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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)	No. CR 05-01499-TUC-RCC [BPV]
Plaintiff,)	
vs.	)	REPORT AND RECOMMENDATION
DANIEL M. STRAUSS and	)	ON DEFENDANTS' JOINT MOTION
SHANTI AMELIA SELLZ,	)	TO DISMISS; GOVERNMENT'S
Defendants.	)	MOTION TO PRECLUDE DEFENSE
_____	)	BASED UPON PUBLIC AUTHORITY
	)	(ENTITLED GOVERNMENT'S
	)	RESPONSE TO NOTICE DEFENSE
	)	BASED UPON PUBLIC AUTHORITY
	)	AND MOTION IN LIMINE TO
	)	PRECLUDE RELIANCE ON DEFENSE)

The Defendants were indicted for the transportation of an alien illegally in the U.S.A. On November 23, 2005, Defendants filed a Notice of Defenses, listing, among others, the public authority defense, for events occurring July 9, 2005 (Docket # 39). On November 29, 2005, Defendants filed a Joint Motion to Dismiss (Docket # 40). On December 5, 2005, the Government filed its Response to the public authority defense (Docket # 46). On December 11, 2005, the Government filed its Response to the Motion to Dismiss (Docket # 50). The Defendants filed a Reply on December 13, 2005 (Docket # 53).

The Court set these matters for an evidentiary hearing over several days. During the course of the hearing, the Defendants called Shanti Sellz, Daniel Strauss, and Mary Margaret (Margo) Cowan. The Government called Reverend John Fife and John Fitzpatrick, U.S. Border Patrol Agent Assistant Chief.

1 **FACTS**

2 This Court takes judicial notice of the fact that aliens illegally in this country and
3 traveling through the desert can suffer serious medical conditions, including death. People
4 and community organizations in this area came to a similar conclusion. As a result, a number
5 of people formed an organization called "Samaritans". True to its name, medical personnel
6 would schedule dates and times wherein healthcare professionals (with perhaps assistance
7 from non-healthcare professionals) would travel to likely crossing paths into the U.S. and
8 render medical assistance "in the field". They would also provide migrants with food and
9 water, if required. The Samaritans' activity began in 2002 and lasted for one and one-half
10 years.

11 For reasons unbeknownst to this Court, Samaritans morphed into "No More Deaths"
12 (NMD). The major difference between the groups was that NMD brought the migrants to
13 the medical personnel located at Southside Presbyterian Church, whereas the Samaritans
14 went in the field to render aid. The only medical treatment available at the desert camps,
15 known to the NMD coalition as "New Arks of the Covenant"¹, was food, water, and
16 laypersons' first aid.

17 At some point, various healthcare providers, faith-based members, interested
18 attorneys, and concerned citizens gathered to discuss whether they could "legally" transport
19 persons illegally in this country from desert camps to metropolitan medical sites. The camps
20 were located in the desert near Douglas, Arivaca, and Lukeville, Arizona. The eventual
21 product of these efforts became known as "The Protocol".

22 The Protocol required that laypersons who located distressed people in the desert had
23 to perform a medical triage and bring only those deemed to be in distress to the camp. NMD
24 volunteers would provide food and water to any persons who needed this assistance. Once
25 the aliens reached camp, they were again triaged and treated for what was possible on site.
26 After observation, the volunteer would call NMD medical personnel in Tucson to report his

27 _____
28 ¹On a historical note, Newark, New Jersey, was initially known as New Ark of the
Covenant.

1 or her observations. The medical personnel, usually a doctor or nurse, would grant or deny
2 authority to transport. The camp volunteer would then call the NMD's lawyer on call to
3 inform the lawyer about the transport. From what was presented in Court, the attorney
4 simply asked if the volunteer had obtained medical authorization to transport.

5 Once these steps were performed, the volunteer would ensure that the NMD logo was
6 placed on the transport vehicle. The volunteer would then inform the alien passenger(s) of
7 the following:

- 8 1) That each person was being transported for medical reasons;
- 9 2) That each person was not to hide, but sit upright;
- 10 3) That, if stopped by Border Patrol, they were not to flee.

11 The Protocol does not require NMD to inform any law enforcement agency of any
12 transport or its destination. The only time U.S. Border Patrol was informed of an alien's
13 presence was at the election of the alien or if the alien was in extremis and no other help was
14 available except for BORSTAR (Border Patrol's search and rescue team). Once the alien
15 arrived at the medical clinic at the Southside Presbyterian Church and was treated, the person
16 was not transported back to the desert, but simply released into the community. If the
17 person's physical condition deteriorated enroute to the medical clinic, the NMD volunteers
18 would take the alien to St. Mary's Hospital in Tucson.

19 NMD claims to have had in the last fiscal year 3,000 alien contacts, with 65
20 transports. Prior to the case at issue, two transporters were detained and subsequently
21 released. The Defendants herein were not only detained; they were prosecuted.

22 For most of this century, the head of the Tucson Border Patrol sector was David
23 Aguilar. By July 9, 2005 (the day the Defendants were arrested), Michael Nicely had taken
24 over that position. Prior to this date, NMD met then Acting Sector Chief Nicely, just as they
25 had previously met with Sector Chief Aguilar. NMD and Nicely had a rocky start. Chief
26 Nicely's opening salvo was: "Any transportation of an illegal alien is a crime!" NMD
27 representatives were surprised, but the meeting ended on a less combative note: any
28 detention of NMD's volunteers would be sorted out either on the road or at the station.

1 Reverend Fife would not concede that, given this new sorting out process, some NMD
2 volunteers would be prosecuted. Agent Fitzpatrick recalled the meeting in more detail. He
3 stated that Chief Nicely informed NMD's representatives of the following:

- 4 1) That smugglers were informing migrants that NMD water stations were
5 available for illegal crossers;
- 6 2) That NMD water location maps were being given to illegal crossers;
- 7 3) That NMD should call Border Patrol for any aliens needing help; they would
8 be helped and then be VR'ed (not prosecuted, but volutarily returned to their
9 country);
- 10 4) That putting illegal aliens in a car put the driver at risk for prosecution;
- 11 5) That Protocol was not approved by him and transporters were subject to
12 prosecution and forfeiture of their vehicle;
- 13 6) That NMD's leader should inform their volunteers of the foregoing; and
- 14 7) That one coyote (smuggler) had used an NMD logo in an attempt to transport
15 aliens.

16 Fitzpatrick opined that NMD transports were a slap in the face of his agents in the
17 field. He further indicated that Chief Aguilar wanted NMD to call Border Patrol prior to any
18 transport. This position was rejected by Chief Nicely, who informed NMD that any transport
19 put drivers at risk of arrest and forfeiture of their vehicle.

20 At no time did NMD incorporate these concerns and demands into their Protocol or
21 disseminate it to members of NMD. At no time did any of NMD's informed leaders or
22 lawyers advise the camp volunteers that each of them risked being charged with a crime as
23 a result of the sorting out process. Nor were the volunteers ever informed of Chief Nicely's
24 warnings. In fact, both Defendants testified that they were informed by NMD's lawyers that
25 their conduct was entirely legal. This legal opinion was never endorsed in writing by any
26 member of the U.S. Border Patrol or the U.S. Attorney's office, nor even by a disinterested
27 private criminal defense attorney. The only written documentation between NMD and the
28 Government were two letters written by William Walker to former Chief David Aguilar and

1 Robert Miskell, Chief Criminal Division of the U.S. Attorney's office. These letters were
2 sent prior to any meeting with Chief Nicely. Neither U.S. Attorney Miskell nor Chief
3 Aguilar ever responded.

4 **DISCUSSION**

5 Samaritans and/or NMD and the U.S. Border Patrol were engaged in 3 ½ years of
6 meetings and transports without ever agreeing what constituted "in furtherance" of illegal
7 conduct or humanitarian aid beyond on site treatment. This undefined truce allowed NMD
8 to operate for 3 ½ years.

9 Since no written memorandum of understanding between the two groups was ever
10 undertaken, NMD had no written assurance that Border Patrol sanctioned its conduct.
11 Having failed to obtain a written agreement of understanding, NMD lost its ability to obtain
12 a written cancellation of any prior understanding. The parties were left to the personal
13 whims or decisions of each respective party.

14 Assuming Chief Aguilar could live with medical transports (with prior notice to
15 Border Patrol), the record clearly demonstrates that the new Chief, Mr. Nicely, could not.
16 He explicitly warned NMD that transporting illegal aliens for medical treatment put the
17 drivers at risk of prosecution. This information was presumably transmitted to agents in the
18 field because the Defendants herein were stopped and prosecuted. It is also clear that the
19 above-mentioned warning was not transmitted by NMD to its membership. NMD allowed
20 its members to assume a grave risk of prosecution without the opportunity to weigh that risk
21 against their interest in saving the lives of undocumented aliens. The Defendants come
22 before the Court seeking relief from prosecution, not so much because the Border Patrol
23 changed its practices, but rather because NMD misled them about the legality of their
24 conduct. Given these facts, the Due Process Clause of the U.S. Constitution affords
25 Defendants no protection.

26 Because Chief Nicely felt that any transportation of an illegal alien from the desert to
27 the Tucson metropolitan area, or elsewhere for that matter, was "in furtherance" of a violation
28 of the law, he apparently had no interest in reading NMD's Protocol. Nor did he apparently

1 have any interest in the uneasy truce permitted by Chief Aguilar. Consequently, as of June
2 2005, NMD did not have Border Patrol's permission to transport illegal aliens. Nor did NMD
3 have Border Patrol's assurance that its members would not be prosecuted.

4 NMD's assessment that Chief Nicely's ignorance of NMD's Protocol coincides with
5 Chief Aguilar's acquiescence is misplaced. Chief Nicely made it clear to NMD that, rather
6 than helping to prevent deaths in the desert, NMD was in reality increasing the number of
7 deaths by helping coyotes or smugglers recruit illegal migrants. Nothing in NMD's Protocol
8 addresses this concern, nor was any evidence presented that NMD in any way considered this
9 issue. The possibility of more deaths was ignored. NMD also ignored Chief Nicely's
10 statement that NMD was to call Border Patrol whenever a distressed person was located;
11 Border Patrol had food, water, and medical assistance. Rather than prosecuting such person,
12 Border Patrol said it would voluntarily return him or her to Mexico. This procedure was not
13 discussed nor incorporated into the Protocol. It appears that NMD, while acknowledging
14 receipt of these declarations, was determined to proceed as usual, perhaps because of their
15 conviction and belief that their conduct was legal and not "in furtherance" of an illegal entry.

16 Therein lies the rub.

17 **CONCLUSION**

18 An alien (ill or well) illegally in this country is at a distinct disadvantage in the desert
19 six miles south of Arivaca, Arizona, than the same person is in metropolitan Tucson,
20 Arizona. The former has no access to food, water, shelter, or the metropolitan transit system,
21 i.e. buses and commercial transportation, and is subject to interdiction by law enforcement.
22 An alien found in the desert unwell and who is treated on site is still at a disadvantage. The
23 issue, therefore, is whether the illegal aliens treated at Southside Presbyterian Church and
24 thereafter allowed to melt into Tucson, Arizona, have been assisted "in furtherance" of their
25 illegal entry. The answer is yes. The Court could find otherwise if the Protocol had at least
26 been amended to require notice of an alien transport to Border Patrol and if these two
27 Defendants had notified Border Patrol prior to the transport. That scenario is not before the
28 Court.

1 It is the recommendation of this Court that the District Judge, after his independent
2 review and consideration, enter an Order as follows:

- 3 1) **DENYING** Defendants' Motions to Dismiss Based on an Alleged Due Process
4 Violation for Humanitarian Reason, for Explicit Authority, and Estoppel
5 (Docket # 40).
6 2) **GRANTING** Government's Motion to Preclude (Docket # 46).
7 3) **GRANTING** Government's request for additional disclosure pursuant to Rule
8 12(3)(A) (Docket #46).

9 Pursuant to 28 U.S.C. § 636(b)(1)(B), the parties have ten (10) days from the date of
10 this Report and Recommendation to file written objections to these findings and
11 recommendations with the District Court. Any objections filed should be filed as CR 05-
12 01499-TUC-RCC.

13 DATED this 12th day of January, 2006.

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18 Bernardo P. Velasco
19 United States Magistrate Judge
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