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6 ULYSSES SIMPSON GRANT EARLY

7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 RYAN McGOWAN, ROBERT
14 SNELLING, ULYSSES SIMPSON
15 GRANT EARLY IV, and THOMAS
16 LU,

17 Defendants.

CASE NO.: 2:12-CR-00207 TLN

DEFENDANT GRANT EARLY'S
MOTION IN LIMINE #1

Evidence of Affirmative Defenses During
the Government's Case-in-Chief

Trial Date: September 29, 2014

Before: Honorable Troy L. Nunley

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19 To the United States Attorneys for the Eastern District of California and this
20 Honorable Court:

21 Please take notice that Defendant ULYSSES SIMPSON GRANT EARLY, IV
22 hereby moves the Court for an Order admitting evidence of affirmative defenses
23 during the Government's case-in-chief.

24 During the hearing on Defendants' Motion to Dismiss, the Court indicated
25 that the defendants' might make appropriate motion for acquittal during the trial.
26 The purpose of this Motion is to insure that the introduction of evidence during the
27 government's case will not waive the defendants' right to a motion for judgment of
28 acquittal, pursuant to Fed. R. Crim. P. 29(a), at the close of the government's case.

1 **Factual Basis for Motion**

2 Defendant EARLY filed a Notice of Affirmative Defenses on February 12,
3 2013 (Doc #66) and filed Supplemental (Doc #121) and a Corrected Supplemental
4 Notice (Doc #122) of Affirmative Defenses on September 8, 2014.

5 Furthermore, the Defendant’s Discovery Motions (Docs # 64, 65, 67, 79) and
6 all of his Motions for Dismissal (Docs # 90, 91, 92, 93, 94, 95, 108, 109, 110,
7 111,119) are predicated on his making the affirmative defenses of Entrapment by
8 Estoppel and Public Authority. (The doctrines are actually variations on a theme.)
9 Additionally, the undersigned counsel has had several discussions with Mr. Wong
10 and Mr. Anderson relating to these defenses.

11
12 **Argument**

13 There is absolutely no legal basis for the proposition that introduction of
14 evidence by the defense in the course of cross examining a witness during the
15 government’s case-in-chief waives the defendant’s right to make a motion for
16 judgment of acquittal at the close of the government’s case. The only authority on
17 point was directly to the contrary. See *Beaudine v. United States*, 368 F.2d 417, 425
18 n.13 (5th Cir. 1966).

19 In *Beaudine*, which was a fraud case involving a significant number of
20 documents, the court on appeal addressed two “mechanical problems which seemed
21 to vex the trial of the case.” *Id.* The “more serious” problem arose from a
22 procedure, apparently a time-honored one among Florida lawyers and Judges, by
23 which documents can be identified only on cross examination reserving to the cross
24 examiner’s own “case” the opportunity to reveal either the contents of the identified
25 paper or offer it in evidence. *Id.*

26 The Fifth Circuit criticized this practice:

27 Considering the valuable right of a defendant to stand on
28 the motion for judgment of acquittal, Fed. R. Crim. P. 29;
Jackson v. United States, 250 F.2d 896, 901 (5th Cir.
1958), and the hazard that comes to one who undertakes

1 to put on a case after the motion is denied, it is difficult to
2 see how evidence (documentary or oral) which is relevant
3 is to be kept from the jury's consideration until the
Government's case is all over and the defendant is forced
to put on a case.

4 *Id.*

5 The "waiver rule" often discussed in relation to Rule 29 motions has nothing
6 to do with the defense introducing evidence in the course of cross examining the
7 government's witnesses; rather, it pertains to whether the defendant waives his or
8 her right to have the Rule 29(a) motion considered solely on the basis of the
9 government's evidence where the defense has introduced evidence during its
10 case-in-chief. See *Cephus v. United States*, 324 F.2d 893, 895-96 (D.C. Cir. 1963)
11 (discussing the evolution of the waiver doctrine). Where the defense introduces
12 evidence in presenting its own case, it is now clear that the defendant waives his or
13 her right to have the Rule 29 motion considered solely based on the government's
14 evidence. See *United States v. Foster*, 783 F.2d 1082, 1085 (D.C. Cir. 1992) (en
15 banc). The *Foster* court held that:

16 a criminal defendant who, after denial of a motion for
17 judgment of acquittal at the close of the government's
18 case-in-chief, proceeds with the presentation of his own
19 case, waives his objection to the denial. The motion can of
course be renewed later in the trial, but appellate review
of denial of the later motion would take into account all
evidence introduced to that point.

20 *Id.*

21 The clear implication of *Foster* is that where the defense introduces evidence
22 during the government's case, that evidence should be considered by the court when
23 it rules on the Rule 29 motion at the close of the government's case. There is no
24 basis from which to infer that the waiver rule results in the defendant waiving his
25 right to make the motion; rather, the rule simply requires that the court consider
26 all of the evidence presented in making its determination. See *id.* at 1084 (noting
27 that "the operative principle" is not really one of "waiver," but rather that by
28 presenting evidence the defendant "cannot insulate himself from the risk that the
evidence will be favorable to the government" (quotations and citation omitted)).

1 The courts have repeatedly noted the importance of the defendant's right to
2 make a motion for judgment of acquittal, see, e.g., *Cephus*, 324 F.2d at 895,
3 *Beaudine*, 368 F.2d at 425 n.13; and no court has ever held that introduction of
4 evidence deprives the defendant of the right to make such a motion.

5 Thus, defense evidence that fills gaps in the government's case may be relied
6 upon by the court in denying a Rule 29(a) motion at the close of the government's
7 case. There is no authority of which the defense is aware to support the proposition
8 that the defense, by introducing evidence, waives its right to make such a motion.

9 Thus, the defense seeks an advance ruling that documents may be admitted
10 by the defense during the course of cross examining the government's witnesses
11 without waiving the defendants' rights to a motion for judgment of acquittal at the
12 close of the government's case.

13
14 **Conclusion**

15 The Court should admit evidence of Defendants' affirmative defenses during
16 the government's case-in-chief and consider that evidence for any and all motions
17 made during the trial or at close of the government's evidence.

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19 Respectfully submitted, September 8, 2014

20 /s/ Donald Kilmer

21 Attorney for Defendant EARLY
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