U.S. v. Fry & SCHAFER

AP: Anne Pings
BG: Brenda Grantland
BM: Barry Morris
FJ: Female Judge
MJ: Male Judge

BM: Good morning Your Honor, Barry Morris appearing on behalf of Marion Fry. I will be reserving five minutes for rebuttal which will be done by co-counsel Ms. Grantland.

MJ: Okay so you're gonna do the opening and Ms. Grantland will do the closing.

BM: Exactly. I'm gonna discuss two issues in the case, basically the first two issues raised in the brief which really point to two areas. One federal involvement and the other reliance. Now there really is no question in the case that the sheriff's deputies who came to the residence of Dr. Fry and Mr. Schafer were working on behalf of the federal government. They were investigating, they were following up on a federal investigation and if there's any questions just ask Ms. Pings, she was the prosecutor in that investigation.

MJ: Well it's not quite that simple Mr. Morris. As I read the record, the first time the El Dorado County sheriff's officers visited the property there was no federal DEA investigation that was open, is that correct?

BM: That's correct.

MJ: So then the question becomes, at some later point months later when the deputies came back, that was after there had been a raid on a grow operation run by some current or former employees of your client.

BM: Well not quite, but they were involved. That's correct.

MJ: Okay. And so they were there at the request of the DEA to conduct an investigation into what they knew about the activities of these other folks whose ranch had been raided.

BM: That's correct.

MJ: Okay. Now that we're straight on the record.

BM: Okay. Well but you see the problem is is that we don't really, the record is not really clear on this as there was no evidentiary hearing. The evidentiary hearing

FJ: Not clear on what?

BM: Not clear on the extent of the involvement that particularly, Detective Ashworth. We know that he was trained by the DEA to do aerial surveillance. We know that he did 25

over flights prior to going to see the, the, Mr. Schafer and Dr. Fry at their residence, so that had there been an evidentiary hearing it may have turned out that they were in fact working for the federal government prior to that, we don't know that.

FJ: But isn't that speculation and does speculation entitle you to an evidentiary hearing?

BM: No speculation doesn't entitle you to an evidentiary hearing. What does entitle you to an evidentiary hearing is when there are conflicts in the facts and where the facts if alleged would establish a defense, you're entitled, I mean establish a proposition, you're entitled to an evidentiary hearing. We

FJ: What evidence was there in the record that these state officers had authority to bind the federal government?

BM: Well I'm glad you brought that up because the, the word, you know as I mentioned in the brief the word estoppel is used in many different contexts. Estoppel for example in a commercial context where an agent has to have authority to bind the principal in order to make, bring an estoppel. But estoppel here doesn't talk about binding the federal government. In other words the federal government, if an authorized agent

MJ: _____ do.

BM: If I could follow this out Your Honor.

MJ: Sure.

BM: In other words if, if, if an authorized federal agent, say the, the head of the DEA walks over to Dr. Fry and says your grow is legal, that doesn't change the law. That doesn't wipe out any prohibition that might be against what, the growing of marijuana. All that does is say that it's unfair to prosecute somebody when in fact they've been informed by a responsible official that in fact they can grow marijuana.

MJ: But isn't that, that's an agency inquiry is it not? A classic agency law is the speaker authorized to bind the principal?

BM: In commercial sense, correct. But the binding here is not in a sense that the law is changed but in the sense that the government forfeits the right to prosecute those who would inform that their conduct was legal.

MJ: But your, your argument would be much stronger if it was a DEA agent who had visited the property. The problem that I have with your argument is that the speaker is a state law enforcement officer

BM: Except for the

MJ: And you, let me finish the question. And you want us to infer that he was an authorized agent who's speech could bind the federal government for estoppel purposes, and that's where I've got a concern.

BM: Okay, two things. First of all he, he was being used in, in, you know the question of bind itself to a fact that the DEA in Northern California uses local agents. You have all these cases coming before the court and this is, there's no secret. The DEA was using local agents cause they don't have manpower to cover Northern California.

FJ: Using local agents to do investigation, and authorizing those agents to bind the federal government are two separate inquiries.

BM: Yeah but if you, you're binding in a sense that you're using the commercial sense, you're right. But this is not a commercial issue. This is a question of fair warning. This is a question of whether or not the government can prosecute those who would advise. Let me get to the questions you raised.

MJ: Go ahead.

BM: It is clear this court had already ruled in United States v. Fort, that state agents who assist in a federal investigation are considered federal agents.

MJ: No, that's not what we said in Fort. We said that for purposes of Rule 16 discovery that we would treat the investigation reports and the incident reports of the San Francisco Police Department that were later used in a federal RICO prosecution the same way that we would treat an FBI 302 for purposes of whether or not they had to be produced. That's a very different question.

BM: Except for the fact

MJ: For the agency.

BM: Except for the fact that in the quest for that opinion the court discussed the fact that federal agencies use local state actors and said that it makes no sense not to treat them as federal actors when they are in fact working under one investigation. There was no state investigation here.

MJ: _____ discovery of their offense report.

BM: Well then you have

MJ: It's a different issue counselor. You're, I think Judge Rawlinson put in on the head, you've got two distinct notions here and you're arguing the two interchangeably and I don't think the law recognizes that.

BM: Okay. Well, the fact, in fact there is no dispute that the officers were acting on behalf of the DEA. They were there, the DEA

MJ: Conducting investigations. I don't think I don't think Ms. Pings would disagree with that statement.

BM: Fine. Well then why didn't she tell the district court that at the time? That's what I don't understand. Why did the

FJ: So what, so what. Even if they, even if the state officers were investigating on behalf of the DEA, how do you make the leap that they were authorized to speak on behalf of the DEA in terms of the legality of the activities?

BM: The fact, if indeed, they were in no different position than if one of the DEA came along with them and told them that what you're doing is fine. They're in no different position, they are performing the function of a DEA agent in the middle of a federal investigation that their salary is paid by the state is irrelevant under these circumstances.

FJ: But our cases say exactly the opposite. That state actors, even if they're acting under the direction of the DEA, they haven't been given the authority to bind the DEA, to speak on behalf of the DEA, if they haven't become special DEA agents by virtue of authority vested in them, how can they bind the DEA?

BM: Well personally I would take issue with the court's statement that our cases say that. I haven't found a single case that said that a state agent working on behalf of the DEA isn't treated as a, as a federal agent. I haven't found one, and I don't think that the government cited any such cases. The government cited a raft of cases that say that state agents acting alone can advise on federal law. Which is the way it should be.

MJ: Mr. Morris, let me move to the second issue

BM: Oh sure

MJ: on entrapment which is reliance. And the district court looked at the patient forms that clearly say distribution of marijuana is illegal under federal law and I guess purport to distance your client from any suggestion by the patient that the doctor was urging a violation of federal law.

BM: Your Honor, murder is illegal. But self-defense is an affirmative defense. So if a person says that murder is illegal that doesn't mean they can't act in self-defense.

MJ: Now you're getting into medical necessity and that's a different question. The question I'm asking you is reliance. And the district court thought that the existence of those forms was fatal to your argument that the, that there was entrapment here.

BM: And the district court was wrong. Because simply saying that marijuana is illegal does not mean that there isn't a medical necessity defense and doesn't mean that they can't rule out—see in other words when the officers came out here and said

MJ: _____.

BM: No, no, I got it. I'm getting to what you're getting at. The officers came out there and said words to the effect what you're doing is fine, legal, whatever they, whatever terminology they used they assured that, that there wouldn't be a problem.

FJ: Counsel, did they encourage larger quantities to be grown?

BM: They encouraged them to continue doing what they were doing, which ended up being larger quantities. Again, we don't have an evidentiary hearing. The issue is whether or not the defense was deprived of the ability to present their evidence to the jury, not whether or not they proved entrapment by estoppel.. One last, I've got about 25 seconds left. One last thing, on the reliance on OCBC, frankly the only reason you can't rule out, you can't rely on it is if there's a split in the circuits. It's not my favorite notion of logicalness so that means you'd have to look up 12 different circuits to see if anybody disagrees, but be that as it may that's the way the Supreme Court's left it.

MJ: The problem with that argument is that you, you've got gaps again. You've got about a four month period where they were growing marijuana before any federal court had opined on this issue.

BM: Okay,

MJ: You've got a period where they continued to grow marijuana after the Supreme Court decision came down, so that doesn't get you where you need to go.

BM: Well it does in terms of the quantity. Because if it, it was legal to do it to for medical necessity during the period in which OCBC was good law then you'd be under 100 plants and then you wouldn't have the mandatory minimum.

MJ: Okay.

BM: With that I

MJ: Thank you Mr. Morris. We'll hear from the government.

AP: Good morning Your Honor, if it please the court I'm Anne Pings on behalf of the United States. A couple of issues, starting with the entrapment by estoppel, I think it's worthwhile to look at the record and figure out exactly what was on the record at the time that the district court made its pretrial ruling, because there is some reference in the defendant's brief that suggests that some of the statements that came later, the proffers by the defendant that got better over time as it got closer to sentencing, that some of those were actually in front of the district court at the pretrial stage. And they were not. What was before the court at the pretrial stage was the sentence essentially that the local sheriff's deputies McNulty and Ashworth were working on behalf of the federal government, the DEA, in interviewing the defendants about the other case, and then a separate statement that McNulty told Schafer his medical marijuana activities were lawful. That was the, that was the entire proffer in district court at the pretrial stage, at the motion stage. And essentially it's just, it's a barebones conclusory allegation by counsel, was not supported by any particular offer of proof and in fact there was a tape in existence of the interview

MJ: I thought there was a declaration by Mr. Schafer that alleged that he has been assured by Sergeant McNulty that it was, what he was doing was okay.

AP: Those were put into the record later.

MJ: Before, or after the district court had ruled?

AP: I believe that's correct. But he, well, there's two issues, I mean there's two individuals. There's McNulty and Ashworth. There were no declarations about Ashworth until the sentencing phase.

MJ: Right. I, I know I read at least one declaration, maybe two, that Mr. Schafer signed.

AP: That's, those were offered at the stage of sentencing by entrapment after I believe the issues were decided.

MJ: After what issues were decided?

AP: The motion in limine and the, the presentation of the defense and the—

MJ: Ms. Pings I'm not sure that's right.

AP: Okay.

MJ: I'm looking at a declaration by Sergeant Timothy McNulty dated December 21, 2005 which is appended to I guess it's the Government's Consolidated Response to the Defendant's Motion to Dismiss where he's denying the allegations in a bid(?) made by counsel on behalf of Mr. Schafer. Was there no declaration attached to the defense motion?

AP: There was a declaration from Mr. Sera stating that the facts that he asserted in the motion were true to his knowledge.

MJ: Yeah, I see it.

AP: There was no declaration from Mr. Schafer until later.

MJ: That's, that's the declaration that also attaches the drug czar's rules?

AP: Yes. Yes.

MJ: Okay.

AP: So the record at the time the district court ruled was, is not the same as is represented in the defendant's brief which includes those later declarations which seem to get more, add more facts as time goes on. The, I would just like to point out that there, that the district court also made its decision on the entrapment by estoppel not by looking at any factual conflicts and in fact made no reference to Sergeant McNulty's declaration at all, and based it entirely on the proffer. And I think that's clear from his, the court's ruling reflected on pages 183 and 189 of the, of the excerpts of record that the, it was not a factual conflict that he resolved, it was purely based on the insufficiency of the proffer that there were any representations made about the federal law. And going to the reliance and the reasonableness of the reliance—

FJ: Counsel, before we leave that point, what's your response to opposing counsel observation or representation, I hope I'm paraphrasing it correctly that there is no case that says that a state official cannot bind the DEA when the state of, state officer is investigating on behalf of the DEA? What's your, what's your response to that observation?

AP: I'm not sure that that's, I'm not sure there's a case that's exactly on point for a joint investigation. I think there are cases that the principal is the same when they're working jointly or someone is working in some collateral role with the federal government. It's—

FJ: What's your strongest case, to refute the argument that if a state officer is working on a task force that officer gets federal status for purposes of estoppel by entrapment.

AP: Well, we cited to the Spires case which refers to a task force and then there's, there's numerous other cases, the Redner case.

FJ: What's your best case?

AP: They're all good [all laugh]. I'm sorry, I know I, I'm sorry, I'm not prepared for that answer at this point. I'm sorry. I apologize. I realize that that's a classic question, I should have been prepared for it.

FJ: Well it's an important question because that's his main argument is because these state officers were a part of a federal task force they become empowered to bind the federal government, that's his argument.

AP: But that's not, that's not supported by the record. There was no task force. There were, the, our system of government there are state agents that exist and there are federal agents that exist. They sometimes work in conjunction. It was not a task force and something else

FJ: Well you don't dispute that the state officers were acting on behalf of the DEA do you?

AP: There, I, I think that's a conclusory statement. I, one fact that is—

FJ: What's the, what's the fact?

AP: Well there's one fact that I think is essential which is misstated in the defendant's brief. The DEA did not indicate that he would not participate in any prosecution. He only said he would not participate in the prosecution without further evidence. So all along there is entirely the possibility totally unacknowledged that their activities were also in violation of state law. So—

FJ: Well but the, the fact of the matter is they were prosecuted federally.

AP: That's, that's ultimately

FJ: And the investigation was, they reported back to the DEA.

AP: That's correct.

FJ: They didn't report back to the sheriff, they reported back to the DEA.

AP: They worked in conjunction. Yes that's correct.

FJ: Okay, so why doesn't that transform them into federal agents? That's the question I'm asking and that's the point opposing counsel is making. They were working for the DEA, they reported back to the DEA, they were prosecuted federally so why doesn't this become a federal matter such that these officers were authorized to bind the DEA?

AP: Well a couple of things. The decision to prosecute federally obviously was not made until the end of the investigation. The statement that they worked for the, that they were doing that one interview on behalf of the DEA occurred a year after their activities had begun. The, the fact that they worked together is not enough. The law requires more.

FJ: What case? That's why I asked you, what's your case that says the fact that they worked for the DEA is not enough?

AP: It's not one particular case, it's all the cases that require a specific delegation and empowerment that says, that that gives the power and I believe it was Your Honor that referred to it, sometimes there is formal deputization but none of these facts are present. There was no explicit formal empowering to these sheriffs to give this information. And the information was given in a context where the feds are enforcing Oakland Cannabis Buyer's Club in San Francisco and where they're there to interview them about other people that are being prosecuted federally. So the, and state and federal law are vastly different at this time and the, the idea that this reliance was reasonable is not, is not borne out by the record or the context. I, I—

FJ: I gather the district court thought that the weakness in the defendant's case was that they could not identify a specific federal agent that had directed this. Is that an accurate statement?

AP: The statement was that the, the defendants had failed to identify a federal officer who had given them the, told them that their conduct was permissible under federal law. So it's two prongs. The failure to mention the specified federal law and that there was the failure to identify someone who was actually empowered. That's the district court's ruling. Okay. With respect to the Oakland Cannabis Buyer's Club I, I would point out something else from when we're reviewing the actions of the district court in the context of over 43 pretrial motions, many filled with conclusory allegations that in that context when the defendants made their arguments about the Oakland Cannabis Buyer's Club case, they asked for a motion to dismiss, they asked for a mistaken reliance on traditional opinion instruction, they asked for different motions in limine, they never asked and they never proffered for the ability to present a necessity defense under Aguilar which is even in this court's opinion was acknowledged it said that if the government had chosen to proceed criminally rather than by civil injunction that defendants could have presented Aguilar defense in due course. That is not ever what the defendants asked for. They asked for reliance on state laws, they, in their motion for jury instructions they attached

numerous instructions none of which are for the same necessity defense that's referred to in the OCBC case. And that's Exhibit E to their motion which is not excerpted in the record but it I think shows what was before the district court which was old jury instructions from the Rosenthal case, none of which included specifically a necessity defense as defined even under the OCBC decision that they seek, or saying that they should have been allowed to

MJ: If a necessity defense isn't based on medical necessity what is it based on? I don't understand what you just said.

AP: Well there was, the, this issue is fairly complicated, we're looking at different periods of time and that's what, type of thing. What the Ninth Circuit was, essentially what this court said was, to the district court, no, you're injunction is overbroad and of course injunctions are different than interpreting criminal statutes. There's area for equitable relief

MJ: Let's go back to necessity.

AP: Okay.

MJ: I, I'm sorry counselor I just don't understand your argument. There's one necessity defense here which is medical necessity

AP: Right. And they've never asked for that was what, is what the record will show they asked for that OCBC it's, it's temporary pendency should have allowed them a motion to dismiss, that it should have allowed them to present reliance on state law, that it should have allowed them to present mistake of law defense, that it should have allowed them to

MJ: But those aren't necessity defenses, there's a classic necessity

AP: But, that's my point.

MJ: Defense is I put a gun to your head and tell you to go rob the bank or I'm gonna kill you or your family and so the law recognizes that maybe we're gonna allow you to defend against the bank robbery charge.

AP: That's exactly my point. They never asked for a classic necessity defense. They cited to OCBC and said so based on that you shall, you should dismiss our indictment. Marijuana was totally legal in that timeframe. Which of course that's not what it says. They said well if you won't dismiss our indictment you should let us introduce reliance on state law as our defense. Since this case was pending you should let us introduce a, an instruction from Rosenthal about mistake of law in fact. They never asked for the or proffered anything about a defense or instruction that they examined all the options, that there were no legal alternatives, that they weighed the, all the factors laid down in Aguilar or even ultimately from the line of cases even ultimately defined by the district court. That defense that the district court went back on remand, they never proffered that. They never said let us present that. Because they couldn't and because, and he district court should not have been required to guess that that's what they wanted to do rather than

what they specifically asked for. With respect to the, I guess I should resist this temptation but it's difficult, the allegation that there was information not provided to the court that was concealed from the court by the prosecutor, I would just direct the court to the transcript of the colloquy with the district court and particularly the excerpt of record page 8 and page 13 makes it perfectly clear that the discussion is about Special Agent Keith and the investigation of these particular defendants and not about the involvement in the interview or investigation of the other defendants. And if there's no further questions.

MJ: Involvement of the interview regarding the raid on the ranch, is that what you're referring to?

AP: Yes.

MJ: Okay. Anything further?

AP Thank you.

UNITED STATES v. SPIRES III

UNITED STATES of America, Plaintiff-Appellee, v. Leroy SPIRES, III, Defendant-Appellant.

No. 95-40176.

-- March 21, 1996

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and SCHWARZER,District Judge.1

Tonda Lynne Curry, Assistant U.S. Attorney, Mike Bradford, U.S. Attorney, Tyler, TX, Cisselon-Simone Nichols, U.S. Attorney's Office, Tyler, TX, for plaintiff-appellee.Terrence W. Kirk, Joseph Andrew Turner, Law Office of Joseph A. Turner, Austin, TX, for defendant-appellant.

Defendant appeals his conviction and sentence contending that the law he broke, 18 U.S.C. § 922(g), is unconstitutional, the judge improperly instructed the jury and his sentence is too harsh. None of his contentions merit reversal.

Leroy Spires is a convicted felon who, while on state probation, was charged with a drug violation by Texas authorities. In return for leniency, Spires and his wife agreed to cooperate with the West Central Texas Interlocal Crime Task Force. During their service to the task force, Spires and his wife showed a task force agent a gun in their truck that was owned by Mrs. Spires. The task force agent told the couple that they could not carry a gun and that they should leave the gun in the truck and put it away at home.

Over a year later, Spires met with his state probation officer, Janice Hale. Spires told Hale that he had a gun in his truck and intended to pawn it. Hale reminded Spires that one condition of his probation was that he not possess a firearm. After Spires left the meeting, Hale followed Spires to the pawn shop and reported him to the police. The police arrested Spires several hours later. After receiving his Miranda warnings, Spires admitted that he had pawned the gun.

Spires pleaded not guilty to possession by a felon of a firearm which had been previously shipped in interstate commerce in violation of 18 U.S.C. § 922(g). Spires was convicted and sentenced. On appeal, Spires argues that § 922(g) is unconstitutional under the reasoning of United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), that he was entitled to a jury instruction on the defense of entrapment by estoppel and that the district court abused its discretion when it denied Spires a two-level sentence reduction for acceptance of responsibility.

Spires argues that the reasoning of Lopez, which held 18 U.S.C. § 922(q) unconstitutional, renders § 922(g) unconstitutional as well. Because Spires did not challenge the constitutionality of § 922(g) at trial, we review only for plain error. United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); United States v. Calverley, 37 F.3d 160 (5th Cir.1994) (en banc). To be plain, the error must be clear under law current at the time of trial.

Olano, 507 U.S. at 734, 113 S.Ct. at 1777; Calverley, 37 F.3d at 162-63. "[T]hey are errors which are so conspicuous that 'the trial judge and prosecutor were derelict in countenancing [them], even absent the defendant's timely assistance in detecting [them].' " Calverley, 37 F.3d at 163 (citing United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)).

Spires argues that we must consider Lopez even though rendered after his trial because Lopez establishes a new rule of conduct for criminal prosecutions and must be applied retroactively. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); United States v. Knowles, 29 F.3d 947 (5th Cir.1994). We do not decide whether this case falls within the parameters of Griffith or Knowles because, even after Lopez, the failure to address the constitutionality of § 922(g) when not raised by defendant is not plain error.

In Lopez, the Supreme Court held that in enacting 18 U.S.C. § 922(q), which criminalizes possession of a firearm in a school zone, Congress exceeded its power under the Commerce Clause. The court held that the possession of firearms on school grounds did not substantially affect commerce because § 922(q) was not an essential part of a larger regulation of economic activity and it did not contain a jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession affected interstate commerce. Lopez, 514 U.S. at ----, 115 S.Ct. at 1631. Lopez does not address § 922(g). It does not determine whether § 922(g) is an essential part of a larger regulation of economic activity nor does it address whether the § 922(g) requirement that the firearm have traveled in commerce ensures on a case-by-case basis that the possession of a firearm by a felon affected interstate commerce.

In contrast, the precursor to § 922(g) was upheld as a valid exercise of Congress's commerce clause power long before Lopez. Scarborough v. United States, 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977); United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971); United States v. Wallace, 889 F.2d 580 (5th Cir.1989), cert. denied, 497 U.S. 1006, 110 S.Ct. 3243, 111 L.Ed.2d 753 (1990). Additionally, § 922(g) has survived Commerce Clause challenges after Lopez in the Seventh and Ninth Circuits. United States v. Bell, 70 F.3d 495 (7th Cir.1995); United States v. Collins, 61 F.3d 1379 (9th Cir.1995); United States v. Hanna, 55 F.3d 1456 (9th Cir.1995).

The pre- and post-Lopez jurisprudence is fatal to Spires's claim of plain error. Even should Spires's contention that Lopez renders § 922(g) unconstitutional be correct, it is not plainly so.

Spires next argues that his conviction should be reversed because the district court refused to instruct the jury on the defense of entrapment by estoppel.[2] A conviction can not be overturned for failure to instruct the jury on a defense unless the requested but omitted instruction has an evidentiary basis in the record which would lead to acquittal. United States v. Duvall, 846 F.2d 966 (5th Cir.1988). The evidence at Spires's trial precludes application of the defense.

The defense of entrapment by estoppel is applicable when a government official or agent actively assures a defendant that certain conduct is legal and the defendant reasonably relies on that advice and continues or initiates the conduct. Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (convictions for demonstrating near courthouse reversed where highest police officials of city, in presence of sheriff and mayor, gave demonstrators permission to picket

across the street from courthouse); Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959) (convictions for failure to testify reversed because inquiring body told defendants they could invoke Fifth Amendment).[3] The defense is a narrow exception to the general rule that ignorance of the law is no excuse and is based on fundamental fairness concerns of the Due Process Clause. The focus of the inquiry is on the conduct of the government not the intent of the accused.

Spires is not entitled to an instruction on the defense because the task force agent is not an authorized federal government agent. To satisfy the requirements of the defense when charged with a federal crime, a defendant is required to show reliance either on a federal government official empowered to render the claimed erroneous advice, or on an authorized agent of the federal government who has been granted the authority from the federal government to render such advice. United States v. Brebner, 951 F.2d 1017 (9th Cir.1991); United States v. Bruscantini, 761 F.2d 640 (11th Cir.1985) This record reveals that the task force agent does not consider herself a federal officer or agent and has never held a federal commission. The agent's commission was held through the Jones County Sheriff's office. The task force is a federally funded but state operated investigative unit ultimately run by the Texas Governor's office. The task force and its agents are state actors. Federal funding alone does not make agents of the task force federal government officials or agents.

Spires's last complaint is that the district court erroneously denied Spires a two-level reduction of his sentencing level for acceptance of responsibility under Section 3E1.1 of the Sentencing Guidelines. Whether a defendant has accepted responsibility for a crime is a factual question and the standard of review is even more deferential than clear error. United States v. Allibhai, 939 F.2d 244 (5th Cir.1991). Because the trial court's assessment of a defendant's contrition will depend heavily on credibility assessments, the "clearly erroneous" standard will nearly always sustain the judgment of the district court. United States v. Thomas, 870 F.2d 174, 176 (5th Cir.1989).

Spires argues that because he did not dispute his factual guilt and admitted all elements of the offense, he is entitled to the reduction. He relies on Application Note 2 of § 3E1.1 which states in part:

In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

Sentencing Guidelines § 3E1.1, Application Note 2 (1994). This case is not one of those "rare situations." Compare United States v. Fells, 78 F.3d 168 (5th Cir.1996) (defendant challenged legality of conviction in improper venue). At trial, Spires put forth two defenses, entrapment by estoppel and duress, both of which required proof of additional facts. The record reveals that these additional facts were disputed at trial and Spires's version of the facts was rejected by the jury.

We are persuaded by the Ninth Circuit's treatment of a similar argument in United States v. Molina, 934 F.2d 1440 (9th Cir.1991). In Molina, the defendant admitted the factual elements of the offense but presented the defense of entrapment. The court recognized that by its very nature, the defense of entrapment requires an admission of the actual criminal activity. The court nevertheless found no error in refusing the reduction where, on defense of entrapment, the defendant provided "a story very different from the one the government offered." Molina, 934 F.2d at 1450-51.

We AFFIRM Spires's conviction and sentence.

FOOTNOTES

2. Defendant alludes to but prudently does not raise a similar defense of acting under public authority. The public authority defense is available when the defendant is engaged by a government official to participate or assist in covert activity. United States v. Achter, 52 F.3d 753 (8th Cir.1995). One of the conditions imposed by the task force on cooperating individuals is that the individual not carry a firearm. The task force agent's instruction to Spires and his wife was consistent with the task force requirements.

3. See also United States v. Corso, 20 F.3d 521 (2d Cir.1994); United States v. Smith, 940 F.2d 710 (1st Cir.1991).

4. Accord, United States v. Caron, 64 F.3d 713 (1st Cir.1995); United States v. Etheridge, 932 F.2d318 (4th Cir.1991), partial reh'g. granted on other grounds, 77 F.3d 1 (1st Cir.1996).

DUHÉ, Circuit Judge: