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State Bar Court of California
Hearing Department
San Francisco
ACTUAL SUSPENSION

Counsel For The State Bar	Case Number(s):	For Court use only
Donald R. Steedman 180 Howard Street, 7th Floor San Francisco, CA 94105 Bar # 104927	05-C-04285	PUBLIC MATTER FILED NOV 09 2011 STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO
Counsel For Respondent Brenda Grantland 20 Sunnyside Ave Ste A-204 Mill Valley,CA 94941 1933 Bar # 165899	Submitted to: **Settlement Judge** STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING **ACTUAL SUSPENSION** ☐ PREVIOUS STIPULATION REJECTED	
In the Matter of: Dale C. Schafer Bar # 127906 A Member of the State Bar of California (Respondent)		

Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

A. Parties' Acknowledgments:

(1) Respondent is a member of the State Bar of California, admitted June 17, 1987.

(2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.

(3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of 8 pages, plus 16 attachment pages, not including the order.

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".

(6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."

(7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):

- ☒ Until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 5.130, Rules of Procedure.
- ☐ Costs are to be paid in equal amounts prior to February 1 for the following membership years: (Hardship, special circumstances or other good cause per rule 5.132, Rules of Procedure.) If Respondent fails to pay any installment as described above, or as may be modified by the State Bar Court, the remaining balance is due and payable immediately.
- ☐ Costs are waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs".
- ☐ Costs are entirely waived.

B. Aggravating Circumstances [for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b)]. Facts supporting aggravating circumstances are required.

(1) ☐ **Prior record of discipline** [see standard 1.2(f)]

(a) ☐ State Bar Court case # of prior case

(b) ☐ Date prior discipline effective

(c) ☐ Rules of Professional Conduct/ State Bar Act violations:

(d) ☐ Degree of prior discipline

(e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below.

(2) ☐ **Dishonesty:** Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.

(3) ☐ **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.

(4) ☐ **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice.

(5) ☐ **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.

(6) ☐ **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.

(7) ☐ **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.

(8) ☒ **No aggravating circumstances** are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [see standard 1.2(e)]. Facts supporting mitigating circumstances are required.

(1) ☐ **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.

(2) ☐ **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.

(3) ☐ **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.

(4) ☐ **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.

(5) ☐ **Restitution:** Respondent paid $ on in restitution to without the threat or force of disciplinary, civil or criminal proceedings.

(6) ☐ **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.

(7) ☐ **Good Faith:** Respondent acted in good faith.

(8) ☐ **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.

(9) ☐ **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.

(10) ☐ **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.

(11) ☐ **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.

(12) ☐ **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.

(13) ☐ **No mitigating circumstances** are involved.

Additional mitigating circumstances:

Respondent has no prior record of disicpline.

D. Discipline:

(1) ☒ **Stayed Suspension:**

(a) ☒ Respondent must be suspended from the practice of law for a period of two years.

i. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii) Standards for Attorney Sanctions for Professional Misconduct.

ii. ☐ and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.

iii. ☐ and until Respondent does the following:

(b) ☒ The above-referenced suspension is stayed.

(2) ☒ **Probation:**

Respondent must be placed on probation for a period of one year, which will commence upon respondent's release from prison., ~~which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)~~ 86, ORS by GD

(3) ☒ **Actual Suspension:**

(a) ☒ Respondent must be actually suspended from the practice of law in the State of California for a period of one year.

i. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct

ii. ☐ and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.

iii. ☐ and until Respondent does the following:

E. Additional Conditions of Probation:

(1) ☐ If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and learning and ability in the general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

(2) ☒ During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.

(3) ☒ Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

(4) ☒ Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

(5) ☒ Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation.

(6) ☐ Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the probation monitor.

(7) ☒ Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions.

(8) ☒ Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.

☐ No Ethics School recommended. Reason: .

(9) ☒ Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.

(10) ☐ The following conditions are attached hereto and incorporated:

☐ Substance Abuse Conditions ☐ Law Office Management Conditions

☐ Medical Conditions ☐ Financial Conditions

F. Other Conditions Negotiated by the Parties:

(1) ☒ **Multistate Professional Responsibility Examination:** Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 5.162(A) & (E), Rules of Procedure.**

☐ No MPRE recommended. Reason: .

(2) ☐ **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.

(3) ☐ **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.

(4) ☒ **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension: December 2, 2007.

(5) ☒ **Other Conditions:** Respondent shall not be required to perform any probation conditions while he is incarcerated. The timelines set forth in the above probation conditions shall not start to run until respondent is released from prison. Thus, for example, respondent will have thirty days after his release from prison to comply with condition E.4.

Attachment language (if any):

FACTS AND CONCLUSIONS OF LAW

The facts concerning respondent's conviction for conspiracy to manufacture and distribute at least 1000 marijuana plants are set forth in the Opinion of the Court of Appeals, a true and correct copy of which is attached as Exhibit A.

The parties agree that the facts and circumstances underlying respondent's conviction do not involve moral turpitude but do constitute a violation of respondent's duty to uphold the law (Business and Professions Code section 6068(a)) and therefores constitute misconduct warranting discipline.

SUPPORTING AUTHORITY

In re Higbie (1972) 6 Cal.3d 562.

DISCLOSURE OF PENDING INVESTIGATIONS

The disclosure mentioned in paragraph A.7 was made on September 23, 2011.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DALE SCHAFER, *Defendant-Appellant.*	No. 08-10167 D.C. No. 2:05-cr-00238-FCD
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARION P. FRY, *Defendant-Appellant.*	No. 08-10169 D.C. No. 2:05-cr-00238-FCD OPINION

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, Senior District Judge, Presiding

Argued and Submitted
August 31, 2010—San Francisco, California

Filed November 8, 2010

Before: Betty B. Fletcher, Richard C. Tallman, and
Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Tallman

COUNSEL

Brenda Grantland, Esquire, Mill Valley, California; Barry L. Morris (argued), Esquire, Walnut Creek, California, for defendants-appellants Dale Schafer and Marion Fry.

Anne Pings (argued), Assistant United States Attorney; Sean C. Flynn, Assistant United States Attorney; Benjamin B. Wagner, United States Attorney, Sacramento, California, for plaintiff-appellee United States of America.

OPINION

TALLMAN, Circuit Judge:

Defendants-Appellants Dale Schafer and Marion Fry challenge federal convictions that arise from their operation of a medical marijuana growing operation and dispensary in the Sierra Nevada community of Cool, California. A jury found Appellants guilty of conspiring to manufacture and distribute at least 100 marijuana plants. The jury specifically convicted Schafer of manufacturing at least 100 marijuana plants and found Fry guilty of manufacturing fewer than 100 marijuana plants. Appellants raise three claims on appeal: (1) the district court improperly denied their motion to dismiss the indictment on a theory of entrapment by estoppel without conducting an evidentiary hearing; (2) the district court erred when it precluded Appellants from presenting an entrapment by estoppel defense and a medical necessity defense at trial; and (3) the district court should have reduced their sentences on a theory of sentencing entrapment. We have jurisdiction over their appeal under 28 U.S.C. § 1291, and we affirm.

I

Fry, a medical doctor, was diagnosed with breast cancer in

December 1997. She received a recommendation to use marijuana in early 1998 to help alleviate the side effects of the chemotherapy treatments she was undergoing. Consequently, Schafer, her husband and a practicing attorney, began cultivating marijuana plants for Fry's use. In July 1999, Fry contacted Detective Robert Ashworth, an officer with the El Dorado County Sheriff's Office, to inform deputies of the marijuana grow operation.[1] Detective Ashworth and Sergeant Timothy McNulty visited Appellants' residence and inspected their marijuana plants.

In late 1999, Schafer's cultivation of marijuana for his wife developed into a much larger marijuana recommendation and sales business, extending well beyond personal use amounts of marijuana. During the time that Schafer and Fry were operating their marijuana business, Ashworth and McNulty repeatedly visited their residence and office. On one particular occasion, Ashworth and McNulty visited Appellants to discuss the unrelated investigation and arrest of two of their former employees. The employees had been involved in a major marijuana growing operation on a rural ranch elsewhere in El Dorado County that was not affiliated with Appellants' business. That separate police raid and investigation involved law enforcement personnel from both local and federal narcotics units who cooperated with one another in a joint interagency task force.

Federal authorities with the Drug Enforcement Administration ("DEA") separately began investigating Appellants in late 2000 after a shipping company reported intercepting several packages containing marijuana sent from "Dale." This investigation included receiving reports from numerous undercover visits by local law enforcement operatives to Appellants' place of business for the purpose of obtaining

[1]Under California law, it was, and still is, legal to grow marijuana or to possess for personal use small amounts of marijuana as a palliative for illness. Cal. Health & Safety Code § 11362.5.

marijuana recommendations. The information gathered through these undercover investigations was then given to federal agents. Local and federal agents ultimately executed a federal search warrant at Appellants' business and home on September 28, 2001.

A federal grand jury returned an indictment against Appellants on June 15, 2005, charging them with one count of conspiring to manufacture and distribute marijuana plants, and one count of manufacturing at least 100 plants. Appellants filed a motion to dismiss the indictment, arguing that the United States could not prosecute them because of their defense of entrapment by estoppel. In support of their motion to dismiss, they filed a memorandum from the Office of National Drug Control Policy and a letter from the Attorneys General of Arizona and California. The attachments emphasized that local law enforcement officers would support federal attempts to enforce the federal laws criminalizing marijuana. In their motion to dismiss, Appellants alleged that both McNulty and Ashworth admitted that they were working on behalf of the federal government and further claimed that Officer McNulty had said Appellants' conduct was legal.

The United States opposed the motion, arguing that Appellants were not entitled to invoke an entrapment by estoppel defense because they had not relied on the representations of a federal official or an authorized agent of the federal government. The opposition included a declaration from McNulty denying that he ever represented himself as a federal official or that he encouraged Appellants to continue growing marijuana. Alternatively, the government contended that Appellants had not reasonably relied on any of the alleged misrepresentations. To prove lack of reliance, the government submitted copies of written recommendations distributed to "patients" by Appellants' business. These recommendations included a disclaimer that unequivocally stated that marijuana remained illegal under federal law.

At a hearing conducted to address the motion to dismiss, Appellants requested an evidentiary hearing for the purpose of resolving the conflict between the factual allegations in their pleadings and those in McNulty's sworn declaration. The district court denied Appellants' request and assumed for purposes of deciding the legal issue that McNulty was a federal official. Notwithstanding that assumption, the district court refused to dismiss the case because Appellants had not adequately shown that they relied on any alleged misinformation.

Before trial, the government filed a motion in limine seeking to prevent Appellants from asserting either a medical necessity defense or an entrapment by estoppel defense. The government argued that the Supreme Court's decision in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) [hereinafter *OCBC II*], precluded any entitlement by a defendant to rely on the claimed medicinal value of marijuana and prohibited Appellants from asserting a cognizable medical necessity defense. The government also sought exclusion of an entrapment by estoppel defense for the reasons stated in their opposition to Appellants' motion to dismiss—that McNulty and Ashworth were not federal officials or authorized agents of the federal government and Appellants did not reasonably rely on any of their alleged misrepresentations.

Appellants contested the applicability of *OCBC II* and argued that a retroactive application of the Supreme Court's decision would be a violation of the ex post facto clause. Although the district court had previously rejected Appellants' entrapment by estoppel defense, they asked that the district court "keep an open mind as to the characterization of the evidence." To further support their argument that McNulty and Ashworth were federal officials, Appellants submitted an affidavit from their attorney attesting to the fact that an agent with the DEA directed the investigations conducted by local law enforcement officers. Appellants incorporated excerpts of the police reports chronicling the investigation of Appellants'

business. These reports established that officers from local law enforcement agencies collaborated with federal agents to conduct undercover investigations of Appellants.

The district court granted the government's motion in limine. It reasoned that *OCBC II* applied retroactively because the decision "was foreseeable in light of a circuit split on the issue," and because marijuana had been illegal under federal law to use or possess since at least 1970. In the alternative, the district court found that the medical necessity defense was viable for only a limited time, and Appellants' illegal conduct began prior to the application of the defense and continued until after the Supreme Court rejected the defense. The district court affirmed its earlier denial of the entrapment by estoppel defense because Appellants "could not identify an authorized federal government official who erroneously told them it was permissible to sell marijuana."

After the federal jury returned a guilty verdict,[2] Appellants sought mitigation of their sentences on a theory of sentencing entrapment. They claimed that Ashworth encouraged them to continue growing medical marijuana, that he induced them into expanding the amount of marijuana they were growing, and that they were not predisposed to illegally grow marijuana. Again, Appellants requested an evidentiary hearing. The district court denied the request after concluding that Appellants had not shown that a federal official either bought or sold any marijuana or engaged in any transactions to make Appellants manufacture a higher number of marijuana plants. Appellants re-asserted their sentencing entrapment claim at sentencing. The district court interpreted our precedent to require active participation by a law enforcement officer in the purchase or sale of controlled substances, and it rejected

[2]As stated earlier, the jury found Schafer guilty of both the conspiracy and manufacturing at least 100 marijuana plants. It convicted Fry of the conspiracy and of manufacturing plants, but concluded that Fry had manufactured fewer than 100 plants.

Appellants' request for sentence mitigation because they could not show that Ashworth was actively involved in their production or distribution of marijuana. Consequently, Appellants were sentenced to the statutory minimum term of sixty months imprisonment. Appellants timely appeal their convictions and sentences.

II

A

Appellants' first challenge focuses on the district court's denial of their request for an evidentiary hearing on their motion to dismiss. They argue that they were entitled to an evidentiary hearing because the filings submitted in support of and in opposition to the motion to dismiss presented significant factual disputes. We review a district court's denial of an evidentiary hearing for an abuse of discretion. *United States v. Hagege*, 437 F.3d 943, 951 (9th Cir. 2006).

[1] Federal Rule of Criminal Procedure 12 allows a defendant to assert a defense in a pretrial motion if the merits of the defense can be determined "without a trial of the general issue." Fed. R. Crim. P. 12(b)(2). However, if the pretrial motion raises factual questions associated with the validity of the defense, the district court cannot make those determinations. *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986) [hereinafter *Shortt*]. Doing so would "invade the province of the ultimate finder of fact." *Id.* (quoting *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976)).

[2] Appellants requested an evidentiary hearing to resolve two factual disputes presented by the motion to dismiss: (1) whether McNulty and Ashworth were federal officials or authorized agents of the federal government; and (2) whether McNulty and Ashworth erroneously informed Appellants that

their marijuana grow was legal under federal law.[3] These two factual disputes directly impacted the validity of Appellants' defense because to establish the defense Appellants were required to prove "reliance either on a federal government official empowered to render the claimed erroneous advice" or on "an authorized agent of the federal government" and "affirmative misleading" by a government official. *United States v. Brebner*, 951 F.2d 1017, 1026-27 (9th Cir. 1991). Thus, the factual disputes raised by the pretrial motion to dismiss were intertwined with the "general issue" to be decided at trial. The district court would have usurped the role of the jury had it conducted an evidentiary hearing and answered these factual questions. *Shortt*, 785 F.2d at 1452.

[3] Appellants' reliance on cases discussing the propriety of evidentiary hearings to resolve factual disputes raised by motions to suppress is misplaced. Generally, any factual differences highlighted by a motion to suppress do not impact the ultimate issue of guilt. Evidence must be suppressed when it is obtained in violation of a defendant's constitutional rights. *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961). A district court may make factual findings with regard to whether evi-

[3]We note a procedural defect in Appellants' attempt to create a factual dispute before trial. None of the averments were set forth in sworn declarations that would be competent evidence for consideration of pretrial motions. Eastern District of California Local Rule 230(h) provides: "Factual contentions involved in pretrial motions shall be initially presented and heard upon affidavits, except that the Court may in its discretion require or allow oral examination of witnesses." *See also* E.D. Cal. Rule 430.1(b) ("Motions and accompanying documents shall conform to the requirements of . . . these Rules."). Appellants' factual statements were raised as unsworn arguments of defense counsel in their pleadings. The district court would have been well within its rights to reject the request for an evidentiary hearing on this ground alone. *Cf. Cohen v. United States*, 378 F.2d 751, 761 (9th Cir. 1967). Given our conclusion that the issue was otherwise inextricably intertwined with the contested evidence the jury had to resolve at trial, we will overlook the procedural defect in the case before us. Trial counsel, however, would be well advised to follow the rules.

dence was unconstitutionally obtained because such issues are "entirely segregable" from the issue of guilt. *See generally Shortt*, 785 F.2d at 1452 (discussing the types of factual findings a district court can make to resolve pretrial motions). In this case, however, the questions raised by Appellants' motion to dismiss establish the viability of Appellants' defense; the factual disputes were not segregable from the issue that was to be decided at trial—Appellants' guilt. Pursuant to Rule 12, the district court could not resolve these disputes before trial, and therefore it did not abuse its discretion when it denied Appellants' request for an evidentiary hearing.

B

In addition to challenging the district court's denial of an evidentiary hearing, Appellants argue that the district court further erred in denying their motion to dismiss on the merits. We review the denial of a motion to dismiss de novo. *United States v. Holler*, 411 F.3d 1061, 1065 (9th Cir. 2005).

[4] In order to succeed on their motion to dismiss, Appellants would have had to show that they were entitled to an entrapment by estoppel defense as a matter of law. In *Sherman v. United States*, 356 U.S. 369, 373 (1958), the Supreme Court found that the defendant had established entrapment as a matter of law because it did not need to "choos[e] between witnesses, nor judg[e] credibility" in order to determine the merits of the defense. Conversely, we have held that a defendant is not entitled to a defense of entrapment as a matter of law when there are "definite conflicts in the testimony on the issue of how [the defendant] began selling heroin." *United States v. Griffin*, 434 F.2d 978, 981 (9th Cir. 1970). When such conflicts arise, the issue of whether the defendant was entrapped "is a credibility question for the jury." *Id.*

[5] Whether Appellants were lulled into believing their marijuana operation was legal and done on the express authorization of agents who could bind the federal government

necessitated a credibility determination that fell within the province of the jury. *See id.*; *cf. Mathews v. United States*, 485 U.S. 58, 63 (1988) ("The question of entrapment is generally one for the jury, rather than for the court."). As such, the district court was precluded from holding that Appellants were entitled to an entrapment by estoppel defense as a matter of law until the jury resolved the truth of the factual dispute. It did not err when it denied Appellants' motion to dismiss on the merits.

III

Appellants' next set of arguments contend that the district court improperly granted the government's motion in limine and prohibited Appellants from presenting entrapment by estoppel and medical necessity defenses. A district court's decision to exclude evidence of a particular defense is reviewed de novo. *Brebner*, 951 F.2d at 1024. A district court may preclude a defense if the defendant fails to make a prima facie showing that he is eligible for the defense. *See United States v. Moreno*, 102 F.3d 994, 997-98 (9th Cir. 1996).

A

[6] Entrapment by estoppel is the "unintentional entrapment by an official who mistakenly misleads a person into a violation of the law," and it is a theory derived from the due process clause. *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (internal quotation and citation omitted). To establish this defense, a defendant "must show that (1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) that [the defendant] relied on the false information, and (5) that [the] reliance was reasonable." *Id.* (internal quotations and citations omitted).

[7] An entrapment by estoppel defense is "available only when [the] defendant can demonstrate a reasonable belief that his conduct was sanctioned by the government." *United States v. Burrows*, 36 F.3d 875, 882 (9th Cir. 1994). Even assuming what is ascribed to McNulty and Ashworth was true, Appellants failed to present evidence to the district court that they relied on the alleged erroneous statements. During pretrial proceedings, the government filed examples of the written marijuana recommendation forms issued to "patients" by Appellants' business and excerpts of prior sworn expert testimony given by Fry in an unrelated judicial proceeding. Each of the recommendations, dated from October 1999 to September 2001, contained a patient declaration that clearly stated that "cannabis remains illegal under Federal Law" and that Appellants had not represented otherwise. Fry's expert testimony, given on July 11, 2001, unequivocally established that Fry knew that marijuana remained a Schedule I controlled substance under federal law and that federal law prohibited her from prescribing it since any drug listed on Schedule I is deemed without medical efficacy. Appellants submitted no admissible evidence that refuted the recommendations and testimony or that supported an inference that they relied on any of the alleged misrepresentations of McNulty and Ashworth.

[8] Instead, the government's uncontradicted evidence established that Appellants were aware that marijuana was illegal under federal law during the time that McNulty and Ashworth allegedly stated that it was legal under federal law —Appellants were not misled into believing that their conduct was permissible under federal law. "The defense of entrapment by estoppel is inapplicable if the defendant is not misled." *United States v. Tallmadge*, 829 F.2d 767, 775 n.1 (9th Cir. 1987). Because Appellants failed to present prima facie evidence that they relied on representations made by either McNulty or Ashworth, they were not entitled to present an entrapment by estoppel defense to the jury.

[9] In light of Appellants' inability to establish reliance, we need not address their arguments regarding whether McNulty and Ashworth were de facto federal officials or authorized agents of the federal government. *See Moreno*, 102 F.3d at 998 (declining to address all of the elements of the defense of duress because the defendant presented no evidence of a lack of a reasonable opportunity to escape the threatened harm). The district court properly granted the government's motion in limine with regard to Appellants' asserted entrapment by estoppel defense.

B

[10] "[M]edical necessity is not a defense to manufacturing and distributing marijuana." *OCBC II*, 532 U.S. at 494. Appellants attempt to circumvent this clear holding of the United States Supreme Court by arguing that the exclusion of a medical necessity defense at their trial violated their due process rights[4] because we recognized the viability of such a defense for a portion of the time Appellants operated their marijuana business. *See United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1114-15 (9th Cir. 1999), *overruled by OCBC II*, 532 U.S. 483 (2001) [hereinafter *OCBC I*]. They contend that any change in the viability of a medical necessity defense occasioned by the Supreme Court's decision was unforeseeable and therefore could not apply retroactively.

"[J]udicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been

[4]Appellants framed their challenge by relying on the ex post facto clause. However, the ex post facto clause applies only to the legislature and "does not of its own force apply to the Judicial Branch of government." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). These limitations also apply to judicial decisionmaking through the due process clause. *Id.*

expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (internal quotation marks omitted); *see also United States v. Qualls*, 172 F.3d 1136, 1139 n.1 (9th Cir. 1999) ("Due process bars retroactive application of a judicial expansion of a law only if the change in the law is unforeseeable."). In *Rogers*, the Supreme Court held that the Tennessee Supreme Court's abolition of the "year and a day rule" did not constitute the "sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." 532 U.S. at 466-67. Although the "year and a day rule" had been recognized in Tennessee for almost 100 years, it "was a principle in name only, having never once been enforced." *Id.* at 465-66. The state supreme court's decision to invalidate the doctrine was thus "a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense." *Id.* at 467.

[11] The Supreme Court's *OCBC II* decision is analogous to the Tennessee Supreme Court's decision. Notwithstanding our temporary indication that a medical necessity defense was legally cognizable, *OCBC I*, 190 F.3d at 1114, it was not "unforeseeable" that the Supreme Court would reject the implementation of a defense that had not theretofore been applied. In fact, it was "an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute." *OCBC II*, 532 U.S. at 490. Despite the opinion held in some medical and scientific circles that marijuana can be effectively used for medicinal purposes, such a defense would directly contradict congressional findings dating back to 1970 that marijuana, as a Schedule I drug, has no medicinal use. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1247-49.

[12] Furthermore, Appellants' reliance on *OCBC I* was unfounded. Our decision recognizing a medical necessity defense did not occur until almost six weeks after the alleged beginning of Appellants' conspiracy. When conducting a due process foreseeability analysis, we must "look only to cases

decided before the crime was committed" because the focus is on notice to the defendant. *Clark v. Brown*, 450 F.3d 898, 912 (9th Cir. 2006). Appellants cited no federal precedent prior to the initiation of their conduct that allowed a defendant to successfully assert a medical necessity defense. The Supreme Court's refusal to accept such a defense—when it had not been recognized by Congress and which undermined congressional findings—is not the typical "unpredictable departure from prior precedent" that warrants holding the Court's final decision cannot be retroactively applied. *Rogers*, 532 U.S. at 467. The district court did not err when it prohibited Appellants from presenting a medical necessity defense.

IV

Appellants' last argument contests the district court's denial of their request for an evidentiary hearing on their claim for mitigation of sentence on a theory of sentencing entrapment. The district court rejected Appellants' request because they had not established a factual basis supporting their allegation that a government official actively induced them to manufacture and distribute more marijuana than they were otherwise predisposed to manufacture. We review de novo a district court's interpretation and application of the Sentencing Guidelines, and we review its sentencing phase factual findings for clear error. *United States v. Naranjo*, 52 F.3d 245, 248 (9th Cir. 1995).

[13] "Sentencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped by the government into committing a crime subject to more severe punishment." *United States v. Mejia*, 559 F.3d 1113, 1118 (9th Cir. 2009). The defendant must show that the government participated in "outrageous official conduct which caused the individual to commit a more significant crime for which a greater penalty attaches." *United States v. Si*, 343 F.3d 1116, 1128 (9th Cir. 2003). The underlying principle is that it is impermissible for the government to "structure sting

operations in such a way as to maximize the sentences imposed on defendants" without regard for the defendant's culpability or ability to commit the crime on his own. *United States v. Staufer*, 38 F.3d 1103, 1107 (9th Cir. 1994).

[14] We have never found sentencing entrapment unless it involves active inducement by government officials. For example, in *Staufer*, the defendant maintained that he wanted to sell only 5,000 doses of LSD (lysergic acid diethylamide) to the confidential informant and undercover agent. 38 F.3d at 1105. However, the informant and agent insisted that the defendant provide 10,000 doses. *Id.* The district court sentenced the defendant using the higher quantity of drugs, and we reversed. *Id.* at 1105, 1108. We held that the defendant was entitled to a lesser sentence because it was the government's involvement that led him to engage in a transaction of a greater magnitude. *Id.* at 1107-08. We recognized the "unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to increase his or her sentence." *Id.* at 1107.

Subsequent precedent affirms the necessity of more than passive government involvement. *See, e.g., United States v. Haynes*, 216 F.3d 789, 799-800 n.9 (9th Cir. 2000) (finding sentencing entrapment inapplicable because the police officers "in no way led [the defendants] to create or enhance" the marijuana grown); *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999) (remanding for resentencing due to a lack of factual findings on sentencing entrapment claim where the defendant argued that the amount of the second sale of drugs was larger due to the undercover officer's request for a higher amount); *United States v. Parrilla*, 114 F.3d 124, 127-28 (9th Cir. 1997) (remanding for a factual determination on whether the defendant was entrapped into trading cocaine for a gun and stating that such entrapment would preclude the application of a two-level enhancement for possessing a firearm in connection with drugs).

[15] In support of Appellants' sentencing entrapment claim, Schafer later submitted affidavits that alleged that McNulty and Ashworth told Appellants that their conduct complied with the law. Even if we accept Schafer's allegations as true, there is no evidence that either McNulty or Ashworth directed Appellants to grow more marijuana or offered them something in exchange for the production of higher amount of plants. There is simply no allegation of active government involvement. We decline to hold that Appellants are entitled to lesser sentences because government officials failed to inform them that their conduct was illegal.

[16] Consequently, Appellants' affidavits are insufficient to establish a prima facie showing of sentencing entrapment, and it was not an abuse of discretion for the district court to deny their request for an evidentiary hearing. *See United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980) ("[I]f the affidavits show as a matter of law that appellant was or was not entitled to relief, no [evidentiary] hearing was required."). There is simply no basis for sentence mitigation on this issue.

V

For the reasons outlined above, the judgments and sentences entered against Schafer and Fry by the district court are

AFFIRMED.

In the Matter of:	Case number(s):
Dale C. Schafer	05-C-04285

SIGNATURE OF THE PARTIES

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Facts, Conclusions of Law, and Disposition.

Date	Respondent's Signature	Print Name
10/3/11		Dale C. Schafer
9-29-2011	Brenda Grantland	Brenda Grantland
Date	Respondent's Counsel Signature	Print Name
10/13/11	Donald R. Steedman by CB	Donald R. Steedman
Date	Deputy Trial Counsel's Signature	Print Name

(Do not write above this line.)

In the Matter of:	Case Number(s):
Dale C. Schafer	05-C-04285

ACTUAL SUSPENSION ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- ☐ The stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.
- ☒ The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
- ☐ All Hearing dates are vacated.

1. On page 5 of the Stipulation, the language at paragraph F.(1) is deleted in its entirety, and in its place is inserted the following language: "Respondent must also take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, within one year after his release from prison and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b)."
2. On page 6 of the Stipulation, the following language is added at paragraph F.(5): Respondent is currently incarcerated. He is projected to get out of prison on September 8, 2015. Within ten days of his release from prison, respondent must file written notice of his release from prison with the State Bar Court and must serve the written notice on the State Bar's Office of Probation and the Office of the Chief Trial Counsel.
3. It is not recommended that respondent be ordered to comply with rule 9.20 of the California Rules of Court, as he complied with rule 9.20 in connection with his interim suspension. Respondent has been on interim suspension since December 2, 2007." Respondent also remains suspended until all costs are paid in full, unless he seeks relief from costs and such relief is granted.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 5.58(E) & (F), Rules of Procedure.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 9.18(a), California Rules of Court.)**

Nov. 9, 2011
Date

Pat McElroy
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on November 9, 2011, I deposited a true copy of the following document(s):

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

BRENDA GRANTLAND
LAW OFC BRENDA GRANTLAND
20 SUNNYSIDE AVE STE A-204
MILL VALLEY, CA 94941 - 1933

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Donald Steedman, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on November 9, 2011.

George Hue
Case Administrator
State Bar Court