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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. ROGER CUSICK CHRISTIE, (01) SHERRYANNE L. CHRISTIE, (02) formerly known as "Sherryanne L. St. Cyr", SUSANNE LENORE FRIEND, (03) TIMOTHY M. MANN, (04) RICHARD BRUCE TURPEN, (05) WESLEY MARK SUDBURY, (06) DONALD JAMES GIBSON, (07) ROLAND GREGORY IGNACIO, (08) PERRY EMILIO POLICICCHIO, (09) JOHN DEBAPTIST BOUEY, III, (10) MICHAEL B. SHAPIRO, (11) also known as "Dewey", AARON GEORGE ZEEMAN, (12) VICTORIA C. FIORE, (13) JESSICA R. WALSH, also (14) known as "Jessica Hackman", Defendants.	CR. NO. 10-00384 LEK-01,-02 REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO PROHIBIT THE CHRISTIE DEFENDANTS FROM PRESENTING DEFENSE OF ENTRAPMENT BY ESTOPPEL; CERTIFICATE OF SERVICE

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR IN LIMINE TO PROHIBIT CHRISTIE DEFENDANTS FROM PRESENTING DEFENSE OF ENTRAPMENT BY ESTOPPEL

The United States of America, by and through its undersigned counsel, hereby responds to the Christie defendants' joint memorandum in opposition filed September 10, 2013 (Docket Document #718).

At the outset, the United States objects to defendant Roger Cusick Christie's ("R. Christie") attempt to make his written proffer of eligibility to present this particular defense in camera. See "Ex Parte application to Make Sealed in Camera Submission", filed September 10, 2013 (Docket Document #712). Defendant has cited United States v. Gurolla, 333 F.3d 944, 951-3 (9th Cir. 2003), as support for this sealing procedure. However, Gurolla's procedural posture differs from the instant case in that the defendant's sealed proffer there dealt only with entrapment; even if the Court found him to be eligible to rely upon entrapment (based upon that sealed submission), the burden still remained upon the prosecution to disprove entrapment beyond a reasonable doubt. Here, however, R. Christie is seeking to establish his eligibility to present the affirmative defense of entrapment by estoppel, for which he bears the burden of proof at trial. United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004). Consequently, because of this difference in the burden of proof, we submit that the Fifth

and Sixth Amendment considerations discussed in dicta in Gurolla (see footnote 11) have less bearing in the instant case. The more recent Ninth Circuit case of United States v. Schafer, 625 F.3d 629 (9th Cir. 2010) is of greater significance here, wherein defendants' factual proffer in support of their eligibility to present entrapment by estoppel was publicly made, such that the prosecution had the opportunity to effectively respond thereto. Based upon the prosecution's counter-submissions, the District Court found that the defendants had failed to make a prima facie showing because they did not rely upon the alleged misrepresentations of the Federal officers. The Ninth Circuit affirmed this ruling on appeal, stating "[t]he district court properly granted the government's motion in limine with regard to appellants' asserted entrapment by estoppel defense". 625 F.3d at 639.[1]

Similarly, in United States v. Brebner, 951 F.2d 1017, 1023-7 (9th Cir. 1991), the defendant had been found guilty of being a convicted felon in possession of firearms and had appealed, inter alia, the District Court's pretrial ruling preventing him from presenting an entrapment by estoppel defense

[1] Defendants' joint opposition memorandum has cited Schafer with respect to factfinding issues in connection with the dispositive dismissal motion which the defendant there filed on entrapment by estoppel grounds. However, Schafer's greater significance to the instant case is the district court's treatment of that proffered trial defense in connection with the prosecution's motion in limine.

at trial. In affirming his conviction, the Ninth Circuit stated as follows on this particular issue:

> In this case, [defendant] Brebner's proffer fails to persuade us that there was government conduct sufficient to [give rise to the defense]. . . . [T]here is no evidence in the record indicating that [Federal firearms dealer] Doyle expressly told Brebner that it was lawful for him to purchase the firearms. As for firearms dealer Helmut Tacke, there is similarly no evidence of any affirmative misrepresentation as to the legality of the purchase. Instead, Brebner's proffer consists merely of evidence that, at the time of the purchase, Tacke failed to make any inquiries as to the status of Brebner's prior convictions.
>
> 951 F.2d at 1025 [emphasis added].

The United States emphasizes this quotation from Brebner because to be actionable to raise this defense, the Federal officials' statements must affirmatively indicate that the defendant's conduct was lawful. Even though the prosecution has not had the opportunity to see the contents of R. Christie's proffer for the reasons hereinbefore stated, the implication from page 9 of the joint opposition memorandum—- specifically, the sentence "[s]tatements by such officers which misled Reverend Christie into believing that the government lacked a compelling interest in criminally prosecuting him or other authorized agents of the THC Ministry . . ."—- would seemingly imply that the most these officials may allegedly have said was that the prosecution of marijuana cases was not necessarily a high priority at the Federal level. However, any such representation merely indicated administrative priorities in the exercise of

prosecutorial discretion, but did not sanction or otherwise legitimize conduct proscribed by the Controlled Substances Act with respect to marijuana. Consistent with Brebner, such statements would be insufficient to trigger the defense of entrapment by estoppel.

Defendants' joint opposition memorandum spends a considerable amount of time admonishing this Court not to measure the overall credibility of their proposed defense. That, the United States suggests, is a distraction. This Court still maintains its "gatekeeping" role to insure appropriate admissibility of evidence at trial. As indicated in both Schafer and Brebner, supra, it is entirely proper for this Court to preclude a defendant from presenting the affirmative defense of entrapment by estoppel if he/she does not make a prima facie showing as to each and every element of the defense.

As indicated in its original moving papers, the United States seriously questions whether R. Christie can make this requisite prima facie showing, particularly taking into account the lack of temporal congruence with the crimes charged in this case. According to R. Christie's Notice filed July 29, 2013, the allegedly misleading statements made to him by one former Federal official took place sometime between 2001 – 2005, and those averred to have been made by another Federal official occurred in 2004. The charged offenses herein occurred many

years later during the time period 2008 – 2010 and consisted of conduct and activities which arose long after this alleged misleading advice was given (including, for example, the Ministry's "express" service first instituted in early 2009-- which was nothing more than a storefront operation to sell marijuana-- and the Ministry's marijuana farm which the Christies instigated and developed with co-defendants Friend and Mann in 2009 in order to exclusively supply the Ministry's marijuana distribution needs and this "express" service). Under these circumstances, where the substantial actions constituting the charged crimes had not yet even occurred and would not for several years, it would have been logically impossible for R. Christie, on one hand, to have made these Federal officials in 2001 – 2005 fully "aware of all the relevant historical facts", and on the other hand, for these officials to have "affirmatively told him [R. Christie] the proscribed conduct was permissible". These quoted excerpts are from United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004), and are two of the elements of entrapment by estoppel which R. Christie must minimally establish in order to make a prima facie showing for eligibility to present this defense.

In this connection, R. Christie has indicated in the joint opposition memorandum that whatever the Federal officials allegedly said to him implicated RFRA to some degree and gave

him the impression that "the government lacked a compelling interest necessary to remove RFRA's protection". Opposition Memorandum at 9. As this Court is well-aware from the extensive briefing submitted with respect to the Christie defendants' RFRA motion in limine, RFRA requires a fact-specific and fact-intensive analysis as to each defendant in order to determine whether the existence of such a compelling interest. Obviously, what constituted a compelling interest is hardly a static affair and must be based upon the facts existing at that particular time. Thus, the nature of the compelling interest can reasonably be expected to change over time depending upon new circumstances and events arising. If RFRA itself was implicated in R. Christie's desire to assert the entrapment by estoppel defense, query the relevance of what Federal officials may have said in 2001 - 2005 to the circumstances of what was actually occurring in 2008 – 2010.

Moreover, that R. Christie may have relied upon what state and local officials allegedly told him about the alleged lawfulness of his conduct is irrelevant to this defense. As the Ninth Circuit also observed in Brebner:

> We also reject Brebner's contention that evidence of his reliance on several state and local law enforcement officials was sufficient to justify an entrapment by estoppel defense. Instead, we conclude that Brebner was not entitled to rely on any representations made by state or local officials because, unlike situations where estoppel has been upheld, these officials lacked the

> authority to bind the federal government to an erroneous interpretation of federal law.
>
> 951 F.2d at 1026.

In other words, R. Christie's ability to present an entrapment by estoppel defense must solely rely upon what the requisite Federal officials specifically told him at that time, and cannot be supplemented or modified by what other non-authoritative, non-Federal sources may have told him at a later or other times.

Lastly, it is uncontroverted that co-defendant S. Christie never had any contact with either of the Federal officials identified by R. Christie. As indicated in her Joinder in R. Christie's Notice filed September 10, 2013 (Docket Document #713), "Defendant Sherryanne Christie relied on the statements federal officials made to Reverend Roger Christie as relayed to her by Reverend Christie". [emphasis added]. The question here is whether S. Christie should be entitled as a matter of law to third-party or derivative entrapment by estoppel. The United States submits that the answer is "no".

To the United States' knowledge, there is no published precedent which has specifically ruled that entrapment by estoppel may be raised by persons who had no contact or involvement with the applicable Federal officials. However, as a matter of commonsense and logic, the extension of the defense on a third-party, derivative basis would not be proper or

feasible. After all, this third-party could only know second-hand from someone else about who the Federal official was, what authority that official had, what historical information was transmitted to that official, and what the official may have said about the legality of the proposed conduct. That third-party consequently could only rely upon what he/she was told the official said (which may or may not have been reported accurately), and it would therefore be impossible to reasonably rely upon such second-hand information.

In this connection, the defenses of "entrapment by estoppel" and traditional "entrapment" have similar policy underpinnings deeply rooted in equitable and fairness principles (i.e., they both focus on the conduct of government officers which may have contributed to the defendant's commission of the charged crimes[2]), and it would therefore be useful to examine how this same question is treated under entrapment law. There, the answer is quite clear, particularly under Ninth Circuit law, which does not recognize the theory of derivative entrapment. See, e.g., United States v. Stewart, 770 F.2d 825, 831 (9th Cir. 1985)("Because [defendant] Stewart never had contact with a federal agent, he cannot claim entrapment, and the district

[2] There, of course, is one difference between the two: for entrapment, the defendant's predisposition also has a bearing. This difference, however, is de minimis for the purposes being considered above.

court's failure to give an entrapment instruction was proper"), United States v. Bonanno, 852 F.2d 434, 439 (9th Cir. 1988). This holding makes eminent sense, because if the defendant had no involvement with the government agent, it is hard to see how he could ever have been "entrapped" by that agent to commit the crime. In a similar vein for entrapment by estoppel, if a defendant had no contact with that Federal official, then there similarly is no reason to believe that he/she could have been misled into committing the crime by that official.

In addition, defendants wish to extrapolate the Supreme Court's treatment of the petty misdemeanor offense in Cox v. Louisiana, 379 U.S. 559 (1965), to more serious felony crimes as present in the instant case. This would not be appropriate, inasmuch as the Supreme Court itself expressly cautioned in the opinion, "[o]bviously telling demonstrators how far from the courthouse steps is 'near' the courthouse for purposes of a permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder, or robbery". 379 U.S. at 569.

Moreover, United States v. Pennsylvania Industrial Group, 411 U.S. 655 (1973), is not really a third-party derivative case, because in that case, the arguably misleading government information was contained in a written administrative regulation. In other words, all this means is that if a

defendant had met all of the other elements of the defense and was actually relying upon misleading statements/advice given in writing by a duly-authorized Federal official, then it is as if he/she received that information from the official first-hand.[3] This is clearly not the situation with the Christies herein, where S. Christie can only claim that she relied upon what R. Christie may have said.

The Christies' joint opposition memorandum at 10 also cited two other cases, United States v. Lynch, 2010 U.S. Dist. LEXIS 53011 (C.D. Calif. 2010), and United States v. Duval, 865 F.Supp.2d 803 (E.D. Mich. 2012), wherein they claimed that "the district court permitted defendants to present entrapment by estoppel defenses to the jury". However, Lynch is inapposite insofar as S. Christie's eligibility is concerned, because it appeared that the trial therein only involved defendant Lynch.

Duval cannot be relied-upon as clear precedent authorizing derivative entrapment by estoppel, because it appeared from the reported facts that both defendants arguably received the alleged misleading advice from the officials first-hand. Duval involved two siblings who were prosecuted for marijuana trafficking crimes. At one point, the published opinion reported that "apparently Jeremy Duval sought and obtained

[3] This would be akin to the typical "comfort letters" which are routinely requested and given in connection with complex financial and security transactions.

advice from law enforcement officials about compliance with laws regulating marijuana growing activity", see p. 1-2, and several sentences later, that "they [the defendants] did identify a state law enforcement officer [assigned to a DEA federal-state task force] who gave them advice", see p. 2 [underscored emphasis added]. If, as reported, both defendants had received the alleged misleading advice, then it would have been proper for the two to be eligible for the defense of entrapment by estoppel. As also indicated in this opinion (see p. 2), the prosecution filed an extensive motion in limine concerning this particular defense and other defenses; it was noteworthy that derivative entrapment by estoppel was not raised, presumably because it was not an issue there, as it is in the instant case with regards to S. Christie.

For the reasons set forth herein, the United States' motion in limine should be granted.

DATED: Honolulu, Hawaii, September 12, 2013.

FLORENCE T. NAKAKUNI
United States Attorney

/s/ Michael K. Kawahara
By_____
MICHAEL K. KAWAHARA
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

Served Electronically through CM/ECF:

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/s/ Valerie Domingo
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