IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	CA -13-30000
	)	(D.Ct # 11-22-RJB)
Plaintiff - Appellee,	)	
	)	
v.	)	
	)	
FRANCIS SCHAEFFER COX	)	
	)	
Defendant - Appellant.	)	
	)	

APPELLANT FRANCIS SCHAEFFER COX'S SUPPLEMENTAL OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE ROBERT J. BRYAN
Sr. United States District Judge

FRANCIS SCHAEFFER COX
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P.O. Box 1000
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Appellant

I. QUESTIONS PRESENTED

1. Did the trial court err in failing to dismiss the indictment against Cox where the government engaged in outrageous conduct via its use of two confidential informants who repeatedly attempted to foment Cox to engage in violent acts and who seized, kidnapped, and otherwise restrained Cox in his residence for 19 days?

2. Did the trial court err in failing to suppress all evidence resulting from the government's seizure, kidnapping, and otherwise restraining Cox to his residence for 19 days or resulting from the corresponding or otherwise-unlawful presence of one of the government's confidential informants?

3. Did the trial court err in failing to instruct the jury on entrapment by estoppel as to several of the charges against Cox?

II. STATEMENT OF THE CASE

Prior to trial Cox moved to dismiss the case against him based upon outrageous government conduct. ER ___. In the same motion Cox moved to suppress *inter alia* all evidence arising from the ruse perpetrated by the government's confidential informant (CI) Olson which kept Cox restrained to the place he was residing and formed the basis for any continued contact between Cox and Olson. ER ___. Cox also moved in that motion to dismiss counts of the indictment that pertained to the weapons the government attempted to place in Cox's hands on March 10, 2011 immediately prior to arresting him with a heavily-armed and large force of federal agents. ER___.

The district court denied Cox's motion in total. ER___; Tr. ___. In so ruling, however, the district court held that Cox's entrapment by estoppel claims were for the

jury to determine. Tr.___.

At the trial Cox testified to additional entrapment by estoppel. This included testimony concerning not paying taxes on the homemade silencer and replica machine gun which formed the basis for Counts 3, 4, 5 and 6 of the third superseding indictment against Cox. ER___; Tr.___. Cox supported his testimony with that of other witnesses, including a federal ATF agent. Tr.___. The district court, however, failed to instruct the jury on entrapment by estoppel as to any count of the third superseding indictment.

III. STATEMENT OF FACTS

Many of the facts pertinent to the claims raised in this brief are set forth in detail in the Statement Of Facts in the primary brief filed by Cox's counsel. Cox incorporates that brief by reference.

To the extent that the claims raised in this brief were not addressed via testimony at trial, they are supported by the affidavit of Cox and the exhibits submitted in support of the motion discussed below. ER ___. The claims are also supported by Cox's supplemental filing in the district court in support of that motion. ER___.

CI Olson was admitted into the Alaska Peacemakers Militia (the Peacemakers) as an entry-level member in 2010. ER___. Despite being never more than an entry-level member, Olson repeatedly disobeyed directives from Cox and again and again exceeded the scope of his membership in the Peacemakers. ER___. That culminated with Olson continuing to advocate for a "2-4-1" plan of violence that Cox and other members of the Peacemakers had adamantly rejected. ER___. As a result, by February 19, 2011, the

Peacemakers' command structure had determined to de-commission Olson as a member of the organization. ER___.

Previously, on February 5, 2011 -- the day Cox's wife gave birth to their second child -- CI Fulton had threatened to kill Cox if Cox continued to refuse to engage in violence. ER ___ Thus, Cox was extremely fearful that if he remained in Alaska, Fulton would follow through on his threat. ER ___ . Cox's wife having by then recuperated from childbirth, Cox concluded on February 19 that the best thing for him and his family and everyone else concerned was for Cox and his family to immediately leave Alaska for the Lower 48 United States. ER___. Upon hearing of Cox's plan to leave that day, Olson removed the battery from Cox's vehicle, promising to replace it. ER___.

Olson never fulfilled his promise to replace the battery he took from Cox's vehicle. Instead, Olson concocted another false promise -- the employment of a (non-existent) sympathetic trucker who would be in the Fairbanks area shortly to transport Cox and his family to the Lower 48. ER___. In reliance upon Olson's ruse, Cox did not depart Alaska in his own vehicle but instead remained in Alaska as Olson offered deceit after deceit as to why the trucker had not yet arrived or was not yet able to depart. ER___.

During the course of the trucker ruse, the government itself was well aware of and even encouraged Olson's ongoing deceit. ER___. The government was likewise aware of Cox's desire to leave as soon as possible in order to avoid violence and that Cox was growing more fatigued with each passing day as he was essentially the sequestered resident of a friend's home. ER___.

On March 10, 2011, Olson told Cox that the trucker was finally in Fairbanks ready to transport Cox and his family to the Lower 48 that day. When Cox and Olson then drove to the place where Cox expected to meet the trucker, Cox was instead arrested by a large and heavily-armed force of federal agents immediately after the government attempted to foist illegal firearms upon Cox. ER___.

As to the illegal firearms which the government attempted to foist upon Cox, Cox understood from Olson that the firearms were being offered by CI Fulton, a federally-registered arms dealer. Thus, any item Cox ultimately chose to acquire would be obtained in accordance with federal law, including licensing and registration. ER___.

IV. SUMMARY OF ARGUMENT

In the principal brief Cox's counsel demonstrates in detail and argues ably that it is reversible error for the district court to have failed to instruct the jury on entrapment based upon the misconduct of the government's two informants Fulton and Olson. It is Cox's position, however, that although he was entrapped, he is not limited to asserting an entrapment defense where the corresponding actions of the government via its informants are independently cognizable as Fourth or Fifth Amendment violations. See United States v. Mayer, 503 F. 3d 740, 749-54 (9th Cir. 2007); United States v. Emmert, 829 F. 2d 805, 811 (9th Cir. 1987).

As to the Fifth Amendment violations, the actions and threats of the knife-wielding Fulton and the conduct of Olson, whether considered individually or in conjunction, are the type of "dominant fomentation" prohibited by due process. Mayer, 503 F. 3d at 754 (quotation and citation omitted). In addition, the acts of the two

informants encompassing assault with a dangerous weapon, a death threat, theft, and kidnapping are *malum in se* so as require dismissal of the prosecution. See United States v. Smith, 924 F. 2d 889, 897 (9th Cir 1991). Even if the government's conduct were not *malum in se*, it is nonetheless outrageous under the totality-of-the-circumstances test employed by the Court in United States v. Black, 733 F. 3d 294, 302-10 (9th Cir 2013), *rehearing and rehearing en banc denied*, 750 F. 3d 1053 (9th Cir 2014), *cert. denied*, ___U.S. ___, ___, ___, ___, 135 S. Ct. 105, 266, 267, 275, 190 L. Ed. 2d 84, 196, 197, 202 (2014).

While this Court has not prohibited the government from using desperate and depraved souls as informants, see United States v. Hullaby, 736 F. 3d 1260, 1261-63 (9th Cir. 2013), the perverse incentive for such informants to fabricate crime in order to save their own hides is all the more reason for the Court to closely scrutinize the conduct of such "persons of the lowest caliber," Emmert, 829 F. 2d at 811-12, in order to ensure that the dictates and safeguards of due process are stringently enforced. As highlighted by the vast array of political speech and otherwise-irrelevant evidence the prosecutors introduced at trial, the government appears to have investigated Cox in response to his exercise of First Amendment rights and was prosecuting a combination of Thomas Paine and Don Quixote.

As to the Fourth Amendment violations, CI Olson repeatedly failed to scrupulously adhere to the scope of the invitation to be a member of the Peacemakers, thus effecting violations of Cox's legitimate expectation of privacy. See Mayer, 503 F. 3d at 753. Even if the government via Olson had not previously violated the Fourth

Amendment, Olson's theft of Cox's car battery and perpetration of the trucker ruse effected an unlawful seizure of Cox. See Nelson v. City of Davis, 685 F. 3d 867, 875-78 (9th Cir. 2012). Regardless of whether the government's actions effected a seizure, the government's deceptions certainly created a coerced, and accordingly invalid, consent. See United States v. Hardin, 539 F. 3d 404, 424-25 (6th Cir. 2008); United States v. Phua, ___ F.Supp. 3d___, ___, 2015 WL 1757489 at *5-*10 (D. Nev. 2015). Thus, all the evidence obtained by the government as a result of Olson's continued contact with Cox after the February 19 battery theft must be suppressed. See United States v. Nerber, 222 F. 3d 597, 605 (9th Cir. 2000).

Moreover, had Cox validly invited Olson to assist Cox in leaving the State of Alaska with his family, the government via Olson nonetheless acted to undermine and nullify the very purpose of the invitation. It is the antithesis of that invitation to say that the government was thereby authorized to kidnap or otherwise seize Cox or to, at the very least, act in bad faith by *actively preventing* the achievement of the invited purpose -- the exercise of his freedom to travel -- by the stealing of Cox's car battery and the deceit of the trucker ruse, especially when the government was well aware that Cox was growing more worn and fatigued with each passing day that Olson kept Cox sequestered in a residence in Fairbanks. See Mayer, 750 F. 3d at 749-54; United States v. Phillips, 497 F. 2d 1131, 1134-35 & n.4 (9th Cir. 1974); cf. Hardin, 539 F. 3d at 424-25.

As to entrapment by estoppel, Cox presented his own testimony and that of several other witnesses to establish that he relied upon and was misled by the representations of a responsible and informed government agent in relation to not paying the taxes arising

from his ownership of a homemade silencer and a replica machine gun and as to any possession of the firearms the government tried to foist upon him immediately prior to his arrest. Once such testimony was presented, Cox was entitled to an instruction on entrapment by estoppel in relation to the corresponding counts of the indictment. See United States v. Rodman, 776 F. 3d 638, 643-44 (9th Cir. 2015); United States v. Batterjee, 361 F. 3d 1210, 1216-19 (9th Cir. 2004); United States v. Tallmadge, 829 F. 2d 767, 773-75 (9th Cir. 1987).

V. ARGUMENT

1. The District Court Erred In Failing To Dismiss The Indictment Against Cox Where The Government Engaged In Outrageous Conduct Via Its Use Of Two Confidential Informants Who Repeatedly Attempted To Foment Cox To Engage In Violent Acts And Who Seized, Kidnapped, And Otherwise Restrained Cox In His Residence For 19 Days.

A. Standard of Review

This Court reviews de novo the district court's denial of a motion to dismiss. Black, 733 F 3d at 301.

B. Discussion

In Black this Court set forth a six-factor inquiry undertaken to evaluate whether the government's conduct was outrageous:

> (1) known characteristics of the defendants;
> (2) individualized suspicion of the defendants;
> (3) the government's role in creating the crime of conviction;
> (4) the government's encouragement of the defendants to commit the offense conduct;
> (5) the nature of the government's participation in the offense conduct; and
> (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

Black, 733 F. 3d at 294. A comparison then between Black and Cox's case demonstrates the absolute outrageousness of the government's conduct here.

As to the first two factors, the Court in Black was quite concerned that the government had targeted individuals with no known criminal background and had done so with no individualized suspicion that those folks had any criminal intentions in relation to the matters encompassed by the government's reverse-sting operation. See Black, 733 F. 3d at 304. The Court expressly noted "the absence of these conditions here supports the defendants' outrageous government conduct claim." Id. at 306 n.8. The saving grace for the government was "the defendants' enthusiastic readiness to participate" in the government's operation, id., and their indications "very early and often that they had engaged in similar criminal activity in the past." Id. at 307.

As in Black, there was no indication that Cox had a criminal record in relation to the matters at issue; all Cox had was one minor misdemeanor reckless-endangerment conviction and one pending case that was an even-lesser charge. Nor did the government have any suspicion that Cox was inclined to engage in the crimes the government charged. Rather, the investigation was begun in response to Cox's political activities. As FBI Agent Sutherland testified before the Alaska State Court Grand Jury, the government had Olson infiltrate the Peacemakers "to see what it was they talked about behind closed doors." ER.___.

Nor were there any rapid and repeated acknowledgments of past criminal conduct to perhaps warrant the government continuing its scheme. Rather, as Agent Sutherland

further testified, on August 13, 2010, Olson and the government commenced a pattern of clandestinely recording Olson's contact with Cox and other Peacemakers, followed by a debriefing, and then on to more recording, likely more than 100 hours worth over the ensuing months. ER.___. This practice of record-debrief-record-some-more persisted for approximately six months before Cox went into hiding as a result of informant coercion in February of 2011, and only then did Olson begin pushing a "2-4-1" (and at one point a "5-4-1") plan. ER.___.

As to the third, fourth, and fifth Black factors, the government's role in creating, encouraging, and participating in the crimes at issue, the government's role is overwhelming as to all the charges -- except those relating to Cox's homemade silencer and replica machine gun (and even as to those charges the evidence is a product of the government's outrageous conduct, and as discussed, *infra*, it is also a product of Fourth Amendment violations and Cox has a valid entrapment by estoppel defense based upon the misrepresentation of a federal ATF agent). As to the remaining charges, the government's tag team of Fulton and Olson fomented toward getting Cox to commit to violence and preyed upon Cox's strong fear of Fulton and the deep fear Cox suffered after being told by a government military officer that he overheard other government agents speaking of provoking Cox to violence in order to assassinate him.

The final Black factor is "the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue," Black, 733 F. 3d at 303, in other words, "the justification for the particular law enforcement strategy employed." Id. at 304 In Cox's case there is woefully no justification. In contrast to

Black where the government posited that its "tactic was designed to avoid" risks of violence to members of the public and law enforcement, id. at 309, the government's conduct in Cox's case is not risk avoidance but risk fomentation. The government pursued an idealistic young man who dared to speak out against the established order, terrorized and pressured him via Fulton and Olson, and then prosecuted him as an example to others who may share Cox's views and beliefs. This is truly the government tilting at windmills, creating a straw man to hold up in the public eye for prosecution. See Black, 733 F. 3d at 302 (it is outrageous conduct *per se* for the government to generate crimes for the sake of prosecuting the accused).

Moreover, the Court does not even need to undertake the Black-factor analysis here because the government's actions are *malum in se.* See Smith, 924 F. 2d at 897. Fulton's holding a knife to the throat of Cox's colleague and subsequent death threat to Cox, Olson's theft of Cox's car battery -- no one would dispute that those are serious criminal acts in furtherance of the government's plan. More subtle, yet equally serious, is the seizure and even kidnapping of Cox in his residence in the 19 days leading up to his arrest.

A Fourth Amendment seizure is "meaningful interference, however brief, with an individual's freedom of movement." United States v. Jacobsen, 466 U.S. 109, 113n.5 (1984). The hallmark of a seizure is that the government engages in purposeful conduct with the intent to interfere with the liberty of a citizen and in fact does so. See Nelson, 685 F. 3d at 876. In Cox's case, there is no question that the government intended to interfere with Cox's freedom of movement when it stole his car battery and perpetrated

the trucker ruse and that the government thereby succeeded in what it intended. Thus, the government effected a seizure of Cox, a seizure which was unlawful because there was no justification for doing so. See id. at 876-78.

Furthermore, since the seizure of Cox was effected inside a residence or was so prolonged, the government needed to have not merely reasonable suspicion but rather probable cause plus exigent circumstances in order to justify such a lengthy or in-home detention. See Florida v. Royer, 460 U.S. 491, 499-500 (1983); United States v. Perea-Rey, 680 F. 3d 1179, 1184, 1188-89 (9th Cir. 2012); United States v. Washington, 387 F. 3d 1060, 1067-68 (9th Cir. 2004). Indeed, the government's seizure of Cox continued precisely in order to generate probable cause.

That the seizure of Cox constituted kidnapping is evident from an examination of both Alaska and federal law. Under Alaska law, the government's confining Cox, either via physically removing his car battery or via the deception of the trucker ruse, constitutes kidnapping. See State v. McDonald, 872 P. 2d 627, 652-53 (Alaska App. 1994). Likewise under federal law, kidnapping is not constricted to the physical limitation of a person's movement but instead includes false promises and other such deception which creates a mental restraint. See United States v Garcia, 854 F. 2d 340, 344-45 (9th Cir. 1988); United States v. Wesson, 779 F. 2d 1443, 1444 (9th Cir. 1986); cf. United States v. Garza-Robles, 627 F. 3d 161, 167-68 (5th Cir. 2010); United States v. Carrion-Caliz, 944 F. 2d 220, 225-26 (5th Cir. 1991); United States v. Hoog, 504 F. 2d 48, 50-51 (8th Cir. 1974). In this regard the government's motivation or motivations are irrelevant, and the government's kidnapping of Cox need not have been for an illegal

purpose. See Gawne v. United States, 409 F. 2d 1399, 1402-03 (9th Cir. 1969).

In sum, each of the various criminal acts which government's informants committed are *malum in se* so that any one requires dismissal of the charges. See Smith, 924 F. 2d at 897. Viewed together, those various government-perpetrated crimes require no lesser remedy.

2. The Trial Court Erred In Failing To Suppress All Evidence Resulting From The Government's Seizure, Kidnapping, Or Otherwise Restraining Cox To His Residence For 19 Days Or Resulting From The Corresponding Or Otherwise-Unlawful Presence Of One Of The Government's Informants.

A. Standard of Review

This Court reviews de novo the denial of a motion to suppress. United States v. Caymen, 404 F. 3d 1196, 1198 (9th Cir. 2008).

B. Discussion

As this Court emphasized in Mayer, CI Olson's ability to infiltrate the Peacemakers was strictly conscripted by the scope of the invitation, the consent he received from Cox. See Mayer, 503 F. 3d at 753. Despite the fact the Cox detailed a parade of instances where Olson exceeded the scope of his invitation prior to February 19, 2011, ER ___, the government failed to dispute any of Olson's transgressions. Accordingly, the district court should have suppressed all evidence derived from Olson's continued participation in the organization. See id.

Regardless of whether Olson exceeded the scope of his invitation prior to February 19, 2011, he blatantly violated the Fourth Amendment commencing on that date through Cox's arrest on March 10, 2011. As discussed above, Olson's theft of Cox's car battery

and perpetration of the trucker ruse effected an unlawful seizure so that all the resulting evidence must be suppressed. See Nerber, 222 F. 3d at 605.

Even if the government did not illegally seize Cox commencing on February 19, Olson's continued presence in the organization and in Cox's residence was the result of the deceit comprising the trucker ruse, thus rendering any consent by Cox invalid. See Hardin, 539 F 3d at 424-25; Phua, ___F. Supp. 3d at ___, 2015 WL 1757489 at *5-*10.

The case perhaps most extensively discussing consent obtained by deception is the Sixth Circuit's decision Hardin. The Hardin Court reviewed many such cases and observed that while deception as to an informant's identity is generally allowable, deception as to an informant's purpose that deprives the consenting person of the ability to make a fair assessment of the need to surrender one's privacy or that is otherwise coercive in the circumstances renders the resulting consent invalid. See Hardin, 539 F. 3d at 424-25. Cox submits that the trucker ruse was by itself impermissible -- and certainly so when perpetrated for the length it was and under the circumstances where Cox was hiding out in fear secluded in a residence and growing more fatigued and exhausted with each passing day -- that renders the ruse plainly impermissible under the Fourth Amendment.

Long ago this Court recognized that consent must not only be knowing, voluntary, and intelligent, it also must be deemed to require the government to act consistent with that consent and not exceed its scope. See Phillips, 497 F. 2d at 1134-35 & n.4. Thus, even assuming that Cox validly consented to the trucker ruse, that does not allow the government to act in bad faith or worse by actively preventing the achievement of the

very purpose of the consent. See Mayer, 750 F. 3d at 749-54; Phillips, 497 F. 2d at 1134-35 & n.4; cf. Hardin, 539 F. 3d at 424-25.

The recent decision in Phua strongly supports Cox's position in that the Court there found the consent invalid under much-less-egregious circumstances than those presented here. The ruse in Phua was that federal agents worked to disrupt one of several internet services to a hotel room, thereby creating the need for federal agents to enter the room in the guise of repairmen when the occupant requested repair and thus purportedly consented to the agents' entry into the room. See Phua, ___ F. Supp. 3d at ___, 2015 WL 1757489 at *1. The Court held that such a ruse violated the Fourth Amendment, both because it was coercive and because the government had acted to intentionally create the problem which it then manipulated to obtain consent. See id., ___ F. Supp. 3d at ___, 2015 WL 1757489 at *1,*5-*10. Likewise, the trucker ruse in Cox's case was coercive under the circumstances. Even if the ruse were not coercive on its own, it must be deemed to violate the Fourth Amendment where the government created the problem by stealing Cox's car battery, which situation it then manipulated by the deceit that followed.

3. The Trial Court Erred In Failing To Instruct The Jury On Entrapment By Estoppel As To Several Of The Charges Against Cox.

A. Standard of Review

Because Cox did not request entrapment by estoppel instructions in the district court, this Court will review the omission of the instructions for plain error. Untied States v. Bear, 439 F. 3d 565, 568 (9th Cir. 2006).

B. Discussion

The affirmative defense of entrapment by estoppel has five elements:

> (1) an authorized government official empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told him the proscribed conduct was permissible, (4) that he relied on the false information, and (5) that his reliance was reasonable.

Batterjee, 361 F. 3d at 1216 (quotation and citations omitted). As discussed above, Cox clearly sought to raise this defense and presented evidence asking the district court to dismiss the charges arising from the government's effort to place illegal firearms in his hands on March 10, 2011. The district court was thus clearly alerted to this defense as to those charges when it then ruled that the jury should decide the defense on the merits. Accordingly, the district court should have so instructed the jury and it was plain error for the district court not to do so.

At the trial itself Cox presented evidence on entrapment by estoppel as to the charges arising from his ownership of a homemade silencer and replica machine gun. Indeed, Cox went so far as to call to the stand the ATF agent who gave Cox the mistaken advice that led Cox to believe his conduct was permissible, testimony that served no purpose other than to prove the entrapment by estoppel defense as to those charges. Thus, it was absolutely obvious that Cox was pursing the defense and it was plain error for the district court to fail to instruct the jury on the defense.

VI. CONCLUSION

For the reasons stated, the Court should vacate Cox's convictions and dismiss the charges against him. If the Court does not dismiss all the charges, the Court should hold

that the district court erred in failing to suppress illegally-obtained evidence and should thus vacate Cox's convictions and remand for a new trial at which the jury should be instructed on entrapment by estoppel on the various applicable charges. Francis Schaeffer Cox respectfully prays that the Court so order.

____

Francis Schaeffer Cox