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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, ) CR 05-1499-TUC-RCC  
Plaintiff, ) **ORDER**  
vs. )  
DANIEL M. STRAUSS; )  
SHANTI AMELIA SELLZ, )  
Defendants. )

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The Court has taken under advisement the objections filed to the report and recommendation of the Magistrate Judge. The Defendants' motion to dismiss and the Government's motion to preclude the defense of public authority and various other issues that have been raised by the Magistrate Judge will be addressed in this ruling.

The Court has reviewed all the pleadings and the transcripts of the hearing held before the Magistrate Judge and the argument before the Court on these objections. The Court has read the transcript, listened to the tape of the April 21, 2005 meeting and reviewed all exhibits.

The basic facts of the case seem to be undisputed. It is the conclusion that one draws from those facts that bring this action into focus. The Magistrate Judge did a masterful job of setting forth those facts in his report and recommendation. Therefore the Court will not attempt to restate them here at length, except when needed to explain or clarify an issue.

1           The Defendants are charged with transporting illegal aliens and a conspiracy to do the  
2 same. The *mens rea* for the crimes is either intentionally, knowingly or in reckless disregard.

3           In 2004 and 2005, the Defendants were volunteers with an organization or coalition  
4 of humanitarian aid groups known as No More Deaths. (NMD). Each had gone through the  
5 training regiment of NMD and were quite familiar with what is known as the " protocol."  
6 The protocol essentially provides for the transportation of illegal aliens:

- 7           1. For the purpose of medical care;
- 8           2. In an open and notorious manner; and
- 9           3. Only after receiving assurances from trained medical personnel that transport was  
10 necessary, and only after approval from legal counsel that it was permissible to provide the  
11 transportation.

12           At the time of the incident at issue here, Defendant Santi Sellz was working with  
13 NMD during an internship with her college. She was assured by Defendant Daniel Strauss,  
14 when she arrived on the scene, that the protocol had been followed and that they had received  
15 "authorization" from medical personnel and legal counsel to transport the aliens in question  
16 in this case. Strauss had been sponsored by his college in 2004, but was not sponsored in  
17 2005 since he had graduated. He has training as an EMT but was not certified at the time.  
18 Each Defendant testified to the training that they received at NMD and that their training  
19 came from community lawyers and law professors. They were assured that the "protocol"  
20 had been approved by Border Patrol and that the transportation for these medical purposes  
21 was not a violation of the law.

22           It is important to note here that there had been several meetings between NMD and  
23 its predecessors, various community leaders and the Border Patrol. Both sides were  
24 interested in preventing the deaths of illegal immigrants, in the desert, who were and are  
25 often found in medical distress. Apparently the purpose of those meetings were to let each  
26 side know what was being done and to prevent any legal violations. It appears that both sides  
27 had the same goal, to provide humanitarian aid in a manner which would not violate the law.  
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1           The Magistrate Judge noted that for most of the time that NMD and its predecessors  
2 existed, the Sector Chief was David Aguilar. Many of the meetings that are referred to are  
3 meetings in which he participated. When he was not available, it appears he had someone  
4 attend on his behalf. Apparently, some time in 2004 Acting Chief Nicely also became  
5 involved.

6           No one was arrested and prosecuted for following the protocol for the years 2002,  
7 2003 and 2004. By 2005, at the April 21<sup>st</sup> meeting, Aguilar was no longer the Sector Chief  
8 and Nicely was the Acting Sector Chief, and it was he who participated in the meeting with  
9 Reverend Fife, who represented Samaritans and other community leaders, including Bishop  
10 Kicanas, who apparently chaired the meeting. It is important to note that prior to this April  
11 2005 meeting Nicely had been involved in another meeting in 2004, after which a letter from  
12 William Walker, dated August 4, 2004, was sent to Acting Chief Nicely. In that letter  
13 Walker states the NMD position, that the protocol had been previously approved by Border  
14 Patrol and that Nicely had agreed that as long as that protocol was followed there would be  
15 no legal problems for NMD.  
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17           There was no response to this letter from Acting Chief Nicely. Additionally, it should  
18 be noted that a month prior, a letter had been sent to the U. S. Attorney's Office again stating  
19 that same belief, that the protocol was legal and approved by the Government. No response  
20 was received.

21           The main thrust of the Defendants' argument for dismissal or estoppel, is that the  
22 Defendants' were involved in a course of conduct that had been agreed to by the Border  
23 Patrol that would not result in prosecution.

24           The Government disputes this claim, and indicates that even if this were true, the  
25 April 21, 2005 meeting with Acting Chief Nicely should have laid to rest any such notion.

26           It would be appropriate to describe the April 21, 2005 meeting as one in which there  
27 was a free flowing discussion of many items. It was not until approximately the last third of  
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1 the dialogue that Acting Chief Nicely indicated that he had a problem with the protocol. He  
2 specifically began by saying, "if you're transporting people for being thirsty, that is going to  
3 get you into trouble."

4 Further discussion takes place and Acting Chief Nicely expounds about his belief that  
5 transporting them for emergency medical care is outside the bounds of the law, or that at least  
6 you are putting yourself at risk of violating the law. By the end of the conversation Nicely  
7 had backed off somewhat from these direct statements. At the end of all the conversation it  
8 is clear that the parties seemed to have reached an agreement to get back together and further  
9 discuss the protocol to ensure that nothing illegal takes place. It is apparent that a follow up  
10 meeting never takes place because on July 9, 2005, the Defendants' in this case were  
11 arrested.

12 It is important to note that at the April 21, 2005 meeting several community leaders  
13 were present. It was not a meeting with only representatives of NMD. Reverend Fife was  
14 present, representing an organization called Samaritans. The majority of the people present  
15 appear to be Clergy. The meeting was chaired or moderated by Bishop Kicanas of the  
16 Roman Catholic Diocese. It was announced at the beginning there was a four part agenda  
17 of which the fourth item was relevant to the issues that we have here today. Bishop Kicanas  
18 says,  
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20 "And finally talk about our humanitarian groups, some of which are  
21 represented around this table, and what are the protocols? As you know, sometimes  
22 there are conflicts, sometimes there are issues that arise and we'd like to have those  
23 reflected on together so that we can avoid misunderstandings."

24 Acting Chief Nicely later in the discussion says the following:

25 "If you decide you're going to put them in your car,  
26 you're putting yourself at risk because— and let me give you my  
27 — forget what the law says. I don't know if you're an EMT. I  
28 don't know how much medical gear you've got. I don't know  
how much rescue training you've got. When you call one of  
those guys wearing that uniform, all of the above show up —  
rescue gear, EMT's people that know what they're doing. So if  
the true mission is, is to get that person help, then get them help.  
If the mission is, well, I'll say I'm being humanitarian, take them  
out of the desert and drop them off at a bus station, you're

1 putting yourself at risk. Don't do that. Don't put yourself at risk  
2 over something like that. I'm telling you, there's no special  
3 dispensation. If you're involved in a , in an activity that meets  
4 all the elements of a criminal act, we're gonna take enforcement  
5 action.

6 And as everybody in this room knows, there's a long way from  
7 enforcement action to, to a prosecution and to conviction, but  
8 don't put yourself in that position for anybody. Don't let  
9 somebody put you in that position".

10 The meeting ends on this note. Bishop Kicanas:

11 "And I think that will be (inaudible) or some of our humanitarian groups  
12 (inaudible) for many, many years doing very important humanitarian outreach.  
13 And they don't need to be in opposition with the Border Patrol".

14 Chief Nicely: "Right."

15 Bishop Kicanas:

16 "And how to make sure that, that they can do the care of the people who are  
17 on the move in a way that is legal and appropriate. I think all of us want that.  
18 So I think that's the most important issue (inaudible) help us to figure out the  
19 form so that those protocols can be fashioned in a way that's helpful to people  
20 who is desperate need (inaudible) that are not in violation of the law.

21 The issue in this case is that the actions by law enforcement officers could be deemed  
22 to have put the Defendants in the position wherein they reasonably believed that their  
23 conduct was legal. It was also argued that Defendants' reasonably believed that their  
24 conduct had been approved by the Border Patrol.

25 Entrapment by Estoppel is the unintentional entrapment by a Government official  
26 which mistakenly misleads a person to a violation of the law.

27 A Defendant's reliance is reasonable if a person is sincerely desirous of obeying  
28 the law, would have accepted the information as true and would not have been put on  
notice to make further inquires. U.S. vs. Ramon-Valencia, 202 Fed 2<sup>nd</sup>, 1107 (9<sup>th</sup> Cir.  
2000)

In this case, for three years, the conduct of people similar to those now charged  
in this case had been, at least tacitly, approved by the Border Patrol. Numerous  
meetings had been held with Border Patrol and the "protocol" had been discussed.

1 The goal of the meetings and the "protocol" was to make sure that no violation of the  
2 law occurred and that everyone could do their job without getting in each others way.

3 It would seem incumbent upon the Border Patrol if this was not the case that  
4 they should have responded to NMD's letter in writing.

5 It would also seem incumbent upon community organizers, if they believe that  
6 the Border Patrol was telling them that this activity was no longer permissible, that  
7 they would also have to tell their volunteers.

8 The Defendants' now before the Court were assured by the NMD's leaders that  
9 the protocol was approved by Border Patrol and that transporting for certain medical  
10 conditions was not a violation of the law. They followed the protocol and began the  
11 transport to a medical clinic set up at a local church. It was in this process that they  
12 were arrested.

13 It should be noted that this was the Defendants' only function in this endeavor.  
14 They were not involved in any other decision as to what would happen with regard to  
15 the aliens after they reached the clinic.

16 Under the circumstances of this case the Court finds that the Government in this  
17 case should be estopped from the prosecution of these Defendants. The Court wants  
18 to make it clear that this Estoppel only applies to the Defendants' in this case. The  
19 notoriety that this case has received makes it highly unlikely that any others will be put  
20 in a similar situation to these Defendants.

21 The Court is making no ruling as to whether or not the protocol is or is not a  
22 violation of the law. That issue must wait for another day.


23 The Court would like to commend the Border Patrol and the Community leaders  
24 for their efforts to meet and try to mitigate the deaths in the desert. The Court would  
25 hope that such meetings would continue. Certainly both sides should be able to work  
26 out an arrangement that would allow each to pursue its' duties as far as it concerns  
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1 Border Patrol and the humanitarian goals of NMD. It would be incumbent on NMD  
2 to let its volunteers know that Border Patrol has a different view on whether or not the  
3 protocol violates the law. It should be made clear to volunteers that they could be  
4 arrested and charged, at the least, with reckless disregard of the law.

5 The Court finds that in these unique circumstances, further prosecution would  
6 violate the Defendant's due process rights.

7 Therefore, **IT IS ORDERED GRANTING** Defendants' motion to dismiss  
8 (#40) , and the Indictment is dismissed.

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10 DATED this 1<sup>st</sup> day of September, 2006.

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17 Raner C. Collins  
18 United States District Judge  
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