How to Free a 'Guilty' Client by Arguing Entrapment by Estoppel

[F]or the state to prosecute someone for innocently acting upon … mistaken [official] advice is akin to throwing water on a man and arresting him because he's wet.

People v. Studifin[1]

BY DANIEL E. MONNAT AND PAIGE A. NICHOLS

How many times have you wished that you could just stomp your foot in court and declare, "*That's not fair!*"? Well guess what? You can! (Though we recommend against the foot stomping.) In the right case, you may ask your judge or jury to acquit your "guilty" client — a client who engaged in every element of the charged offense — because it is simply *not fair* for the government to prosecute your client. This is not a request for jury nullification. This is an entrapment by estoppel defense.

Entrapment by Estoppel

Entrapment by estoppel is a common law due process defense to criminal charges when an official advises the defendant that conduct is legal, and the defendant reasonably believes the official. This is a venerable defense, originating half a century ago in *Raley v. Ohio*.[2] The *Raley* defendants were held in contempt of a state legislative commission for refusing to answer questions about Communist Party activities and subversive labor activities. The commission chairman had erroneously led the defendants to believe that they had a right to rely on their privilege against self-incrimination. They did not, however, under the terms of a state immunity statute. The U.S. Supreme Court reversed their convictions. The Court concluded that even though there was "no suggestion that the commission had any intent to deceive the appellants," to affirm their convictions "after the commission had acted as it did would be to sanction the most indefensible sort of entrapment by the state — convicting a citizen for exercising a privilege which the state clearly had told him was available to him."[3] The Court expressly grounded its ruling in due process: "We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances."[4]

Six years after *Raley*, the Court decided *Cox v. Louisiana*.[5] Police officers had permitted defendant Elton Cox to demonstrate across the street from a courthouse. Cox was later charged with and convicted of picketing near a courthouse. Following *Raley*, the Supreme Court reversed his conviction, explaining as in *Raley* that "after the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could would be to sanction an indefensible sort of entrapment by the state — convicting a citizen for exercising a privilege which the state had clearly told him was available

to him."[6] The Court again invoked due process as the basis for its opinion: "The Due Process Clause does not permit convictions to be obtained under such circumstances."[7]

The Supreme Court recognized a right to present evidence in support of a *Raley/Cox*-type defense in *United States v. Pennsylvania Indus. Chem. Corp.* (*PICCO*).[8] In *PICCO*, the Court held that the defendant corporation should have been allowed to present evidence at its jury trial that a federal agency's longstanding construction of the Rivers and Harbors Act had misled the defendant about what conduct the government considered criminal. Once again emphasizing the due process nature of the defense, the Court explained that "to the extent that the regulations deprived PICCO of fair warning as to what conduct the government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the government from proceeding with the prosecution."[9]

The Supreme Court did not use the phrase "entrapment by estoppel" in *Raley*, *Cox*, or *PICCO*. That phrase apparently originated in a 1985 Ninth Circuit case.[10] The phrase makes no logical sense, and neither part of the phrase is truly apt. After all, what could it possibly mean to be entrapped *by estoppel*? The defendant is not entrapped in the usual sense (i.e., the government has not intentionally induced the defendant to commit a crime in order to prosecute him or her).[11] And the government is not estopped in the usual sense.[12] Nonetheless, this awkward phrase has stuck. But practitioners should not forget that this is at heart a constitutional due process or fairness defense. This fact is essential for convincing state courts that they, too, must recognize the defense.[13]

Elements

The elements of an entrapment by estoppel defense vary from jurisdiction to jurisdiction. The Sixth Circuit, for instance, has adopted a four-element definition that incorporates the fairness aspect of the defense.

- First, that an agent of the U.S. government announced that the charged criminal act was legal.
- Second, that the defendant relied on that announcement.
- Third, that the defendant's reliance on the announcement was reasonable.
- Fourth, that given the defendant's reliance, conviction would be unfair.[14]

The Ninth Circuit, on the other hand, has created a five-element test that emphasizes the actual authority of the government official and, seemingly divorcing the defense from its due process roots,[15] omits any explicit fairness element: "(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 he relied on the false information; and (5) that his reliance was reasonable."[16]

Some federal jurisdictions recognize and define the entrapment by estoppel defense in their model jury instructions.[17] Other jurisdictions — state and federal — rely on case law to define the defense.[18]

Regardless of how the elements are defined or enumerated, federal courts have held that entrapment by estoppel is an affirmative defense that the defendant must prove by a preponderance of evidence.[19]

What Entrapment By Estoppel Is *Not*

Entrapment by estoppel has elements in common with several other defenses. Some of these other defenses may be easier to prove in a particular case, and some more difficult. It is important to recognize the differences among these overlapping defenses so as to make strategic decisions about whether to promote a single defense or multiple (and possibly conflicting) defenses.[20] Additionally, as the Eleventh Circuit once warned while sorting through interrelated claims of entrapment by estoppel, public authority, and lack of specific intent: "In presenting arguments to busy trial courts, subtlety is no virtue."[21] Because "[p]lain talk by lawyers is necessary for clear understanding by judges" — and necessary to preserve all of the defendant's appellate options — counsel should be prepared to articulate the precise nature and applicability of these related defenses.[22]

Traditional Entrapment And Public Authority

Entrapment by estoppel should not be confused with a traditional entrapment defense. The defendant is not arguing that "the government secretly induced me to do X even though I knew X was illegal," but rather that "the government openly told me it was legal to do X." Additionally, in a traditional entrapment case, the defendant must prove lack of predisposition to commit the acts constituting the crime. In an entrapment by estoppel case, the defendant may well have been predisposed to commit the acts constituting the crime. Indeed, that predisposition may have been the reason the defendant sought out the official advice at issue. But that predisposition does not undermine the defense.[23]

Entrapment by estoppel is sometimes confused with the "public authority" defense. The public authority defense is a common law defense designed to immu-

Figure 1

Did the defendant —	Fall prey to intentional government trickery?	Reasonably rely on government advice or direction?	Know that the conduct was illegal?
Entrapment by estoppel	**No** (the government official openly, although perhaps erroneously, interpreted the law)	**Yes** (the defendant relied on the government official's advice)	**No** (because of the government official's advice, the defendant thought the conduct was legal)
Traditional entrapment	**Yes** (the government official secretly and intentionally induced the unpredisposed defendant to commit the crime)	**No** (the defendant was not aware of the government's involvement)	**Yes** (the defendant simply did not expect to get caught)
Public authority	**No** (the government official openly permitted the defendant to commit the crime)	**Yes** (the defendant followed the government official's direction)	**Yes** (but the defendant expected to be immune from prosecution)

nize undercover police officers from prosecution for crimes committed during legitimate law enforcement investigations. In practice, informants who claim to have engaged in drug trafficking on behalf of the government most often invoke the defense.[24] Public authority and entrapment by estoppel both require reasonable reliance upon government advice or direction. But the defendant claiming public authority believes that he or she will be immunized from prosecution for conduct known to be criminal. In contrast, the defendant claiming entrapment by estoppel believes that the conduct at issue is not criminal.[25]

Figure 1 summarizes the key commonalities and differences among entrapment by estoppel, traditional entrapment, and public authority.

Mistake of Law

Many states have statutory mistake of law defenses adopted (or adapted) from the Model Penal Code.[26] Depending on the wording of these defenses, they may or may not provide adequate stand-ins for the constitutional entrapment by estoppel defense. Statutory defenses that do not quite satisfy the fairness demands of the due process defense cannot be said to supplant entrapment by estoppel. The Hawaii Intermediate Court of Appeals recognized this in *State v. Guzman*.[27] The *Guzman* defendants were security guards who had picketed their employer hospital after unsuccessful labor negotiations. The guards had discussed their picketing procedure with the police, and had picketed for several weeks before being arrested and charged with blocking entry to the hospital.

In an interlocutory appeal from the trial court's denial of their motion to dismiss, the Hawaii appellate court held that the defendants should be allowed to introduce evidence in support of a due process entrapment by estoppel defense. Hawaii has a statutory mistake of law defense that explicitly requires that the official advice at issue be "afterward determined to be invalid or erroneous."[28] The *Guzman* court observed that, in contrast, the due process defense does not require an official "*mis*representation," but merely an official "*representation*."[29] The due process defense is therefore more fitting when defendants are charged under statutes entrusted to public agencies for interpretation, and thus "the representation of law is not necessarily a mistaken or false interpretation."[30] The *Guzman* court held that this subtle distinction between the defenses "underlies our belief that the affirmative defense contained in HRS § 702-220 (1993), while similar to the due process defense of entrapment by estoppel, does not replace or subsume the latter defense."[31]

Good Faith

Finally, entrapment by estoppel is easily confused with good faith. A good faith belief in the honesty or legality of one's conduct is a defense to specific intent crimes such as tax evasion and fraud.[32] Entrapment by estoppel requires reasonable reliance on government advice, while a good faith belief need be neither reasonable nor based on government advice.[33] Additionally, entrapment by estoppel is an affirmative defense that does not rebut any particular element of the charged offense. Good faith, on the other hand, negates the essential element of specific intent to cheat the government or other victim. Nonetheless, the same facts might support both defenses — if, for instance, the defendant's good faith belief in the legality of his or her conduct is in fact based on government advice (instead of, or in addition to, for example, advice of counsel). But the fineness of the distinction between these defenses has caused some courts to conclude that defendants charged with specific intent crimes are not entitled to entrapment by estoppel instructions when good faith instructions will suffice.[34] Other courts have sensibly held that the defense is available in both specific and general intent cases.[35]

Applicability to Strict Liability Crimes

The entrapment by estoppel defense is just as viable in strict liability cases as it is in specific and general intent cases. Indeed, PICCO was convicted of a strict liability crime, and that fact did not preclude the U.S. Supreme Court from concluding that the corporation was entitled to raise the defense.[36] As noted above, entrapment by estoppel does not rebut any "state of mind" or other element; rather, it is simply a defense of fairness. "Because the defense of entrapment by estoppel rests upon principles of fairness … it may be raised even in strict liability offense cases."[37]

'Official'

Federal courts have suggested that all manner of government employees, publications, and even nonemployee agents may be capable of giving advice subject to

entrapment by estoppel defenses — even when those employees and agents would have no authority to issue formal legal advisory opinions. Recall that the official advice-givers in the Supreme Court cases establishing this defense were a legislative commission chairman interpreting a state statute (*Raley*); a local police chief interpreting a state statute (*Cox*); and a federal agency's published regulation interpreting a federal statute (*PICCO*). In one Eleventh Circuit case, the official whose advice was held to implicate the defense was an Air Force Standards of Conduct Counselor whose military rank was *below* that of the defendant.[38] The counselor's advice-giving authority arose not from his rank, but from "regulations and direct orders of his superior."[39] And one district court has held that employees of a private agency that assisted the government with processing immigration applications "may well have been empowered to render the claimed erroneous advice" justifying an entrapment by estoppel defense in an immigration fraud case.[40]

The Ninth Circuit has held that "the United States Government has made licensed firearms dealers federal agents in connection with the gathering and dispensing of information on the purchase of firearms."[41] Thus, the Ninth Circuit allows defendants charged with illegal possession of firearms to argue entrapment by estoppel if a licensed firearms dealer misled them about their eligibility to own the firearms in question.[42] Other jurisdictions reject the argument that licensed firearms dealers can be deemed government agents in this context.[43]

Finally, most federal courts have held that ordinarily a defendant cannot claim entrapment by estoppel based on a *state* official's incorrect advice about *federal* law.[44]

Jury Question

In *Raley* and *Cox*, the Supreme Court held that affirming the defendants' convictions would violate due process. But in *PICCO*, the Court suggested that even going forward with a trial would violate due process: "[T]raditional notions of fairness inherent in our system of criminal justice prevent the government from *proceeding* with the prosecution."[45] This language suggests that trial courts may (and perhaps should) dismiss a case before trial if the defendant can establish entrapment by estoppel. And yet courts are divided over whether entrapment by estoppel is a question for the court, a jury, or both.

The federal resistance to pretrial dismissals based on this defense is rooted in the dictates of Rule 12 of the Federal Rules of Criminal Procedure. This rule authorizes district courts to entertain any pretrial defense "that the court can determine without a trial of the general issue."[46] Federal courts tend to interpret this language as limiting their ability to rule on fact-bound affirmative defenses. In *United States v. Fadel*, the Tenth Circuit explained that most federal courts "have *not* favored the pretrial resolution of [traditional] entrapment defense motions," because the defense "is intertwined with the issue of intent and is typically based on credibility determinations, an area traditionally reserved for jury resolution."[47] While the *Fadel* court was "not prepared to say that a district court may *never* decide an entrapment motion prior to trial," it concluded that "such motions are 'seldom' appropriate for pretrial resolution."[48] The Sixth Circuit exemplified the exception to the rule in *United States v. Levine*, affirming a trial court's pretrial dismissal of multiple counts on entrapment by estoppel grounds, where the dismissal was based on "undisputed extrinsic evidence," and "a two- or three-week trial of the substantive criminal charges would not have assisted the district court or this court in deciding the legal issues."[49]

On the other hand, one federal district court has sensibly concluded that entrapment by estoppel "is properly determined by the court before trial" regardless of the circumstances, because, in considering the defense, "the allegations of the indictment may be assumed to be true."[50] And at least some state courts have held that "entrapment is a question of law for the trial court to decide, not a question of fact for the jury to resolve."[51]

These conflicting authorities suggest that counsel might argue for either approach — a pretrial judicial decision or a jury determination at trial — or both. A favorable pretrial judicial decision would, of course, save the defendant from the rigors of trial. But such a decision might be reversed without any double jeopardy implications,[52] whereas a favorable jury determination resulting in a general "not guilty" verdict would protect the defendant from any future trial.[53] Additionally, a district court that decides the issue *against* the defendant before trial might be less inclined to allow the defendant to present evidence of entrapment by estoppel or to instruct the jury on the defense at trial.

Notice

Federal practitioners are cautioned that it may be necessary to file a Rule 12.3 notice of intent to raise an entrapment by estoppel defense. While this defense is not explicitly mentioned in the rule, several courts have assumed the rule's application to entrapment by estoppel.[54]

Conclusion

Entrapment by estoppel is a unique constitutional defense that will only apply in rare cases. Because of its uniqueness, many judges and prosecutors have never heard of the defense, may confuse it with other defenses, and may have to be convinced of its legal and factual viability. But with three strong U.S. Supreme Court opinions on your side, and ample support in the lower federal and state courts, in the right case you can invoke this fairness defense to free your "guilty" client.

Notes

1. 504 N.Y.S.2d 608, 610 (N.Y. Sup. 1986).
2. 360 U.S. 423 (1959).
3. *Id.* at 438.
4. *Id.* at 439.
5. 379 U.S. 559 (1965).
6. *Id.* at 571.
7. *Id.*
8. 411 U.S. 655 (1973).
9. *Id.* at 674.
10. *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 825 (9th Cir. 1985). The Ninth Circuit has also sometimes called the defense "official misleading" — a more accurately descriptive term. *See United States v. Batterjee*, 361 F.3d 1210, 1216 n.6 (9th Cir. 2004) (citing examples).
11. *See United States v. Tallmadge*, 829 F.2d 767, 775 n.1 (9th Cir. 1987) (distinguishing "intentional entrapment" from "entrapment *by* estoppel") (emphasis in original).
12. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 68 (1984) (noting that *PICCO* was "not [a] traditional equitable estoppel case[]") (Rehnquist, J., concurring); *Miller v. Commonwealth*, 492 S.E.2d 482, 487 n.4 (Va. App. 1997) ("The 'entrapment by estoppel' misnomer inhibits clear analysis and application of the defense, because the use of the word 'estoppel' unnecessarily places the due process basis for the defense in conflict with the well-established principle that 'the government may not be estopped on the same terms as any other litigant.' … Furthermore, the use of the word 'estoppel' improvidently suggests that the dispositive analysis is grounded in the application of agency principles rather than constitutional concerns.") (citations omitted); *United States v. Brady*, 710

F. Supp. 290, 295-96 (D. Colo. 1989) (noting that the defense "is not an estoppel at all in any meaningful sense," but rather a defense of "fundamental unfairness").

13. *See, e.g., State v. Guzman*, 968 P.2d 194, 204 (Haw. App. 1998) (recognizing that "the defense originated in U.S. Supreme Court cases interpreting the due process clause of the U.S. Constitution," and adopting defense under state constitution as well); *Miller v. Commonwealth*, 492 S.E.2d 482, 487 (Va. App. 1997) (recognizing defense and noting that "[t]he defense is a due process defense … grounded in traditional notions of fairness inherent in our system of criminal justice") (internal quotation marks and citation omitted).

14. Sixth Circuit Criminal Pattern Jury Instructions 6.09 (2009).

15. *See People v. Woods*, 616 N.W.2d 211, 218 (Mich. App. 2000) (noting that the unfairness element "is an important part of the analysis").

16. *Batterjee*, 361 F.3d at 1216 (internal quotation marks and citations omitted).

17. *See* Pattern Criminal Jury Instructions for the District Courts of the First Circuit 5.05 Comment ¶ 7 (2010); Third Circuit Model Criminal Jury Instructions 8.05 Comment (2009); Sixth Circuit Criminal Pattern Jury Instructions 6.09 (2009); Pattern Criminal Federal Jury Instructions for the Seventh Circuit 6.07 (1998); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 9.01 Committee Comments (2009) (but noting only existence of defense, and that the circuit's model entrapment instruction "does *not* describe" entrapment by estoppel) (emphasis in original). *See also* Model Penal Code 2.04(3)(b) (2001).

18. *See, e.g., United States v. Apperson*, 441 F.3d 1162, 1204-05 (10th Cir. 2006) (describing elements); *Batterjee*, 361 F.3d at 1216 (same); *United States v. Eaton*, 179 F.3d 1328, 1332-33 (11th Cir. 1999) (describing elements and holding that district court properly refused appellant's proposed instruction); *People v. Woods*, 616 N.W.2d 211, 217-18 (Mich. App. 2000) (discussing various federal permutations of elements and adopting detailed elements for defense in Michigan); *State v. Howell*, No. 97CA824, 1998 WL 807800, at *11-12 (Ohio App. 4 Dist. Nov. 17, 1998) (unpublished) (describing elements); *Commonwealth v. Kratsas*, 764 A.2d 20, 32-33 (Pa. 2001) (discussing elements with reference to federal cases).

19. *See United States v. Beatty*, 245 F.3d 617, 624 (6th Cir. 2001); *United States v. Stewart*, 185 F.3d 112, 124 (3d Cir. 1999); *United States v. Austin*, 915 F.2d 363, 365 (8th Cir. 1990).

20. Defendants may or may not be permitted to raise conflicting defenses, depending on the jurisdiction. *Compare Mathews v. United States*, 485 U.S. 58 (1988) (holding that federal defendants may raise traditional entrapment defense even while denying one or more elements of charged crime), *with People v. Hendrikson*, 45 P.3d 786, 791-92 (Colo. App. 2001) (noting that "it does not appear that the *Mathews* rule has been accepted by the majority of [state] courts addressing the issue") (citing A.L.R. and cases).

21. *United States v. Reyes Vasquez*, 905 F.2d 1497, 1549 (11th Cir. 1990).

22. *Id.* at 1500.

23. *See United States v. Blood*, 435 F.3d 612, 624-26 (6th Cir. 2006) (district court's "muddling of the elements of entrapment and entrapment by estoppel could have made the charge viewed as a whole confusing, misleading, or prejudicial … as it could have erroneously led the jurors to believe that the defense of entrapment by estoppel required the defendants to present evidence that they were not predisposed to commit the crime in question") (internal quotation marks and citation omitted); *Batterjee*, 361 F.3d at 1218 ("While one of the elements of an entrapment claim is the absence of predisposition on the part of the defendant … a defendant's predisposition to commit an offense is not at issue in an entrapment by estoppel defense.") (internal quotation marks and citations omitted).

24. *See, e.g., United States v. Bear*, 439 F.3d 565 (9th Cir. 2006).

25. *United States v. Strahan*, 565 F.3d 1047, 1051 (7th Cir. 2009) ("[I]n the case of the public authority defense, the defendant engages in conduct at the request of a government official that the defendant knows to be otherwise illegal, while in the case of entrapment by estoppel, because of the statements of an official, the defendant believes that his conduct constitutes no offense.") (citations omitted). Note that despite this recognition, the Seventh Circuit Pattern Instructions continue to equate the entrapment by estoppel defense with the public authority defense. Pattern Criminal Federal Jury Instructions for the Seventh Circuit 6.07 (1998). For other authorities that appear to conflate the two defenses, see *United States v. Mergen*, No. 06-CR-352, 2010 WL 395974, at *5 (E.D.N.Y. Feb. 3, 2010) (unpublished) (describing entrapment by estoppel as subset of public authority defense), and *United States v. Fulcher*, 188 F. Supp. 2d 627, 641-42 (W.D. Va. 2002) (allowing drug defendants who may have thought they were immune from prosecution, but could not possibly have thought that drug distribution was legal, to present evidence in support of both public authority and entrap-

ment by estoppel defenses) (citing cases).

26. *See* Model Penal Code 2.04(3)(b) (2001).

27. 968 P.2d 194 (Haw. App.), *cert. denied*, 980 P.2d 998 (Haw. 1998).

28. *Id.* at 207 n.18 (quoting HRS § 702-220).

29. *Id.* (emphases in original).

30. *Id.*

31. *Id.*

32. *See Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc).

33. *Id.*

34. *See, e.g., United States v. Cassidy*, No. 05-10641, 2007 WL 1578293, at *2 (9th Cir. May 31, 2007) (unpublished) (defendant not entitled to entrapment by estoppel instruction in tax evasion case, where "the trial court adequately instructed the jury on willfulness and the good faith misunderstanding defense"); *United States v. Dixon*, No. 97-6088, 1999 WL 98578, at *4 (6th Cir. Jan. 27, 1999) (unpublished) ("When a criminal statute requires specific proof of culpable intent, the constitutional defense of entrapment by estoppel is superfluous because a defendant who acted in good faith reliance on the advice of government officials that his conduct was legal cannot have the specific intent to commit the offense"); *United States v. Conley*, 859 F. Supp. 909, 929 (W.D. Pa. 1994) (because "subjective good faith is a complete defense" to specific intent crimes, there is "no need for protection" from entrapment by estoppel; thus "the Due Process reliance on misleading government conduct does not apply in the context of crimes requiring proof of an intentional violation of a known legal duty").

35. *See, e.g., United States v. Cross*, 113 F. Supp. 2d 1253, 1264 (S.D. Ind. 2000) (rejecting *Conley* and holding that entrapment by estoppel "may be raised as against both general intent crimes and specific intent crimes").

36. PICCO was convicted under 33 U.S.C.A. § 407, which describes conduct that is criminalized at 33 U.S.C.A. § 411. *See PICCO*, 411 U.S. at 656-67 n.1. The statute on its face contains no scienter requirement, and at the time *PICCO* was decided (1973), the statute was well-established as creating a strict liability offense. *See, e.g., United States v. United States Steel Corp.*, 328 F. Supp. 354, 356 (D. Ind. 1970) (noting that in over 70 years, "no reported decision has ever imposed a scienter requirement," and concluding that "scienter is not an essential element under the Refuse Act"); *United States v. Interlake Steel Corp.*, 297 F. Supp. 912, 915 (N.D. Ill. 1969) (finding no basis for reading a scienter requirement into the Act).

37. *United States v. Thompson*, 25 F.3d 1558, 1564 (11th Cir. 1994) (internal quotation marks and citations omitted).

38. *United States v. Hedges*, 912 F.2d 1397 (11th Cir. 1990).

39. *Id.* at 1405.

40. *United States v. Ubiparipovic*, No. CR-04-1142-PHX-DGC, 2007 WL 1958836 (D. Ariz. July 2, 2007) (unpublished) (declining to hold entrapment by estoppel defense unavailable as a matter of law before trial).

41. *Batterjee*, 361 F.3d at 1217; *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987).

42. *See id.*

43. *See United States v. Hullette*, 525 F.3d 610, 612 (8th Cir. 2008) (citing cases).

44. *See, e.g., United States v. Ormsby*, 252 F.3d 844, 850 (6th Cir. 2001); *United States v. Caron*, 64 F.3d 713, 714-17 (1st Cir. 1995), *and cases cited therein*.

45. 411 U.S. at 674 (emphasis added).

46. FED. R. CRIM. P. 12(b)(2).

47. 844 F.2d 1425, 1430 (10th Cir. 1988) (emphasis in original).

48. *Id.* at 1431 (citation omitted; emphasis in original).

49. 973 F.2d 463, 465-67 (6th Cir. 1992). *See also United States v. Neufeld*, 908 F. Supp. 491, 499 (S.D. Ohio 1995) (citing *Levine* for the proposition that entrapment by estoppel "may be raised in a Fed. R. Crim. P. 12(b)(2) motion to dismiss," but concluding in case at hand that "a determination of this issue without trial is unrealistic and would invade the province of the jury").

50. *United States v. Conley*, 859 F. Supp. 909, 928 (W.D. Pa. 1994).

51. *People v. Woods*, 616 N.W.2d 211, 216 (Mich. App. 2000) (applying procedural rule to entrapment by estoppel and directing trial court to hold evidentiary hearing); *see also Commonwealth v. Kratsas*, 764 A.2d 20, 31 (Pa. 2001) (holding that where defendant moves pretrial to dismiss charges on grounds of entrapment by estoppel, trial courts "are fully authorized to take evidence … and to make dispositive findings and conclusions concerning whether trial should proceed").

52. *See United States v. Conley*, 859 F. Supp. 909, 928 n.12 (W.D. Pa. 1994) (opining that a district court's pretrial judgment of "acquittal" on grounds of entrapment by estoppel "would not bar further prosecution under the Double Jeopardy Clause, and hence would not bar an appeal of the judgment by the government").

53. *See Green v. United States*, 355 U.S. 184, 188 (1957).

54. *See, e.g., United States v. Hilton*, No. 97-78-P-C, 2000 WL 894679, at *4 (D. Me. June 30, 2000) (unpublished) (assuming application of rule, but allowing defendant to argue entrapment by estoppel at bench trial despite fact that defendant only filed notice as to public authority defense: "Given the close similarity between these doctrines, the court overlooks the fact that Defendant's Notice pursuant to Fed. R. Crim. P. 12.3 refers to only the public authority defense."); *United States v. Jackson*, No. 96-CR-815, 1998 WL 149586, at *4 (N.D. Ill. Mar. 24, 1998) (unpublished) ("Based on the plain language, legislative history, and underlying purpose of the Rule, as well as the case law interpreting the Rule, the court concludes that Rule 12.3 applies to common law defenses of innocent intent, entrapment by estoppel, and public authority."); *United States v. Giacobbe*, No. 98-CR-11, 1998 WL 275599, at *2 (N.D.N.Y. May 26, 1998) (unpublished) (invoking entrapment by estoppel case while discussing applicability of Rule 12.3 to public-authority defenses). ■

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