UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO: 10-99-RET-SCR
Versus	:	
	:	
THOMAS A. NELSON, JR.	:	

MOTION TO RECONSIDER RULING DENYING ENTRAPMENT JURY INSTRUCTION (with Incorporated Memorandum)

Comes now defendant, Thomas A. Nelson, Jr., who respectfully requests that the Court reconsider its ruling denying Nelson's requested Fifth Circuit pattern jury charge regarding entrapment, and in support shows:

I.

In opening statement, the government told the jury:

> "Now, because of the evidence that Nelson took the bribe is so strong, you may hear from Mr. Nelson that he was entrapped. He may try to raise the defense of entrapment. In other words, he may admit that he accepted the bribes, but claim that he did so only after being induced by the government. I was induced. But as you listen to the evidence over the coming days, ask yourselves whether there's any indication based on what you're hearing and seeing that the government did anything more than offer Tommy Nelson opportunities to which he enthusiastically, but sometimes cautiously, accepted? The evidence will show that these agents never pressured, they never insisted, they never cajoled, they never harassed, they never coerced, indeed, they never took advantage of Tommy Nelson."

Prior to trial, the defense tendered a proposed Fifth Circuit patter instruction to the court on the issue of entrapment. At the charge conference, the prosecutor objected to the instruction urging that Mr. Nelson had not made a *prima facie* case warranting an entrapment instruction.

The defense asked the court to instruct on entrapment, pointing out that the issue in the case was lack of predisposition to accept bribes and whether the intent to commit the offense originated with the government rather than Mr. Nelson.

The Court disagreed with the defense, apparently finding that no reasonable juror could find entrapment based on the evidence presented at trial. The Court further ruled that the jury be instructed that there is no issue of entrapment in this case.

The Court specifically noted that Mr. Nelson's predisposition to accept bribes was shown early on in the government's undercover operation when Mr. Nelson attended a Cifer 5000 marketing meeting in New Orleans on October 6, 2008, and, at the close of that meeting, accepted a ticket to a Saints football game, a hotel room, and $300 cash (the latter given to George Grace by an undercover FBI agent who later gave it to Mr. Nelson). The Court specifically described the things Mr. Nelson received at the meeting on October 6 as "bribes" taken by Mr. Nelson.

II.

With due respect to the Court, Nelson urges that the Court's central argument on predisposition, namely that the things Mr. Nelson received on October 6, were, on their face, obvious "bribes," is a factual question for the jury, and in no way conclusively establishes predisposition prior to all the other government interactions with Mr. Nelson in the ensuing three-year investigation. Viewing the evidence in the light most favorable to Mr. Nelson, a reasonable jury could conclude that the receipt of gratuities after merely being present at a marketing meeting does not by itself demonstrate predisposition to accept "bribes"—i.e, perform official acts in exchange for things of value.

III.

Moreover, Mr. Nelson presented the jury ample evidence of non-predisposition. Both Scott Byrd and Lynette Nelson testified that the Tommy Nelson described by the government was inconsistent with the reputable Tommy Nelson they knew *before* the government's investigation. In addition, not a single government agent could identify any credible or verifiable act of bribery by Mr. Nelson *prior* to the government's investigation. Under the circumstances of this case it is simply not possible for Mr. Nelson to develop predisposition *after* the government initiated its sting operation.

IV.

In sum, Nelson submits that on the evidence presented in this case, he is entitled to a jury instruction on his entrapment defense. As shown by the very instructive Fifth Circuit case, *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir.2009) (a case in which the defendant's conviction was vacated and remanded for a new trial due to the district court's failure to give a requested entrapment instruction), Nelson's conviction without that instruction cannot stand. As noted by the Court in *Theagene*, in an analysis that applies squarely to Nelson's case;

> A lack of predisposition can appear from, for example, lack of prior interest or experience related to the crime, significant hesitation or unwillingness, or attempts to return discussion to lawful conduct. In *Bradfield*, a government informant importuned defendant *Bradfield* approximately eighteen times to participate with him in a drug deal, before *Bradfield* finally acquiesced. 113 F.3d at 523. There was no evidence that *Bradfield* "had ever shown an interest or willingness to participate in a drug deal before he met [the government informant]." *Id.* at 523. We held that *Bradfield* made a prima facie showing of non-predisposition. *Id.* Similar reasoning led the Fourth Circuit to vacate a conviction and remand for retrial with an entrapment instruction, in a case with facts similar in some ways to the present case. In *United States v. Sligh*, 142 F.3d 761 (4th Cir.1998), an IRS agent, after attending a bribery awareness course, became convinced that a taxpayer who had called her several times intended to bribe her. *Id.* at 764. Through multiple conversations and ultimately in-person meetings, the taxpayer

"never made ... an overture [of bribery] and in fact ... ignored [the agent's] multiple suggestions of wrongdoing and her initial suggestions of a bribe." See *id.* at 766-67. Nonetheless, the agent persisted until the taxpayer finally bribed her. *Id.* The Fourth Circuit, applying a "more than a scintilla of evidence" standard, held there was evidence the IRS had "implanted the bribery scheme in a mind that had never contemplated bribery," and that an entrapment instruction was appropriate. *Id.* at 762, 767.[1]

* * *

Having concluded that Theagene made an adequate showing of both lack of predisposition and government inducement, we also conclude that the evidence could raise a reasonable doubt on entrapment. Cf. *Nations*, 764 F.2d at 1079 ("[A]lthough we concluded that a reasonable jury would not necessarily have had a reasonable doubt concerning entrapment, we also conclude that, on the evidence, a reasonable jury could have had a reasonable doubt concerning entrapment."). We have concluded that the sending of the $500 envelope was, by itself, not conclusive as to predisposition, and that the October 5, 2006 phone call arguably suggests there was none. The strongest evidence supporting a finding of predisposition concerns Theagene's conduct at the restaurant meetings, but those meetings occurred after the October 5 call, which we have concluded provided some evidence of government inducement. This evidence, in this chronological sequence, would permit a reasonable jury to conclude that the prosecution failed to prove criminal intent originated with Theagene rather than the government.

We therefore hold that Theagene made out a prima facie case of entrapment and was entitled have the jury consider his case with a proper instruction on that defense. It is undisputed that Theagene properly requested the entrapment instruction below, and that the defense, if credited by the jury, would preclude a guilty verdict. Accordingly, the trial court "err[ed] reversibly by not adequately charging the jury on the theory of entrapment." See *Gutierrez*, 343 F.3d at 419.[2]

V.

In Mr. Nelson's case, there has been sufficient—and, indeed, substantial—evidence in the

[1] *United States v. Theagene*, 565 F.3d 911, 920 (5th Cir.2009).

[2] *Id.* at 924.

record that he was not predisposed to commit the offense of bribery, and that the government agents' three-year investigation crossed the line from criminal investigation to criminal creation—from mere solicitation to inducement. This being so, Nelson submits that it will be reversible error for the trial court to refuse to instruct the jury on Mr. Nelson's sole theory of defense: entrapment. For the foregoing reasons, Mr. Nelson requests that the Court reconsider its ruling denying the Fifth Circuit pattern entrapment instruction.

RESPECTFULLY SUBMITTED:

s/ MichaelA. Fiser
MICHAEL A. FISER
Attorney at Law
830 Main Street
Baton Rouge, LA 70802
Phone: (225)343-5059
Fax: (225)336-4667
Email: michael@fiserlaw.com
Bar Roll No: 28575
Local Counsel for Defendant

s/ Page A. Pate
PAGE A. PATE
Pate & Brody, LLP
101 Marietta Street, Suite 3300
Atlanta, Georgia 30303
Phone: (404) 223-3310
Email: ppate@patebrody.com
Georgia Bar No. 565899
Visiting Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that, on June 22, 2011, a copy of the foregoing motion was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to AUSA Corey Amundson and all counsel of record by operation of the Court's electronic filing system.

s/ Michael A. Fiser
MICHAEL A. FISER