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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROGER CUSICK CHRISTIE (01),  
SHERRYANNE L. CHRISTIE (02),

et al.,

Defendants.

CR. NO. 10-00384 LEK

DEFENDANTS ROGER CUSICK  
CHRISTIE AND SHERRYANNE L.  
CHRISTIE'S JOINT  
MEMORANDUM IN OPPOSITION  
TO GOVERNMENT'S MOTION IN  
LIMINE (DOC. 663) TO PROHIBIT  
DEFENDANT ROGER CUSICK  
CHRISTIE FROM PRESENTING  
THE DEFENSE OF ENTRAPMENT  
BY ESTOPPEL; CERTIFICATE OF  
SERVICE

**DEFENDANTS ROGER CUSICK CHRISTIE AND SHERRYANNE L.  
CHRISTIE'S JOINT MEMORANDUM IN OPPOSITION TO  
GOVERNMENT'S MOTION IN LIMINE TO PROHIBIT DEFENDANT  
ROGER CUSICK CHRISTIE FROM PRESENTING  
THE DEFENSE OF ENTRAPMENT BY ESTOPPEL**

On July 29, 2013, Defendant Reverend Roger Christie filed under seal a Notice of Intent to Rely Upon the Defense of Entrapment by Estoppel (Doc. 658). Defendant Sherryanne L. Christie has filed a Joinder in this Notice (Doc. 713). On August 6, 2013, the Government filed its Motion in Limine to Prohibit Defendant Roger Cusick Christie from Presenting the Defense of Entrapment by Estoppel (the Motion, Doc. 663). In the Motion, the government also seeks to prohibit defendant Sherryanne L. Christie from presenting this defense (Doc. 663, p.4-5).

Reverend Christie and Sherryanne Christie herein respond to the Government's Motion, and assert that Reverend Christie's sealed, in camera submission, filed concurrently herewith, is sufficient to make a prima facie showing that the defense of entrapment by estoppel should be presented to, and decided by, the jury at trial.

**I. THE LEGAL STANDARD**

The government asks this Court to prohibit the defendants from relying on the defense of entrapment by estoppel on the ground that they have not demonstrated that they are entitled to such defense (Doc. 663, p.2). The

government is, in essence, requesting that the Court exclude the Christies' entrapment by estoppel defense as a matter of law.<sup>1</sup>

In deciding whether to exclude a defense as a matter of law, the issue is whether "the proffered evidence, construed most favorably to the defendant, would fail to establish all elements of that defense." *U.S. v. Cervantes-Flores*, 421 F.3d 825, 828 (9<sup>th</sup> Cir. 2005). "The sole question presented in such situations is whether the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense" (*quoting U.S. v. Dorrell*, 758 F.3d 427, 430 (9<sup>th</sup> Cir. 1985)). In deciding whether to exclude a defense as a matter of law, the Court cannot weigh the credibility of the proffered evidence, but rather must view it as "if believed," *Dorrell*, 758 F.2d at 430.

Moreover, the proffered evidence need not be strong. *U.S. v. Gurolla*, 333 F.3d 944, 956 (9<sup>th</sup> Cir. 2006). Indeed, the evidence could even be "weak, insufficient, inconsistent, or of doubtful credibility." *U.S. v. Becerra*, 992 F.2d 960, 963 (9<sup>th</sup> Cir. 1993) (*cited in Gurolla*) (*quoting United States v. Yarbrough*, 852 F.2d 1522, 1541 (9<sup>th</sup> Cir. 1988)). Therefore, "the trial court rarely rules on a defense

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<sup>1</sup> The government requests that the Christies make a prima facie showing of the applicability of the defense of entrapment by estoppel prior to even being permitted to cross examine government witnesses in an effort to elicit testimony concerning this defense (Doc. 63, p.4). The Christies respectfully object to any effort by the government to deprive them of their Sixth Amendment Confrontation Clause rights.

as a matter of law. *See Sandstrom v. Montana*, 442 U.S. 510, 523 . . . (1979).” *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9<sup>th</sup> Cir. 1984). “A district court’s determination that there exists no evidence sufficient to raise a valid defense is analogous to a determination that a jury instruction relating to a defendant’s theory of the case is not warranted by the evidence.” *U.S. v. Brebner*, 951 F.2d 1017, 1024 (9<sup>th</sup> Cir. 1991).

Exclusion of evidence which, if believed and viewed most favorably to the defense, is sufficient to allow a rational trier of fact to find in the defendant’s favor on each element of the defense, would deprive the defendant of the constitutional rights to have the jury serve as fact-finder and to have a meaningful opportunity to present a complete defense. *See e.g., Gurolla*, 333 F.3d at 954-55; *Contento-Pachon*, 723 F.2d at 695-96 and n.2.

Entrapment by estoppel is an affirmative defense derived from the Due Process Clause of the Constitution which prohibits the government from convicting a citizen for exercising a privilege which the Government clearly told him was available. *U.S. v. Tallmadge*, 829 F.2d 767, 773 (9<sup>th</sup> Cir. 1987) (*quoting and discussing Raley v. Ohio*, 360 U.S. 423, 425-26 (1959)).

Entrapment by estoppel has been explained as the unintentional entrapment by an official who mistakenly misleads a person into a violation of law. *U.S. v.*

*Batterjee*, 361 F.3d, 1210, 1216 (9<sup>th</sup> Cir. 2004). The Due Process Clause “prohibits convictions based on misleading actions by government officials.” *Id.*<sup>2</sup>

According to the Ninth Circuit, the defendant must show the following five elements in order to establish entrapment by estoppel: (1) that an authorized government official empowered to render the claimed erroneous advice, (2) who has been made aware of all relevant historical facts, (3) affirmatively told defendant the proscribed conduct was permissible, (4) that defendant relied on the false information, and (5) that defendant’s reliance was reasonable. *U.S. v. Batterjee*, 361 F.3d, 1210, 1216 (9<sup>th</sup> Cir. 2004).

A defendant’s reliance on additional third parties, such as an attorney or a state official, is relevant to demonstrate the reasonableness of the defendant’s reliance on statements by the federal officials empowered to render the claimed erroneous advice, *see e.g., Tallmadge*, 829 F.2d at 775, or statements by authorized agents of the federal government, *see e.g. U.S. v. Schafer*, 625 F.3d 629, 636 (9<sup>th</sup> Cir. 2010).

The entrapment by estoppel defense differs from a typical entrapment defense in that one of the elements of an entrapment defense is the absence of predisposition on the part of the defendant, whereas a defendant’s predisposition to

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<sup>2</sup> Entrapment by estoppel is also referred to as “official misleading”. *Batterjee*, 361 F.3d at 1217 n. 6.

commit an offense is not at issue in an entrapment by estoppel defense. *Batterjee*, 361 F.3d at 1216-17. Entrapment by estoppel focuses on the actions of the government officials and not on the defendant's predisposition. *Id.*

In *Schafer*, 625 F.3d at 635-36, the defendants filed a motion to dismiss the indictment on the grounds that the government could not prosecute them because of their defense of entrapment by estoppel. The district court denied the defendant's request for an evidentiary hearing on the motion to dismiss on the ground that such hearing would have usurped the jury's fact-finding role, and ultimately denied the motion to dismiss, reasoning that the court could not rule on the applicability of the defense as a matter of law until after the jury resolved the truth of any factual disputes. *Id.*, at 636-37. The Ninth Circuit stated:

Federal Rule of Criminal Procedure 12 allows a defendant to assert a defense in a pretrial motion if the merits of the defense can be determined "without a trial of the general issue". [H]owever, if the pretrial motion raises factual questions associated with the validity of the defense, the district court cannot make those determinations. [D]oing so would "invade the province of the ultimate finder of fact."

...

Thus, the factual disputes raised by the pretrial motion to dismiss were intertwined with the "general issue" to be decided at trial. The district court would have usurped the role of the jury had it conducted an evidentiary hearing and answered these factual questions.

...

In this case, however the questions raised by Appellants' motion to dismiss establish the viability of Appellants' defense; the factual

disputes were not segregable from the issue that was to be decided at trial - - Appellants' guilt. Pursuant to Rule 12, the district court could not resolve these disputes before trial, and therefore it did not abuse its discretion when it denied Appellants' request for an evidentiary hearing.

Schafer, 625 F.3d at 635-36 (internal and external citations omitted).

In denying defendants' motion to dismiss, the Ninth Circuit stated:

In order to succeed on their motion to dismiss, Appellants would have had to show that they were entitled to an entrapment by estoppel defense as a matter of law. [W]e have held that a defendant is not entitled to a defense of entrapment as a matter of law when there are "definite conflicts in the testimony on the issue of how [the defendant] began selling heroin." When such conflicts arise, the issue of whether the defendant was entrapped "is a credibility question for the jury."

Whether Appellants were lulled into believing their marijuana operation was legal and done on the express authorization of agents who could bind the federal government necessitated a credibility determination that fell within the province of the jury. [A]s such, the district court was precluded from holding that Appellants were entitled to an entrapment by estoppel defense as a matter of law until the jury resolved the truth of the factual dispute."

Id. at 636-37 (internal and external citations omitted).

Thus, *Schafer* highlights the fact-intensive nature of an entrapment by estoppel defense, and therefore the difficulty in ruling on its availability prior to trial as a matter of law.

**II. REVEREND CHRISTIE'S PROFFER OF EVIDENCE IS  
SUFFICIENT TO PRECLUDE EXCLUSION OF ENTRAPMENT  
BY ESTOPPEL DEFENSE AS A MATTER OF LAW**

The Christies respectfully submit that Reverend Christie's sealed in camera submission proffers evidence which, if believed and viewed most favorably to the defense, is sufficient to establish every element of the entrapment by estoppel defense as to both defendants. Therefore, exclusion of this defense as a matter of law would deprive the Christies of their constitutional rights to: (1) have the jury serve as fact-finder; and (2) a meaningful opportunity to present a complete defense.

Defendant Roger Christie's in camera submission makes a prima facie showing that he was misled by authorized Federal officials and their agents into believing that he and members of his Ministry would not be prosecuted because their cannabis distribution activities were legal and permissible under RFRA, and that he conveyed this information to Sherryanne Christie. Defendant Christie's in camera submission makes a prima facie showing that he and Sherryanne Christie relied on such misleading statements and actions. Given the vagueness of RFRA, the statements and actions of other State and County officials, and the overall circumstances of this case, Defendants Reverend and Sherryanne Christie have made a prima facie showing that their reliance on such misleading statements by



the authorized Federal Officials and their agents was reasonable. The defense should therefore be allowed at trial.

Where, as here, a defendant relies on government officials in connection with a vague statute, an entrapment by estoppel defense is particularly appropriate. In *Cox v. Louisiana*, 379 U.S. 559 (1965), the defendant was convicted of obstructing justice by picketing “near” a courthouse. The Court rejected the defendant’s facial and as applied vagueness challenges, but nonetheless held that the defendant’s conviction violated the Due Process Clause. *Id.*, at 564-71. Officials present gave the defendant, who led a group of 2,000, permission for their demonstration to take place at a certain location. *Id.*, at 564, 569-70. The defendant was thereafter ordered to disburse for allegedly breaching the peace, but he refused. *Id.*, at 572. The Court stated that although the word “near” did not rise to the level of unconstitutional vagueness, it did require administrative interpretations by responsible officials on whom the demonstrators would justifiably rely. *Id.*, at 568-69. In reversing the defendant’s conviction, the Supreme Court stated:

In *Raley v. Ohio*, 360 U.S. 423, this Court held that the Due Process Clause prevented conviction of persons for refusing to answer questions of a state investigating commission when they relied upon assurances of the commission, either express or implied, that they had a privilege under state law to refuse to answer, though in fact this privilege was not available to them. The situation presented here is analogous to that in *Raley*, which we deem to be controlling. As in *Raley*, under all the

circumstances of this case, after the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could "would be to sanction an indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Id.*, at 426. The Due Process Clause does not permit convictions to be obtained under such circumstances.

379 U.S. at 571.

Here, RFRA is vague (see Docs. 469 and 555 which are incorporated herein by reference). Reverend Christie justifiably relied on statements of the United States Attorney and a DEA Agent, both of whom clearly indicated to Reverend Christie that his conduct and the conduct of authorized agents of the THC Ministry was protected under RFRA, and that the government lacked a compelling interest necessary to remove RFRA's protection. Just like the statute at issue in *Cox*, RFRA, by its terms, foresees justifiable reliance on government officials charged with administering and enforcing its "compelling" interests. Statements by such officials 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 for activities related to the THC Ministry thus supports the defendants' entrapment by estoppel defense.

To hold the defense unavailable to Sherryanne Christie would be a manifestly unfair limitation on the availability of the defense. If any of the 2,000 demonstrators had been prosecuted along with *Cox*, surely the defense would have

been available to them if they, like Sherryanne Christie, demonstrated that they relied on the statements the federal officials made to the leader of their group. *See also U.S. v. Duval*, 865 F. Supp. 2d 803, 805-808 (E.D. Mich. 2012) (allowing two defendants, siblings, to present evidence of entrapment by estoppel defense based on law enforcement official's statements to one defendant); *U.S. v. Pennsylvania Industrial Group*, 411 U.S. 655, 673-674 (1973) (relying on administrative regulation, rather than statement made directly to defendant, to support defense based on *Raley* and *Cox*).

The Christies also direct the Court's attention to two medical marijuana cases where district courts permitted defendants to present entrapment by estoppel defenses to the jury. In *U.S. v. Lynch*, 2010 U.S. Dist. LEXIS 53011, \*26 (C.D. CA 2010), the defendant testified:

as to having telephoned a DEA branch office to inquire about the legality of medical marijuana dispensaries. He also placed into evidence a copy of his phone records which showed that contact was made between his telephone and the DEA's branch office for a number of minutes. However, Lynch did not have any record as to the identity of the purported DEA employee to whom he spoke or what exactly was said by the employee.

Based on this evidence the court allowed the defendant to raise an entrapment by estoppel defense and instructed the jury thereon. *Id.*, at \*26-27.

Similarly, in *U.S. v. Duval*, 865 F. Supp. 2d 803 (E.D. Mich. 2012), the court permitted two defendants, Gerald and Jeremy Duval, to introduce evidence of

entrapment by estoppel, based on statements a government agent made to one of the defendants, Jeremy Duval. The court stated, *Id.*, at 805-808:

Before embarking on his venture, apparently Jeremy Duval sought and obtained advice from law enforcement officials about compliance with laws regulating marijuana growing activity. Up to now, the Duvals have not named a federal official who provided such advice, but they did identify a state law enforcement official who gave them advice. That individual turned out to be deployed to a joint federal-state drug task force and was working for the Drug Enforcement Administration.

...

The government predicts that the defendants cannot succeed in proving that defense [entrapment by estoppel] because they will not be able to show that a *federal* official gave them misleading advice about *federal* law upon which they relied to their detriment. That, indeed, is a valid point. . . . But a slim chance of success does not justify a ruling pretermittting the attempt. [emphasis in original].

What the government seeks, in essence, is an advance ruling on the viability of the defense of entrapment by estoppel without allowing the Court to hear the evidence. However, the rule governing pretrial motions instructs that only those “defense[s], objection[s], or request[s] that the court can determine without a trial of the general issue” may be raised before trial by motion. Fed. R. Crim. P. 12(b). The Court may not adjudicate the validity of a defense in advance of trial if doing so would invade the province of the ultimate finder of fact. According to Rule 12(b), a defense is capable of determination only if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. That rule ought to apply to proving the defense of entrapment by estoppel, which is a fact-intensive enterprise. [citations and internal quotations omitted].

The defendants are entitled to attempt to prove their defense. They say, for now, that they relied on the statements of a Monroe County sheriff deputy about the legality of their operation.

Perhaps they relied on others. The sheriff deputy has testified at a pretrial hearing in this case that he was working as part of a joint task force operation with the DEA. Perhaps the defendants will be able to offer evidence that the deputy spoke with the authority of the federal government or led the defendants to believe that he did. The way the Court understands it, the defendants will describe their understanding that if they complied with Michigan's medical marijuana laws, they would not be prosecuted by any government authority. Consequently, proof of compliance with those state laws would necessarily be part of their defense. So would the conversations they had with the "authorities" upon which they allegedly relied. It is certainly possible that none of those proofs will materialize, in which case the jury will not be instructed on the entrapment by estoppel defense. And wisdom may suggest a different course, as well. But the defendants should not be frustrated in the *attempt* to bring their defense to trial. [emphasis in original].

Reverend Christie's sealed, in camera submission provides a far stronger foundation for the admission of Reverend and Sherryanne Christie's entrapment by estoppel defense than that which was presented in *Lynch* or *Duval*. Like *Lynch* and *Duval*, the Christies should be afforded the opportunity to present the evidence of their defense at trial.

Clearly, it is the jury not the Court that should make any credibility determinations as to the factual issues presented above. If the Government has witnesses that would testify to a different set of facts than those proffered in Reverend Christie's sealed, in camera submission, it is for the jury to determine who is more credible and what weight to give each piece of evidence. The recent 9<sup>th</sup> Circuit opinion in United States v. Evans, 2013 WL 4516754 (9<sup>th</sup> Cir. Aug. 27,

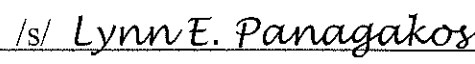
2013), highlighted the fact that, when it comes to the admissibility of evidence related to preliminary challenges under FRE Rule 104(a), credibility findings are a jury's job – not the district courts. *Id* at \*6. In *Evans*, the 9<sup>th</sup> Circuit clarified that FRE 104's gatekeeping function to only permit *admissible* evidence does not give the Court the power to make *credibility* determinations pre-trial.

For the foregoing reasons, Reverend Christie and Sherryanne Christie respectfully request that they be permitted to introduce evidence of the defense of entrapment by estoppel at trial.

DATED: September 10, 2013, Honolulu, Hawaii.

Respectfully submitted,

  
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Defendants.

CR. NO. 10-00384-LEK

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I hereby certify that, on the date indicated 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:

MICHAEL K. KAWAHARA,  
Assistant U.S. Attorney  
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UNITED STATES OF AMERICA

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DATED: September 10, 2013, Honolulu, Hawaii.

Respectfully submitted,

/s/ Lynn E. Panagakos

LYNN E. PANAGAKOS

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