Entrapment Issue

1. Did the govt induce the defendant?
2. Was the defendant predisposed to commit the crime?
3. **United States v. Jones, 231 F.3d 508, 516 (9th Cir. 2000)**

Reminders:

1. “Real meat is in 9th Cir Cases—it has it’s own test
2. Do **not** address (1) entrapment by estoppel; (2) derivative entrapment; (3) sentencing entrapment; (4) outrageous government conduct
3. Nothing to challenge in the judge’s jury instructions
4. Uphill battle b/c standing for evaluating Rule 29 motions are v favorable to govt (See. E.g., United States v. Ruiz-Lopez, 749 F.3d 1138, 1141-43 (9th. Cir. 2014)

# Cases

# 9th Circuit

## United States v. Jones, 231 F.3d 508, 516 (9th Cir. 2000)

* 1. Defense of Entrapment elements
     1. The defense of entrapment contains **two** elements: (1) government inducement of the crime, and (2) the absence of predisposition on the part of the defendant.
     2. Generally, whether a defendant was entrapped is a question for the jury.
     3. entrapment defense is submitted to the jury 🡪 an appellate court should not disturb the jury's finding unless, viewing the evidence in the light most favorable to the government, no reasonable jury could have concluded that the government had disproved either of the elements of the entrapment defense.
     4. In this case, there was sufficient evidence for a reasonable jury to find either that Appellant was not induced by government agents or that he was predisposed to commit the crimes charged.
  2. Inducement
     1. (517) Factors in determining whether a person is a government agent include “the nature of that person's relationship with the government, the purposes for which it was understood that person might act on behalf of the government, the instructions given to that person about the nature and extent of permissible activities, and what the government knew about those activities and permitted or used.” Ninth Cir. Model Jury Instr. Crim § 6.3.
     2. (517) In sum, although the government agreed to accommodate King's decision to “call the loans,” a reasonable jury could have found that the agents did not “authorize, direct or supervise” his activities.
     3. (517) “Inducement has been defined as ‘repeated and persistent solicitation’ or ‘persuasion’ which overcomes the defendant's reluctance. Mere suggestions or the offering of an opportunity to commit a crime is not conduct amounting to inducement.”

## [United States v. Smith, 802 F.2d 1119, 1124 (9th Cir.1986)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986151091&pubNum=350&originatingDoc=I5d6e5177799111d9bf29e2067ad74e5b&refType=RP&fi=co_pp_sp_350_1124&originationContext=document&transitionType=DocumentItem&ppcid=2cab8b750acb4ef3a37641f8007f84b2&contextData=(sc.Search)#co_pp_sp_350_1124).

* 1. Entrapment as matter of law
     1. To establish entrapment as a matter of law, the defendant must point to undisputed evidence of entrapment.

## United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 821 (9th Cir. 1985)).

* 1. Entrapment as a matter of law
     1. In order to show that entrapment exists as a matter of law, there must be undisputed testimony making it patently clear that an otherwise innocent person was induced to commit the act complained of by trickery, persuasion, or fraud of a government agent. United States v. Rangel, 534 F.2d 147, 149 (9th Cir.), cert. denied, 429 U.S. 854, 97 S.Ct. 147, 50 L.Ed.2d 129 (1976); see United States v. Abushi, 682 F.2d 1289, 1297 (9th Cir.1982).
     2. The controlling question on review is whether the defendant lacks the predisposition to commit the act. Id. (U.S. v. Rangel) at 1297.

## United States v. Davis, 36 F.3d 1424, 1430 (9th Cir. 1994)

* 1. Defense of Entrapment
     1. There are two elements to the defense of entrapment: (1) government inducement of the crime, and (2) the absence of predisposition on the part of the defendant.
  2. Inducement
     1. Where the government has induced an individual to break the law and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to first being approached by government agents. See Jacobson v. United States, 503 U.S. 540, ----, 112 S.Ct. 1535, 1540, 118 L.Ed.2d 174 (1992).
     2. Inducement must be provided by someone acting for the government.United States v. Becerra, 992 F.2d 960, 963 (9th Cir.1993). Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship. See United States v. Garza-Juarez, 992 F.2d 896, 909 (9th Cir.1993).
  3. Predisposition Evaluation (5 factors)
     1. In evaluating predisposition, the court reviews five factors: (1) the character and reputation of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement. Becerra, 992 F.2d at 963. Although none of these five factors controls, the most important is the defendant's reluctance to engage in criminal activity.
  4. Overturning entrapment
     1. Generally, “the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.”
     2. It is inappropriate for an appellate court to determine whether a defendant was entrapped when such a determination would necessarily entail “choosing between conflicting witnesses” and “judging credibility.” See Sherman, 356 U.S. at 373, 78 S.Ct. at 821.
     3. we should not disturb the jury's finding unless, viewing the evidence in the light most favorable to the government, no reasonable jury could have concluded that the defendants were predisposed to commit the charged offenses. See United States v. Hart, 963 F.2d 1278, 1283 (9th Cir.1992).
     4. In short, to justify an acquittal based on entrapment as a matter of law, there must be undisputed evidence that Davis and Williams were induced to commit crimes by the government and were not predisposed to do so. See Skarie, 971 F.2d at 320; Hart, 963 F.2d at 1283; Smith, 802 F.2d at 1124.
  5. Predisposition Facts (lead to “no plain error” conclusion")
     1. **(United States v. Davis, 36 F.3d 1424, 1432 (9th Cir. 1994)** Consequently, the jury would have been able to consider all of the same evidence it did in determining predisposition, and this evidence strongly supports a finding that Williams was predisposed. Specifically, the evidence suggested that Williams sold crack in Las Vegas before he was targeted by Richardson and McConnell. Williams' actions during the transaction belied the contention that he had no experience selling drugs: he asked McConnell for identification and insured that McConnell had the money before summoning Davis to bring the crack. *Cf. Citro,* 842 F.2d at 1152 (relying on similar facts in finding the defendant was predisposed). Further, although Williams did not live in Las Vegas, he was able to obtain the crack quickly and with no apparent difficulty. Finally, Williams admitted that he could supply crack on a weekly basis. Thus, the jury would have found Williams to be predisposed even under *Jacobson* and would have rejected his entrapment defense. No plain error exists.

## United States v. Poehlman, 217 F.3d 692, 698 (9th Cir.2000).

* 1. Cited in *Jones* (516) for when entrapment defense = submit to jury 🡪 appellate court disturb jury finding 🡪 govt disprove elements
  2. Inducement
     1. Not only did this diminish the risk of detection, it also allayed fears defendant might have had that the activities would be harmful, distasteful or inappropriate, particularly since Sharon claimed to have herself benefitted from such experiences (702).

## United States v. Skarie, 971 F.2d 317, 320 (9th Cir.1992).

* 1. Cited in *Davis* (1430) for element of entrapment defense
  2. Prior drug conviction ≠ sufficient to show predisposition
     1. (WL 6) Evidence presented by the gov only showed predisposition prior to govt acts intended to create predisposition

### United States v. Simas, 937 F.2d 459, 462 (9th Cir. 1991)

* 1. Cited in United States v. Jones for inducement definition

## U.S. v. Mendoza-Prado, 314 F.3d 1099 (9th Cir. 2002)

* 1. Inducement by **Friend**
     1. The mere suggestion to commit a crime does not amount to inducement, *United States v. Simas,* 937 F.2d 459, 462 (9th Cir.1991), even if the suggestion is made by a friend. (\*1102)
  2. Character assessment for predisposition ($$$$$$$)
     1. Nevertheless, we have held that evidence of prior bad acts is not relevant to prove predisposition unless the prior bad acts are similar to the charged crime. *United States v. Bramble,* 641 F.2d 681, 682 (9th Cir.1981).(\*1103)
  3. Propensity
     1. When a defendant argues that he was not predisposed to commit *a particular* crime, the only relevant response from the government is one that bears on his propensity to engage in *that kind* of criminal activity. For example, a person who has been convicted of reckless driving does not necessarily have a propensity to cheat on his taxes. (\*1104)

## U.S. v. Bramble, 641 F.2d 681 (9th Cir. 1981)

* 1. Personal MJ plants ≠ commercial operation
     1. In absence of evidence that the planting was of commercial quantity, no rational inference can be drawn from the fact of cultivation that it was for the purpose of sale.
  2. Prior Conviction usage for new charge
     1. Prior conviction of MJ 🡪 Predisposed to sell cocaine

## U.S. v. Sandoval-Mendoza, 472 F.3d 645 (9th Cir. 2006)

* 1. Entrapment as matter of law (setup isn’t enough)
     1. the government presented evidence Sandoval–Mendoza was predisposed to sell drugs, including wiretap recordings of him talking as though he were an experienced drug dealer. Offering to buy drugs from a drug dealer is not entrapment, even if the government “sets the dealer up” by providing an informant pretending to be a customer, because the dealer is already predisposed to sell. (\*649)

## Enriquez v. U.S., 314 F.2d 703 (9th Cir. 1963)

* 1. MJ **not** same as heroin ($ $ $ $ $)

## De Jong v. U.S., 381 F.2d 725 (9th Cir. 1967)

* 1. Evidence of prior crimes
     1. Evidence of prior acts of misconduct is not admissible unless in some way relevant to the crime charged, and where entrapment is in issue evidence of prior crimes is not relevant unless it tends to prove that defendant was engaged in illegal operations in some way similar to those charged in the indictment. Proof that a man is a burglar or a drunk does not tend to show that he has dealt in narcotics and was prepared to deal in narcotics at the time of the asserted entrapment. For this reason the judgment is reversed and the cause remanded for a new trial. (\*726)

## U.S. v. Martinez, 122 F.3d 1161 (9th Cir. 1997) ($ $ $ $ $$ $ $ $$ $ $ $$ $ $ $)

* 1. Weighing of different factors (D favored)
     1. The government concedes that the first two factors weigh in Martinez's favor. The third factor weighs slightly in the government's favor because Martinez would stand to profit from successful drug deals and there was evidence that Martinez needed money at the time. The fourth and most important factor—defendant's reluctance to be drawn into criminal conduct—also favors Martinez.(\*1164)
     2. Four of the five predisposition factors weigh in favor of Martinez, including the most important of them. (\*1165)

# Supreme Court of the United States

## Sherman v. United States, 356 U.S. 369, 377, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958)).

* 1. Cited in *Jones* (516) for entrapment defense
     1. the inducement consisted of establishing a friendly relationship with the defendant, and then playing on his sympathy for the supposed suffering of a fellow drug user

## Jacobson v. United States, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992)

* 1. Cited in *Jones* (516); holding when D provided w/ opportunity to commit crime 🡪 entrapment defense = bad b/c commission of criminal act shows D’s **predisposition**

## Sorrells v. U.S., 287 U.S. 435, 439-41 (1932)

* 1. Cited in Poehlman; the inducement consisted of repeated requests (for liquor), made in an atmosphere of comradery among veterans.