UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, CR 15-MJ-130

Plaintiff,

vs.

VAL H. DEMARS,

Defendant.

DEFENDANT DEMARS' RESPONSE TO UNITED STATES' MOTION IN LIMINE TO PROHIBIT PUBLIC AUTHORITY DEFENSE

The Defendant, Val H. DeMars, by and through his undersigned attorney, Assistant Federal Public Defender Gary G. Colbath, Jr., objects to and responds as follows to the United States' June 6, 2016 "denial of public authority defense and motion in limine" and supporting memorandum. (Doc. 28, 29.)

ARGUMENT

1. <u>DeMars Has a Right to Present His Theory of Defense.</u>

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Holmes v. South Carolina*, 547 U.S. 319 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). In *United States v. Faust*, 850 F.2d 575, 583 (8th Cir. 1988), the Eighth Circuit, quoting *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir. 1979), recognized that it is "reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the [trier of fact], would be legally sufficient to render the accused innocent."

In determining whether the evidence is sufficient to support a particular theory of defense, the evidence should be considered in the light most favorable to the defendant, giving the defendant "the benefit of all favorable inferences reasonably deducible therefrom." *Hallberg v. Brasher*, 679 F.2d 751, 757 n.6 (8th Cir. 1982) (quoting *Underwood v. Crosby*, 447 S.W.2d 566, 570 (Mo. 1969) (en banc)).

Given that no evidence has yet been presented to the court at trial of this matter, the government's motion is decidedly premature and, at any rate, should be denied as it seeks to prevent Defendant DeMars from exercising a right the Constitution, and the Eighth Circuit, has clearly stated he possesses.

2. <u>The Public Authority Defense</u>.

The defense of public authority derives from Federal Rule of Criminal Procedure 12.3(a). This rule states:

> (a) Notice of the Defense and Disclosure of Witnesses.
>
> (1) *Notice in General*. If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.

In asserting a defense of public authority, "the defendant does not have to testify or even offer any evidence; the basis for the defendant's theory may derive from the testimony of government witnesses on direct or cross-examination. Finally, the evidence to support a theory

of defense need not be overwhelming; a defendant is entitled to an instruction on a theory of defense even though the evidentiary basis for that theory is weak, inconsistent, or of doubtful credibility." *United States v. Parker*, 267 F.3d 839, 843 (8th Cir. 2001) (quoting *United States v. Scout*, 112 F.3d 955, 960 (8th Cir. 1997) (internal quotations and alterations omitted)).

Again, until evidence is presented to the court at trial of this matter, the government's motion is decidedly premature. The question is not whether the Defendant is entitled to present the defense of public authority; clearly he has the right to do so. The question is whether the evidence at trial reasonably supports that defense. Since trial of this matter has not yet occurred and the government cannot predict the range of evidence that may be presented by Defendant DeMars either through cross examination or in his case in chief, the government's in limine motion to attempt to prevent him from offering a defense of public authority should be denied.

Finally, nothing about Defendant's notice or alleged lack of information prohibits exercise of the defense. Counsel for DeMars provided the government, on June 7, 2016, the names of the Forest Service officials upon whom he will rely to support his defense. His reliance will also be on Forest Service documents and his own testimony. The documentary evidence is all known to and previously possessed by (in fact drafted by) the Forest Service, the entity that issued the citations herein and for whom the prosecution proceeds. The government has full notice of the entirety of the facts, circumstances, and persons upon which DeMars relies for proof of his defense. To the extent not completely explained by his notice, DeMars' theory and position regarding his defense of public authority is fully laid out in his motion to dismiss which

the government now has almost two months prior to trial. Any claimed lack of notice by the government is simply unfounded on the record at this point.

3. <u>Alternative Defense of Entrapment by Estoppel</u>.

At trial, Defendant DeMars, in addition to the defense of public authority for which notice is required under Rule 12.3, reserves the right, should he choose to do so, to also present a defense of entrapment by estoppel. This defense involves the "unintentional entrapment by an official who mistakenly misleads a person into a violation of the law." *United States v. Brebner*, 951 F.2d 1017, 1025 (9th Cir. 1991) (quotation omitted). The defense of entrapment by estoppel applies "when an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advise and continues or initiates the conduct." *United States v. Achter*, 52 F.3d 753, 755 (8th Cir. 1995).

To prevail on a defense of entrapment by estoppel, a defendant must show that an official assured the defendant that certain conduct was legal and the defendant reasonably relied on that advice in continuing or initiating the conduct for which he was subsequently charged. *United States v. Kieffer*, 621 F.3d 825, 833-34 (8th Cir. 2010). The defendant must establish a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries. *Id*.

CONCLUSION

For these reasons, Defendant DeMars respectfully submits the government's motion in limine and attempt to deny him, at this early stage, the defense of public authority which he is Constitutionally entitled to present at trial should be rejected by the court and the government's "denial" and motion in limine denied in total.

Dated this 8th day of June, 2016.

Respectfully submitted,

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Federal Public Defender
By:

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