UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
JESUS VICENTE ZAMBADA-NIEBLA,	)	09 CR 383-3
a/k/a "Vicente Zambada-Niebla,"	)	
a/k/a "Vicente Zambada,"	)	Judge Ruben Castillo
a/k/a "Mayito,"	)	
a/k/a "30"	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S RULE 12.3 NOTICE AND GOVERNMENT'S MOTION *IN LIMINE* TO PRECLUDE DEFENSES OF PUBLIC AUTHORITY AND ENTRAPMENT BY ESTOPPEL SUBJECT TO SUFFICIENT EVIDENTIARY FOUNDATION

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, provides the following response to defendant's notice of a public-authority defense, and presents the government's motion *in limine* to preclude the defenses of public authority and entrapment by estoppel, subject to defendant's pre-trial proffer of a sufficient evidentiary foundation to support the defense as a matter of law.

INTRODUCTION

The second superseding indictment charges that from about May 2005 to about December 2008, defendant Jesus Vicente Zambada-Niebla conspired to possess with intent to distribute and to distribute five kilograms or more of cocaine and one kilogram or more of heroin (Count One), and conspired to import into the United States from Mexico more than five kilograms of cocaine and more than one kilogram of heroin (Count Two).

The indictment alleges that defendant was a high-level member of the Sinaloa Cartel, a cocaine and heroin drug trafficking organization in Mexico. R. 75 at 2, 5. The indictment further

alleges that, among other things, defendant acted as a logistical coordinator for the Zambada-Garcia faction of the Sinaloa Cartel, which was headed by defendant's father and co-defendant, Ismael Zambada-Garcia. *Id.* The Zambada-Garcia faction was involved in importing multi-ton quantities of cocaine and multi-kilogram quantities of heroin, and defendant specifically coordinated deliveries of multi-kilogram quantities of cocaine and heroin into the United States, as well as deliveries of bulk quantities of United States currency to his father and the Zambada-Garcia faction in Mexico. *Id.* at 3-4, 5-6. In addition, the indictment alleges that defendant and other cartel leaders engaged in acts of violence to further their narcotics trafficking activities and threatened to do so in retaliation for the Mexican and American governments' enforcement of their narcotics laws. *Id.* at 16-17.

Pursuant to Federal Rule of Criminal Procedure 12.3, defendant has filed notice of a defense of public authority. R. 70. Defendant's notice states that he intends to assert the defense of "actual and/or believed public authority, and/or entrapment by estoppel, on behalf of the United States Department of Justice, Drug Enforcement Administration ('DEA') and the Federal Bureau of Investigation ('FBI'); and the Department of Homeland Security, Immigration and Customs Enforcement ('ICE')." *Id.* Defendant purports to identify the American officials who allegedly sanctioned his criminal activities as follows: "The members of the DEA and ICE included the Regional Assistant of the DEA for South America, the General Director of the DEA for Mexico, DEA agents from Monterrey, Hermosillo and Mexico City, including but not limited to those named Eduardo Martinez, 'Manny' LNU, 'David' LNU, and Esteban Monk, a/k/a Steven Monk, and others including FBI agents whose names are unknown to defendant but are known to the agencies." *Id.*

The government denies that defendant exercised public authority when he committed the serious crimes charged in the indictment. Based on defendant's Rule 12.3 notice, the government

moves *in limine* to preclude defendant from presenting evidence or making arguments at trial relating to defenses of public authority and entrapment by estoppel, absent a pre-trial proffer of evidence that is sufficient to support those defenses as a matter of law. In particular, the Court should require defendant to proffer evidence that a specific American official or officials with actual or apparent authority expressly authorized defendant to import multi-kilogram quantities of cocaine and heroin into the United States, as charged in the indictment, or expressly assured defendant that these acts were not criminal, and that defendant reasonably relied on these communications.

ARGUMENT

I. Defendant's Rule 12.3 Notice

A. Requirements of Rule 12.3

Federal Rule of Criminal Procedure 12.3 sets forth specific requirements the defendant must meet in giving notice of a public-authority defense. These requirements apply equally to a defense of entrapment by estoppel. *United States v. Neville*, 82 F.3d 750, 761 (7th Cir. 1996). Rule 12.3 provides:

> If a defendant intends to assert a defense of actual or believed exercise of public authority or behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time for filing a pretrial motion, or at any later time the court sets.

Fed. R. Crim. P. 12.3(a)(1).

Under the rule, the notice must contain: (1) the law enforcement agency or federal investigative agency involved; (2) the agency member on whose behalf the defendant claims to have acted; and (3) the time during which the defendant claims to have acted with public authority. Rule 12.3(a)(2).

Congress enacted Rule 12.3 because of concerns "with the increasing number of defendants attempting to utilize [the pubic authority] defense, the problems of surprise the defense created at trial[,] and the subsequent disclosures of confidential information which the defense often required." *United States v. Pitt*, 193 F.3d 751, 756 (3d Cir. 1999). Like Rule 12.1 and Rule 12.2, which govern notice of alibi and insanity defenses, "the rule's purpose is to avoid unfair surprise to the government," and like those rules, Rule 12.3 requires detailed notice. *See United States v. Burrows*, 36 F.3d 875, 881 (9th Cir. 1994) (explaining that the three rules "embod[y] the same rationale"); *United States v. Jackson*, No. 96 CR 815, 1998 WL 149586 (N.D. Ill. Mar. 24, 1998) (Williams, J.) ("Rule 12.3 was designed to protect the government from unfair surprise"); *cf. United States v. Buchbinder*, 796 F.2d 910, 915 (7th Cir. 1986) (explaining notice requirements of Rule 12.2 and noting that "the government cannot conduct its own investigation into the validity of the defense of lack of mental capacity and decide if it will present expert witnesses in rebuttal until such time as it has knowledge of the psychiatric and psychological evidence the defense intends to present."). Accordingly, Rule 12.3 rule "requires the defendant to summarize the defense," and requires the government to respond by "stat[ing] its position regarding the defense summarized in the notice." Committee Note, Preliminary Draft of Proposed New Amendment to the Federal Rules of Criminal Procedure; 111 F.R.D. 489, 500 (1986); Rule 12.3(a)(3).[1]

B. Denial

The government denies that when the defendant committed the acts charged in the

[1] The Committee Note is to the draft rule circulated by the Criminal Rules Committee of the Judicial Conference of the United States in 1986. Courts have cited the Committee Note as an authoritative explanation of the rule as adopted by Congress. *See Pitt*, 193 F.3d at 757 (3d Cir. 1999); *Burrows*, 36 F.3d at 881 (9th Cir. 1994).

indictment, he did so exercising public authority.

II. Defendant Must Produce Evidence Sufficient to Support the Defense.

A. Pre-trial Proffer of Evidence

In addition to the specific notice requirements of Rule 12.3, in all criminal cases, and particularly where the defendant asserts an affirmative defense, "[m]otions *in limine* are well-established devices that streamline trials and settle evidentiary disputes in advance, so that trials are not interrupted mid-course for the consideration of lengthy and complex evidentiary issues." *United States v. Tokash*, 282 F.3d 962, 968 (7th Cir. 2002). In response to a motion *in limine* challenging an affirmative defense, the defendant must make a pre-trial proffer of evidence. *Id.* at 979. If, taken as true, the evidence is insufficient as a matter of law to support a defense, the court should exclude the defense. *See United States v. Bailey*, 444 U.S. 394, 415-17 (1980); *United States v. Baker*, 438 F.3d 749, 753 (7th Cir. 2006); *United States v. Fish*, 388 F.3d 284, 287 (7th Cir. 2004) (vacated on other grounds by 544 U.S. 916 (2005)). Applying these standards, the Seventh Circuit and other courts have repeatedly upheld the pre-trial exclusion of the public-authority and entrapment-by-estoppel defenses. *See Baker*, 438 F.3d at 753-58*; Fish*, 388 F.3d at 287; *United States v. Pardue*, 385 F.3d 101, 108-09 (1st Cir. 2004); *United States v. Achter*, 52 F.2d 753, 755 (8th Cir. 1995); *United States v. Reyes-Vasquez*, 905 F.2d 1497, 1501 (11th Cir. 1990); *United States v. Anderson*, 872 F.2d 1508, 1515-16 (11th Cir. 1989); *United States v. Rosenthal*, 793 F.2d 1214, 1236-37 (11th Cir. 1986); *United States v. Kashmiri*, No. 09 CR 830-4, 2011 WL 1326373, *3 (N.D. Ill. Apr. 1, 2011) (Leinenweber, J.).

B. Legal Standards

The defenses of public authority and entrapment by estoppel are "closely related," and the

Seventh Circuit has at times "questioned the meaningfulness of the difference between them." *United States v. Jumah*, 493 F.3d 868, 874-75 & n.4 (7th Cir. 2007). Both are affirmative defenses, and defendant bears the burden of proving them by a preponderance of the evidence. *Id*. at 874-75 & n.4, 878. The premise of the defenses is that defendant committed the acts with which he is charged, but he did so reasonably believing that the government authorized his conduct. The defenses are grounded on the principle that it violates due process to prosecute someone "who acts in reliance upon official statements that [his] conduct is lawful." *Id.* at 874.

To establish a public authority defense, defendant must show that a public official expressly authorized defendant to take otherwise illegal action; the official had actual authority to provide such authorization; and the defendant reasonably relied on the authorization. *United States v. Strahan*, 565 F.3d 1047, 1051 (7th Cir. 2009).

To establish an entrapment-by-estoppel defense, defendant must show that: (1) a government official who had actual or apparent authority; (2) affirmatively assured the defendant by actively misleading him; (3) that certain conduct was legal; (4) the defendant actually, and in good faith relied on the official; and (5) this reliance was reasonable in light of the identity of the agent, the point of law represented, and the substance of the misrepresentations. *Baker*, 438 F.3d 749 at 755; *Fish*, 388 F.3d at 286-87; *United States v. Rector*, 111 F.3d 503, 506-07 (7th Cir. 1997); *Neville*, 82 F.3d at 761-62; *United States v. Howell*, 37 F.3d 1197, 1204-05 & n.9 (7th Cir. 1994).

There are two main differences between public authority and entrapment by estoppel. First, "in 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 actually

constitutes no offense." *Strahan*, 565 F.3d at 1051 (quoting *Jumah*, 493 F.3d at 875 n.4). Second, the public-authority defense requires that the government official have actual authority, while entrapment by estoppel requires only apparent authority. *See Baker*, 438 F.3d at 753-754.[2]

Both defenses are subject to a "rigorous" standard, *Fish*, 388 F.3d at 287, and the Seventh Circuit has repeatedly cautioned that they are "rarely available." *Id.*; *Rector*, 111 F.3d at 506; *Neville*, 82 F.3d at 761; *Howell*, 37 F.3d at 1204. As one court has put it, "[t]he only circumstances justifying use of the doctrine[s] are those which add up to the conclusion that [they] do[] not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation." *United States v. Hardridge*, 379 F.3d 1188, 1194 (10th Cir. 2004).

C. Defendant's Required Showings

Regardless of which defense defendant pursues, as discussed in detail below, defendant must establish the following propositions: a U.S. government official acted with actual or apparent authority; personally and directly communicated with defendant; gave defendant an express authorization or an affirmative assurance that defendant was authorized or legally permitted to traffic multi-kilogram quantities of cocaine and heroin into the United States and to commit acts of violence in furtherance of those criminal activities; and defendant actually, reasonably, and in good faith relied on these communications and believed his conduct was permitted.

---

[2] While *Baker* did not expressly decide that public authority requires actual authority, as the Seventh Circuit recognized, decisions from other courts make clear that actual authority is required. *Baker*, 438 F.3d at 753; *e.g.*, *United States v. Passaro*, 577 F.3d 207, 220 (4th Cir. 2009); *United States v. Giffen*, 473 F.3d 30, 39 (2d Cir. 2006); *Pitt*, 193 F.3d at 758; *United States v. Matta-Ballesteros*, 71 F.3d 754, 770 n. 12 (9th Cir. 1995); *United States v. Holmquist*, 36 F.3d 154, 161 nn.6-7 (1st Cir. 1994); *United States v. Baptista-Rodriguez*, 17 F.3d 1354 (11th Cir. 1994).

1. Express Authorization or Affirmative Assurance

Public Authority

For the public-authority defense, a government official must expressly authorize defendant to break the law. Applying this strict standard, the Seventh Circuit has upheld a district court's refusal to give a public-authority instruction, concluding that the defense was "utterly unsupported by the evidence," where defendant failed to show such an express authorization. *See Strahan*, 565 F.3d at 1051. In support of this conclusion, the court of appeals noted that "[n]o witness testified that [the official] ever instructed or authorized [defendant] to distribute crack cocaine," defendant testified that the official "never said I could sell drugs," and defendant never asked the official for permission to sell drugs. *Id.* at 1051.

Other circuits also interpret "express authorization" narrowly, holding, for example, that in order to establish that the government authorized defendant to commit a crime, defendant "must have reasonably clearly revealed the criminal aspect of [his] acts–not merely raised a suspicion about it," and that "[e]ven if [defendant] was authorized to commit a crime that is *not* charged in the indictment, this does not give him a defense to the crimes that *are* charged in the indictment." *United States v. Giffen*, 473 F.3d 30, 41 n.10, 40 (2d Cir. 2006). Furthermore, a showing of some nebulous connection between a criminal organization and an agency of the United States government is insufficient; defendant must show express government authorization for the specific criminal acts charged in the indictment. *see id*; *United States v. Matta-Bellesteros*, 71 F.3d 754, 770 (9th Cir. 1995) (rejecting public-authority defense when "[t]here was no showing that any relationship between [a cocaine trafficker], the CIA, and the Nicaraguan Contras amounted to United States government approval of the narcotics enterprise alleged in the indictment.").

Entrapment By Estoppel

Entrapment by estoppel requires that the government affirmatively assure the defendant that his conduct is legal, and this requirement is also a strict one. The Seventh Circuit has held in one case, for example, that "[i]n order for the defense of entrapment by estoppel to arguably apply, [the defendant] must identify a *person or persons*, cloaked with the actual or apparent authority of a governmental entity, who actively assured him that shooting his brother in the leg with a shotgun was a legal activity," *Fish*, 399 F.3d at 287, and, in another case, that defendant must show that he "received affirmative advice or information . . . that [he] was legally permitted to possess a firearm," *Howell*, 37 F.3d at 1205. Government policies that foster a "pervasive environment of lawlessness and violence" are insufficient to establish the defense. *Fish*, 399 F.3d at 287. It also "will not suffice to allege (or even prove) that 'the government' in the abstract has pursued policies that have unintentionally contributed" to the crime: the defense is specific to the state of mind of the defendant and the crime with which he has been charged." *Id.* Where a defendant "has not identified a government official with whom he had contact," "has not identified the substance of a misrepresentation of the law made by such an official," and has not "suggested that he mistakenly believed his conduct to have been lawful," the defense fails. *Id*.

As with the public-authority defense, the government's representation to the defendant must be express; a defendant may not merely assume that his conduct is legal based on government silence, *see Pardue*, 385 F.3d at 108-09, and the government's failure to "volunteer an observation that the conduct was illegal does not reasonably support [defendant's] concluding that his conduct was being authorized." *Giffen*, 473 F.3d at 43 n.13.

2. Direct Contact With Government Officials

For both defenses, defendant himself must have direct contact with a government official or officials who inform him that his conduct is authorized or legally permitted—the defense is unavailable if defendant communicates only with third-party intermediaries. This is because the central premise of both defenses is that "*a government official* authorized the defendant to perform an act that would otherwise be a crime," *Baker*, 438 F.3d at 753 (emphasis added), and "*a government official* . . . affirmatively assured or actively misled the defendant into a reasonable belief that certain conduct was legal," *Fish*, 399 F.3d at 286 (emphasis added). For entrapment by estoppel, the defendant "must identify a person or persons cloaked with the actual or apparent authority of a governmental entity" who assured him his conduct was legal, *id.* at 287 (emphasis removed), and the defendant's reliance on the government must be reasonable "in light of the identity of the agent. . . ." *Baker*, 438 F.3d at 755. These requirements make sense only if the defendant communicates with a government agent. Indeed, the Seventh Circuit has affirmed a district court's pre-trial exclusion of the entrapment-by-estoppel defense where, among other things, defendant failed to identify "a government official with whom [defendant] had contact." *Fish*, 399 F.3d at 287.

Other circuits have similarly insisted that the defendant have direct contact with the government. The Third Circuit, for example, has held that a defendant was not entitled to public-authority or entrapment-by-estoppel instructions because he had no direct contact with government agents and "[t]he assurances of . . . his partner in crime do not rise to the level of instructions, encouragement, or advice from a government official." *Pitt*, 193 F.3d at 758. Similarly, the Second Circuit has rejected a defendant's entrapment-by-estoppel defense where, among other things, "there

was no communication from an authorized government official to the defendant," and no evidence that defendant knew the details of any communication between the government and a third party. *United States v. Corso*, 20 F.3d 521, 528 (2d Cir. 1994).

3. Actual or Apparent Authority

Public Authority

Public authority requires actual authority. This means that, regardless of what defendant believed, the government official must "*in fact* ha[ve] the authority to empower the defendant to perform the acts in question." *Baker*, 438 F.3d at 753. Most courts hold that the government official in question had no actual authority. *See Pitt*, 193 F.3d at 758 (testimony at trial showed that "only the Director of Customs and the Director of the Drug Enforcement Agency, in conjunction with the approval of the United States Attorney for the subject district, could sanction and authorize" defendants to ship hundreds of kilograms of cocaine from Los Angeles to New York); *Anderson*, 872 F.2d at 1516 (finding no actual authority because, by Executive Order, the CIA cannot authorize conduct that violates the Constitution or statutes of the United States); *Rosenthal*, 793 F.2d at 1236 (same).

In particular, the law is clear that federal law enforcement agents have no actual authority to promise defendant immunity, because grants of immunity "are the exclusive prerogative of United States Attorneys." *United States v. Flemmi*, 225 F.3d 78, 87, 91 (2d Cir. 2000)(holding that FBI agents had no authority to promise defendant immunity, and such a promise was unenforceable); *accord United States v. Fuzer*, 18 F.3d 517, 519 (7th Cir. 1994) (holding that conviction should stand because defendant failed to establish that ATF agents had authority to bind U.S. Attorney by promising immunity); *United States v. Cordova-Perez*, 65 F.33d 1552, 1554 (9th Cir. 1995) (same

for INS agent); *United States v. Streebing*, 987 F.2d 368, 372-73 (6th Cir. 1993) ("the FBI agent lacked any actual or apparent authority to make the alleged promise not to prosecute"); *United States v. Kettering*, 861 F.2d 675, 678 (11th Cir. 1988)(DEA agent lacked authority to promise defendant a sentence through a plea agreement). As the First Circuit has explained, any other rule would allow "a minor government functionary hidden in the recesses of an obscure department . . . to prevent the prosecution of a most heinous criminal simply by promising immunity in return for the performance of some act which might benefit his department. Such a result could not be countenanced." *Flemmi*, 225 F.3d at 87-88.[3]

Entrapment By Estoppel

Entrapment by estoppel requires actual or apparent authority, but as with actual authority, the Seventh Circuit interprets apparent authority strictly. A defendant must "show the federal government clothed [an official] with apparent authority to speak on its behalf," *Baker*, 438 F.3d at 756, but "[r]arely, if ever, can a case for apparent authority be made against the federal government based on actions of government agents." *Rector*, 111 F.3d at 507. When dealing with the government, a defendant is "charged with knowledge of the law 'and may not rely on the conduct of Government agents contrary to the law.'" *United States v. Larson*, 862 F.2d 112, 115 (7th Cir. 1988) (quoting *Heckler v. Comm. Health Servs. of Crawford*, 467 U.S. 51, 63 (1984)); *see also Streebing*, 987 F.2d at 372-73 ("the FBI agent lacked any actual or apparent authority to make the alleged promise not to prosecute").

Just as importantly, defendant must show that an official's statement to him caused him

[3] Courts recognize a narrow exception to this rule when the government's failure to comply with an unauthorized promise "would render a prosecution fundamentally unfair." *Flemmi*, 225 F.3d at 88 n.4.

actually, reasonably, and in good faith to believe that importing kilograms of cocaine and heroin into the United States, and threatening to commit violent acts against the American or Mexican governments, was lawful. *See Baker*, 438 F.3d at 753, 755.

4. Summary

The chart that follows summarizes the requirements of the two defenses, as set forth above.

	Public Authority	**Entrapment By Estoppel**
Nature of Communication	Express authorization to commit the specific crimes charged in the indictment	Affirmative assurance that specific acts charged in the indictment are not criminal
Contact with Official	Direct contact with identified American official	Direct contact with identified American official
Type of Authority Official Possesses	Actual authority	Actual or apparent authority
Defendant's Reasonable Reliance	Required	Required

D. The Content of Defendant's Pre-trial Proffer

Defendant must set forth factual allegations that would permit a reasonable jury to conclude by a preponderance of the evidence that when defendant committed the acts charged in the indictment, he was exercising public authority. "Whether a defendant was given governmental authorization to do otherwise illegal acts through some dialogue with government officials necessarily depends, at least in part, on precisely what was said in the exchange." *Giffen*, 473 F.3d at 39. Therefore, defendant's proffer of evidence must be specific and detailed; "[v]ague and necessarily self-serving statements of defendants or witnesses" are not sufficient. *See Bailey*, 444 U.S. at 415. The Seventh Circuit has strictly enforced this requirement, affirming a district court's

pre-trial exclusion of the entrapment-by estoppel defense where the defendant failed to identify "a public official with whom he had contact," and "the substance of a misrepresentation of the law made by such an official," and also failed to "suggest[] that he mistakenly believed his conduct to have been lawful." *Fish*, 399 F.3d at 287.

This Court should require defendant to make a pre-trial proffer of evidence showing that: (1) a specific witness or witnesses will testify at trial that (2) at specific times and places; (3) a specific American official or officials; (4) who had actual or apparent authority; (5) gave the defendant an express authorization to commit the specific criminal acts charged in the indictment; or (6) affirmatively assured defendant that the specific acts charged in the indictment were not criminal; and (7) defendant actually, reasonably, and in good faith relied on this authorization or assurance. If defendant fails to proffer such evidence, or if defendant's proffer fails to meet these standards, the Court should grant the government's motion *in limine* and exclude the defenses of public authority and entrapment by estoppel.[4]

III. Request for Disclosure of Witnesses

Pursuant to Rule 12.3(a)(4)(A), the government requests that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority or entrapment-by-estoppel defense.

CONCLUSION

For the foregoing reasons, the government denies defendant's defense of public authority and entrapment by estoppel. The government also moves *in limine* to preclude defendant from

[4] The government requests an opportunity to challenge the legal sufficiency of whatever factual pre-trial proffer defendant makes.

presenting evidence or making arguments at trial relating to these defenses, absent a pre-trial proffer of evidence that is sufficient to support the defenses as a matter of law.

Dated: July 21, 2011

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/ Thomas D. Shakeshaft_

THOMAS D. SHAKESHAFT
ANDREW C. PORTER
MICHAEL J. FERRARA
ANTHONY P. GARCIA
MARC KRICKBAUM
Assistant United States Attorneys
219 S. Dearborn Street
Chicago, IL 60604
312-886-0667