim. P. 12.3 (regarding public authority defense). None of these rules require a defendant to disclose a duress defense, much less proffer evidence. Therefore, Mr. * should not be prevented from arguing duress to the jury during opening statement or required to proffer his evidence to the court prior to trial. If the court finds that the evidence presented at trial is insufficient as a matter of law, the court may refuse to give a jury instruction on duress.

C. It Would Be Reversible Error to Prevent Mr. * From Presenting Evidence of Duress at Trial.

Mr. *'s ex-parte proffer is sufficient to establish duress as a matter of law because there was an immediate threat of death or serious bodily injury to Mr. *'s family if he did not commit the crime, Mr. * had a well-grounded fear that the threat of death or serious bodily injury would be carried out, and he had no reasonable opportunity to escape the threatened harm prior to committing the act.

Mr. * anticipates that the Court may try to exclude his duress defense because he did not confess to the agents at the time of his arrest that he was under duress. However, as explained above, the surrender requirement only applies to prison escape cases. Therefore, the issue is not whether Mr. * submitted to authorities, but whether he had a reasonable opportunity to avoid committing the crimes charged without danger to himself or his family. Furthermore, even if the Court finds that the fourth element is applicable, Mr. *'s ex-parte proffer is sufficient. The fourth element does not require a defendant to waive his or her Fifth Amendment right to remain silent and confess everything to authorities in order to preserve duress as a defense at trial - it simply means that the defendant must submit to authorities once it is safe to do so. Mr. *'s compliance with the agent's request that he shut off the vehicle and give him the keys fulfills that requirement. In addition, Mr. * immediately informed the agents that there were drugs in the vehicle.

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[Transcript of Motions In Limine, p. *].

A line of Ninth Circuit cases has held that a defendant does not have to inform the agents at that border that he or she was under duress where there was evidence that he “believed he could not trust law enforcement or safely contact the authorities” and evidence that he was under surveillance. See United States v. Ibarra-Pino, 657 F.3d 1000, 1005 (9th Cir. 2011).

In Dominguez-Mestas, 929 F.2d 1379 (9th Cir. 1991), the government filed an in limine motion to exclude Mr. Dominguez’s duress defense. Mr. Dominguez proffered that he believed he was under surveillance by his lender’s agent while he attempted to cross heroin through the port of entry. The district court granted the government’s motion to exclude duress as a defense. However, the Ninth Circuit reversed the district court’s order excluding Mr. Dominguez’s duress defense and remanded the case for further proceedings. Id. at 1381.

Similarly, in Contento-Pachon, 723 F.2d 691 (9th Cir. 1984), the defendant claimed that a man named Jorge offered him a job as the driver of a privately-owned car. Id. at 693. Contento expressed interest in the job and agreed to meet with Jorge the following day. Id. Instead of a driving job, Jorge proposed that Contento swallow cocaine-filled balloons and transport them to the United States. Id. Contento told Jorge that he would consider the proposition and continued to meet with Jorge on several occasions. Id. Contento testified that when he tried to refuse, Jorge mentioned facts about Contento’s personal life, including private details Contento had never mentioned and threatened to kill his family. Id. Contento stated that he did not contact the police because he believed the Bogota police were corrupt and that they were paid off by drug traffickers. Id. After leaving Bogota, Contento’s plane landed in Panama. Id. Contento asserted that he did not notify the police in Panama because he believed that were as corrupt as the police in Bogota

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and because Jorge warned him that he would be watched at all times during the trip. Id. Therefore, he felt that any such action would place his family in jeopardy. Id. When he arrived at the customs inspection point in Los Angeles, he did not voluntarily surrender or tell the agents about the threats, however, he consented to a stomach x-ray. The Ninth Circuit found Contento had no reasonable opportunity to escape the threatened harm. Id. at 695. The proffered evidence, if found credible by a jury, would justify a determination that Contento acted under duress; therefore, it was error for the district court to prevent Contento from presenting evidence of duress to the jury. Id. at 696.

Likewise, United States v. Otis, 127 F.3d 829 (9th Cir. 1997), held that defendant Monsalve's failure to notify American authorities of the threats made was justified because Monsalve's family did not live in the United States and would not be protected. Monsalve alleged that he had lost \$300,000 of the Cali cartel's money to the police, and that the Cali cartel did not believe him and thought he stole the money. The cartel kidnaped his father in Colombia, and agreed to release him only if Monsalve worked for them in the United States. Monsalve's father was in fact released by the cartel, but Monsalve continued to work for them in the United States out of fear that his father would be kidnaped a second time if Monsalve did not comply with the cartel's demands. The district court denied Monsalve's request for a duress instruction because it found that Monsalve could have escaped by cooperating with American authorities. The Ninth Circuit reversed because Monsalve's cooperation with American authorities would not have protected his father in Colombia. Id. at 835.

These cases establish that the fourth element (submission to authorities when safe), sometimes required in prison escape cases, is applied only in a limited manner to cases dealing

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with importation of drugs or possession of drugs with intent to distribute. Submission to authorities is necessary only to the extent required by the third prong, opportunity to escape. See Ibarra-Pino, 657 F.3d at 1006 (“A defendant takes the opportunity to escape the threatened harm where the defendant cooperates with authorities at the first opportunity to do so without alerting an observer and submits to authorities at the first reasonable opportunity by consenting to a search.”) (quotation marks omitted); see also United States v. Moreno, 102 F.3d 994 (9th Cir. 1996). Because Mr. * did not have an “opportunity to escape,” his failure to inform American authorities about the threats does not preclude a duress defense. Therefore, it would be reversible error for the district court to prevent Mr. * from presenting evidence of duress and the government’s motion in limine must be denied.

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III.

CONCLUSION

For these reasons, Mr. * respectfully requests that the court deny the government's motion in limine to exclude evidence of duress.