A P P E N D I X

APPENDIX

Opinion, United States Court of Appeals for the Eleventh Circuit, *Alvin Andre v. United States*, No. 19-11486 (11th Cir. May 8, 2020) A-1

Judgment in a Criminal Case, United States District Court for the Southern District of Florida, *United States v. Alvin Andre*, No. 18-60271-Cr-Scola A-2

Defendant's Notice of Proposed Jury Instructions – Entrapment (DE 39) *United States v. Alvin Andre*, No. 18-60271-Cr-Scola A-3

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11486
Non-Argument Calendar

D.C. Docket No. 0:18-cr-60271-RNS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALVIN CELIUS ANDRE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 8, 2020)

Before ED CARNES, Chief Judge, LAGOA, and HULL, Circuit Judges.

PER CURIAM:

Alvin Andre was caught in an undercover sting operation attempting to pay for sex with a child. After a jury trial, he was convicted of attempted enticement of a minor and attempted sex trafficking of a minor. This is his appeal.

I.

In January 2018, FBI agent Matthew Fowler began an undercover sting operation to catch child abusers. He placed an ad on Craigslist posing as a man who abused his nine-year-old daughter and who was looking for another man to have sex with her. In the title of his ad he said that he was a "younger dad" and included "MW4M," meaning man and woman looking for a man. In the body of the ad he wrote: "Younger dad looking for other like-minded. Daughter here. . . . Love to meet others with similar interests."

The next day, Andre contacted Fowler, saying he had read the ad and "wanted to see what's up." Fowler replied that he was looking for others into "youngggg," a spelling that he knew, based on his experience investigating child abuse cases, meant underage. After confirming that Fowler was talking about his nine-year-old daughter, Andre asked for a picture. They continued to text back and forth. Andre asked if Fowler was a cop and, being assured that he was not, began to ask questions and describe in graphic and horrifying detail his plans to have sex with the nine-year-old child.

Agent Fowler attempted to arrange a meeting with Andre in January, but Andre did not show up for the meeting. Fowler contacted Andre the next week and invited Andre to another meeting in mid-February, but the plans fell through again.

Over the next seven months, Andre would stop texting agent Fowler for long periods of time. At one point, he did not text Fowler for three months. But Andre eventually restarted the conversation and steered the topic of conversation to the daughter. During their conversations that summer, Fowler told Andre that his daughter had turned ten.

In September, Fowler and Andre arranged another meeting. The two agreed that Andre would pay $100 to have sex with the ten-year-old child, $50 in advance and $50 after. They met at a McDonald's where Andre paid $50 to Fowler. They left together, and Andre was arrested in the parking lot.

Andre pleaded not guilty and went to trial. He moved for judgment of acquittal after the government rested, but the court denied his motion. Andre did not call any witnesses for his defense. He objected to the jury instruction that the court gave on entrapment and proposed his own. The district court overruled Andre's objection and used the Eleventh Circuit pattern jury instruction for entrapment instead of his. He was convicted of attempted enticement of a minor in violation of 18 U.S.C. § 2422(b) and attempted sex trafficking of a minor in violation of 18 U.S.C. § 1591(a)(1) and (b)(1) and 18 U.S.C. § 1594(a).

Andre makes two contentions on appeal. First, that the district court abused its discretion in declining to use his proposed entrapment instruction. And second, that the evidence was insufficient to support the convictions.

II.

The entrapment instruction that Andre proposed, and the district court rejected in favor of the Eleventh Circuit pattern jury instruction, stated the following:

> "Entrapment" occurs when a government agent induces a Defendant to commit a crime that the Defendant was not already willing to commit.
>
> The Defendant has claimed to be a victim of entrapment regarding the offenses charged in the indictment.
>
> The law forbids convicting an entrapped Defendant.
>
> The Government must prove beyond a reasonable doubt that the Defendant was willing to commit the crimes charged in the indictment before this contact with the government agent and without the inducement of the government agent.
>
> If you have a reasonable doubt about whether the Defendant was willing to commit the crimes charged in the indictment before his contact with the government agent and without the inducement of the government agent then you must find the Defendant not guilty.

The Eleventh Circuit pattern jury instruction, which the court gave instead, stated as follows:

> "Entrapment" occurs when law-enforcement officers or others under their direction persuade a defendant to commit a crime that the Defendant had no previous intent to commit.

> The Defendant has claimed to be a victim of entrapment regarding the charged offense.
>
> The law forbids convicting an entrapped Defendant.
>
> But there is no entrapment when a defendant is willing to break the law and the Government merely provides what appears to be a favorable opportunity for the Defendant to commit a crime.
>
> For example, it's not entrapment for a Government agent to pretend to be someone else and offer – directly or through another person – to engage in an unlawful transaction.
>
> So a defendant isn't a victim of entrapment if you find beyond a reasonable doubt that the Government only offered the Defendant an opportunity to commit a crime the Defendant was already willing to commit.
>
> But if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty.

Eleventh Circuit Criminal Pattern Instruction, No. S13.1 (2016).

We review a district court's rejection of a proposed jury instruction only for abuse of discretion. United States v. Lebowitz, 676 F.3d 1000, 1014 (11th Cir. 2012). "Although a defendant may request a specific instruction, the court is not obligated to use the exact wording of the proposed instruction, as long as the words chosen clearly and accurately state the proposition being requested." United States v. Duff, 707 F.2d 1315, 1320–21 (11th Cir. 1983). A district court's refusal to give a requested jury instruction is grounds for reversal only if "(1) the requested instruction was substantively correct, (2) the court's charge to the jury did not cover

the gist of the instruction, and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense." Lebowitz, 676 F.3d at 1014 (quoting United States v. Culver, 598 F.3d 740, 751 (11th Cir. 2010)).

Andre argues that his proposed instruction includes an important element of entrapment that is missing from the pattern jury instructions. He asserts that under Jacobson v. United States, 503 U.S. 540 (1991), to overcome an entrapment defense, the government must show that the defendant had a predisposition to commit the crime before coming into contact with the government agent; that predisposition requirement is not clear from the pattern jury instruction; therefore, his ability to present an effective defense was substantially impaired.

We disagree with his minor premise. The pattern jury instruction states that entrapment "occurs when law-enforcement officers or others under their direction persuade a defendant to commit a crime that the Defendant had no previous intent to commit" and that "if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty." Those sentences clearly communicate that the defendant cannot be convicted unless the government proves beyond a reasonable doubt that he was predisposed to commit the crime before the government agent did anything to persuade him to do it. Because the jury charge that was given covered the gist of

the requested instruction, the refusal to give it did not impair Andre's ability to mount an entrapment defense.

Our prior decisions support that holding. In United States v. Brown, 43 F.3d 618 (11th Cir. 1995), for example, we held that an older version of the pattern jury instruction for entrapment, with substantially similar language, properly communicated the predisposition requirement described under Jacobson. In Brown, the instruction said that if the evidence left the jury with "reasonable doubt whether a defendant had any intent to commit the crimes except for inducement or persuasion on the part of the Government officer or agent," the jury had to find the defendant not guilty. 43 F.3d at 628 (emphasis added). We held that language was good enough to communicate the predisposition requirement.

The instruction here is essentially the same as the one in Brown. It says that "if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then [the jury] must find the Defendant not guilty." (Emphasis added). The court's charge to the jury communicated the gist of the instruction that Andre wanted, and the court did not abuse its discretion by refusing to give his proposed instruction. See Lebowitz, 676 F.3d at 1014.

III.

Andre also challenges the sufficiency of the evidence underlying his convictions. He argues that the government failed to demonstrate both that he had the specific intent to entice a minor for the purposes of § 2422(b) and that before the government had contact with him Andre was predisposed to commit the crimes for which he was convicted.

We review de novo a challenge to the sufficiency of the evidence. United States v. Isnadin, 742 F.3d 1278, 1303 (11th Cir. 2014). We view the evidence in the light most favorable to the government, resolving all reasonable inferences and credibility evaluations in favor of the verdict. Id. To be sufficient to support a conviction, the evidence "need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." Id. (quotation marks omitted). Evidence is sufficient to support a conviction if a reasonable trier of fact could find that the evidence established the defendant's guilt beyond a reasonable doubt. Id.

A.

Andre argues that the government failed to demonstrate that he had the specific intent to entice a minor for the purposes of 18 U.S.C. § 2422(b). Section 2422(b) applies if a defendant uses interstate commerce and "knowingly persuades, induces, entices, or coerces any individual" who is not yet eighteen years

old to engage in prostitution or sexual activity. To prove attempt under § 2422(b), the government must prove that the defendant (1) had the specific intent to persuade, induce, entice, or coerce a minor to engage in criminal sexual activity, and (2) took a substantial step toward the commission of the underlying crime. United States v. Yost, 479 F.3d 815, 819 (11th Cir. 2007).

A defendant does not have to communicate or negotiate directly with a child to be convicted under § 2422(b), nor does the child even have to exist. A defendant "can be convicted under [§ 2422(b)] when he arranges to have sex with a minor or a supposed minor through communications with an adult intermediary." United States v. Lanzon, 639 F.3d 1293, 1299 (11th Cir. 2011).

Andre asserts that because the Craigslist ad he responded to indicated that the father had already assented to the sexual contact, the government did not prove that he had the specific intent to persuade, induce, entice, or coerce anyone. That argument is foreclosed by United States v. Rutgerson, 822 F.3d 1223 (11th Cir. 2016). In Rutgerson, the defendant argued that the minor had already indicated through an online ad that she would have had sex with anyone who paid, so he did not have the intent to coerce her. Id. at 1233. We rejected that argument, holding that "offering or agreeing to pay money in exchange for engaging in various sex acts qualifies as inducement within the meaning of the statute." Id. at 1234 (emphasis added). Because merely agreeing to the underaged victim's price in

exchange for sex counts as inducement, the defendant violated the act by attempting to "persuade or induce [the minor] to engage in sex with him by offering to pay her money (and a substantial amount at that) for her services." Id.

So too here. It does not matter that the child in this case does not exist or that the fictional father had already assented to sexual contact between her and an adult. See Lanzon, 639 F.3d at 1299. What matters is that Andre agreed to pay money to have sex with a child. The government put forth sufficient evidence for a conviction under § 2422(b).

B.

Andre also argues that the government did not establish that he had a predisposition to commit the enticement and the sex trafficking crimes. Specifically, he asserts that the government failed to show that he was predisposed to commit those crimes because it found no evidence of child pornography or any other attempt to have sex with a child when it searched his phone and laptop. He argues that his chats with Fowler cannot show predisposition because he had already been contacted by police, so his willingness to sleep with a child at the government's prompting cannot prove that he was predisposed to sleeping with children.

The entrapment defense applies if (1) the government induced the defendant to engage in criminal activity and (2) the defendant was not predisposed to commit

the crime before the inducement. Rutgerson, 822 F.3d at 1234. The defendant bears the initial burden of production to show that the government "created a substantial risk that the offense would be committed by a person other than one ready to commit it." Id. Once the defendant has met this burden, the government must establish the defendant's predisposition to commit the alleged offense — it must prove beyond a reasonable doubt that the defendant was predisposed to commit the criminal act before he was approached by Government agents. Id. at 1234–35.

Both parties seem to assume that Andre showed that the government induced him to engage in the illegal activity, so the question before us is whether Andre was predisposed to commit his crimes before he was contacted by the government. Even though predisposition involves the defendant's willingness to commit the crime before he was contacted by the government, proving it does not require pre-contact evidence. Predisposition can be proven by the defendant's "ready commission" of the charged crime. Id. Or it can be shown if the defendant is given the opportunity to back out of the illegal activity but fails to do so. Id. Whether a defendant was predisposed to committing a crime is a "fact-intensive and subjective inquiry." Id.

The government's evidence proved that Andre was predisposed to commit the crimes. It showed that Andre was the one who initially contacted Fowler in

response to the Craigslist ad. It showed that once Andre knew the daughter was nine years old he chose to ask for photos of her and continued to plan to have sex with her. And it showed that Andre had plenty of opportunity to back out of the crimes during the months-long gap in communication but chose instead to re-engage with Fowler and break the law. That is enough to show predisposition.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 08, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-11486-AA
Case Style: USA v. Alvin Andre
District Court Docket No: 0:18-cr-60271-RNS-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA

v.

ALVIN CELIUS ANDRE

JUDGMENT IN A CRIMINAL CASE

Case Number: **18-60271-CR-SCOLA**

USM Number: **15595-104**

Counsel for Defendant: Deric Zacca, Esquire
Counsel for The United States: Francis I. Viamontes
Court Reporter: Tammy Nestor

The defendant was found guilty on counts 1 and 2 of the superseding indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 2422(b)	Attempted enticement of a minor to engage in illicit sexual activity.	01/10/2018	1
18 U.S.C. § 1594(a) and 1591(a)(1), (b)(1)	Attempted sex trafficking of a minor.	01/10/2018	2

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: 4/11/2019

ROBERT N. SCOLA, Jr.
United States District Judge

Date: 4/11/2019

DEFENDANT: **ALVIN CELIUS ANDRE**
CASE NUMBER: **18-60271-CR-SCOLA**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **forty years**. The term consists of ten years as to Count 1 and thirty years as to Count 2, to be served consecutively to Count 1.

The court makes the following recommendations to the Bureau of Prisons: the defendant be designated to a facility in the South Florida area.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **ALVIN CELIUS ANDRE**
CASE NUMBER: **18-60271-CR-SCOLA**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **twenty-five years**. This term consists of twenty-five years as to each of Counts 1 and 2, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **ALVIN CELIUS ANDRE**
CASE NUMBER: **18-60271-CR-SCOLA**

SPECIAL CONDITIONS OF SUPERVISION

Adam Walsh Act Search Condition - The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Computer Possession Restriction - The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Credit Card Restriction - The defendant shall not possess any credit cards, nor shall he be a signer on any credit card obligations during his term of supervision, without the Court's approval.

Data Encryption Restriction - The defendant shall not possess or use any data encryption technique or program.

Employer Computer Restriction Disclosure - The defendant shall permit third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No Contact with Minors with one exception - The defendant shall have no personal, mail, telephone, or computer contact with children/minors under the age of 18 or with the victim, with one exception. He can have supervised contact with his own daughter if either the mother agrees to this after she is fully informed of the circumstances of this case by the probation department. Or if she does not agree, then Mr. Andre can petition the appropriate family court. And if that court enters an order allowing for supervised contact with his daughter, then I will also incorporate that order into the terms of his sentence and supervised release.

No Contact with Minors in Employment - The defendant shall not be employed in a job requiring contact with children under the age of 18 or with the victim.

No Involvement in Youth Organizations - The defendant shall not be involved in any children's or youth organization.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

DEFENDANT: **ALVIN CELIUS ANDRE**
CASE NUMBER: **18-60271-CR-SCOLA**

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Restricted from Possession of Sexual Materials - The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Sex Offender Registration - The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Sex Offender Treatment - The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay.

DEFENDANT: **ALVIN CELIUS ANDRE**
CASE NUMBER: **18-60271-CR-SCOLA**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **ALVIN CELIUS ANDRE**
CASE NUMBER: **18-60271-CR-SCOLA**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $200.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	**TOTAL AMOUNT**	**JOINT AND SEVERAL AMOUNT**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 18-60271-CR-SCOLA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALVIN CELIUS ANDRE,

Defendant.
_____/

DEFENDANT'S NOTICE OF PROPOSED JURY INSTRUCTION – ENTRAPMENT

COMES NOW Defendant, ALVIN CELIUS ANDRE, through counsel, and hereby submits the following proposed jury instruction on the issue of Entrapment.

Respectfully submitted,

By: s/Deric Zacca
DERIC ZACCA, ESQUIRE
Fla. Bar No. 0151378

Deric Zacca, P.A.
110 Tower
110 SE 6th Street, Suite 1700
Fort Lauderdale, Florida 33301
Telephone: (954) 450-4848
Facsimile: (954) 450-4204

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 28, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record in this matter by CM/ECF.

s/Deric Zacca
DERIC ZACCA, ESQUIRE

S13.1
Entrapment
(MODIFIED)

"Entrapment" occurs when a government agent induces a Defendant to commit a crime that the Defendant was not already willing to commit.

The Defendant has claimed to be a victim of entrapment regarding the offenses charged in the indictment.

The law forbids convicting an entrapped Defendant.

The Government must prove beyond a reasonable doubt that the Defendant was willing to commit the crimes charged in the indictment before his contact with the government agent and without the inducement of the government agent.

If you have reasonable doubt about whether the Defendant was willing to commit the crimes charged in the indictment before his contact with the government agent and without the inducement of the government agent then you must find the Defendant not guilty.

Modified Standard Entrapment Defense Instruction*; see also Jacobson v. United States*, 503 U.S. 540, 549 (1992) where the Supreme Court held that "where the government has induced an individual to break the law and the defense of entrapment is at issue, . . . , the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."

A-4

5.05 Entrapment

[Updated: 1/13/17]

[Defendant] maintains that [he/she] was entrapped. A person is "entrapped" when he or she is induced or persuaded by law enforcement officers or their agents to commit a crime that he or she was not otherwise ready and willing to commit. The law forbids his or her conviction in such a case. However, law enforcement agents are permitted to use a variety of methods to afford an opportunity to a defendant to commit an offense, including the use of undercover agents, furnishing of funds for the purchase of controlled substances, the use of informers and the adoption of false identities.

For you to find [defendant] guilty of the crime with which [he/she] is charged, you must be convinced that the government has proven beyond a reasonable doubt that [defendant] was not entrapped. To show that [defendant] was not entrapped, the government must establish beyond a reasonable doubt one of the following two things:

> One, that [the officer] did not improperly persuade or talk [defendant] into committing the crime. Simply giving someone an opportunity to commit a crime is not the same as persuading [him/her], but persuasion, false statements or excessive pressure by [the officer] or an undue appeal to sympathy can be improper; OR
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> Two, that [defendant] was ready and willing to commit the crime without any persuasion from [the officer] or any other government agent. You may consider such factors as: (a) the character or reputation of the defendant; (b) whether the initial suggestion of criminal activity was made by the government; (c) whether the defendant was engaged in the criminal activity for profit; (d) whether the defendant showed reluctance to commit the offense, and whether that reluctance reflects the conscience of an innocent person or merely the caution of a criminal; (e) the nature of the persuasion offered by the government; and (f) how long the government persuasion lasted. In that connection, you have heard testimony about actions by [defendant] for which [he/she] is not on trial. You are the sole judges of whether to believe such testimony. If you decide to believe such evidence, I caution you that you may consider it only for the limited purpose of determining whether it tends to show [defendant]'s willingness to commit the charged crime or crimes without the persuasion of a government agent. You must not consider it for any other purpose. You must not, for instance, convict [defendant] because you believe that [he/she] is guilty of other improper conduct for which [he/she] has not been charged in this case.

Comment

(1) "A criminal defendant is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it. In making this determination, the district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. Rather, the court's function is to examine the evidence on the record and to draw those inferences as can reasonably be drawn therefrom, determining whether the proof, taken in the light most favorable to the defense can *plausibly* support the theory of the defense. This is not a very high standard to meet, for in its present context, to be 'plausible' is to be 'superficially reasonable.'" United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998) (citations omitted). The

Circuit sometimes suggests a higher standard, however, requiring "some hard evidence." E.g., United States v. González-Pérez, 778 F.3d 3, 11 (1st Cir. 2015); United States v. Vasco, 564 F.3d 12, 18 (1st Cir. 2009); see also United States v. Young, 78 F.3d 758, 760 (1st Cir. 1996) ("The record must show 'hard evidence,' which if believed by a rational juror, 'would suffice to create a reasonable doubt as to whether government actors induced the defendant to perform a criminal act that he was not predisposed to commit.'" (quoting United States v. Rodriguez, 858 F.2d 809, 814 (1st Cir. 1988))).

(2) In United States v. Hinkel, 837 F.3d 111, 121 (1st Cir. 2016), the First Circuit approved the use of the pattern instruction for entrapment. In Hinkel, the court stated that the pattern entrapment instruction "accurately describe[es] the general defense and correctly outlin[es] the elements." Id. at *5. I note that the current Pattern Criminal Jury Instruction, First Circuit, § 5.05 is identical to the 1998 version approved by the court in Hinkel. See also United States v. Prange, 771 F.3d 17, 30-31 (1st Cir. 2014); United States v. Nishnianidze, 342 F.3d 6, 17-18 (1st Cir. 2003); United States v. LaFreniere, 236 F.3d 41, 44-45 (1st Cir. 2001); Gamache, 156 F.3d at 9-12; United States v. Montañez, 105 F.3d 36, 38 (1st Cir. 1997); United States v. Acosta, 67 F.3d 334, 337-40 (1st Cir. 1995); United States v. Gendron, 18 F.3d 955, 960-64 (1st Cir. 1994); United States v. Gifford, 17 F.3d 462, 467-70 (1st Cir. 1994); United States v. Hernandez, 995 F.2d 307, 313 (1st Cir. 1993); United States v. Reed, 977 F.2d 14, 18 (1st Cir. 1992); see also United States v. Pion, 25 F.3d 18, 20 (1st Cir. 1994). We have intentionally avoided using the word "predisposition," a term that has proven troublesome to some jurors. See, e.g., United States v. Rogers, 121 F.3d 12, 17 (1st Cir. 1997). See also United States v. Tom, 330 F.3d 83, 91-92 (1st Cir. 2003), where the First Circuit seems to approve an alternate formulation (incorrectly labeled an entrapment "offense" rather than defense). Although at one point the First Circuit said merely that there is "nothing wrong in using the term 'improper[ly]'" as an adverb before the verb "persuade" in the first factor, United States v. DePierre, 599 F.3d 25, 28 (1st Cir. 2010) (citing United States v. Santiago, 566 F.3d 65, 68 (1st Cir. 2009)), more recently it seems to require it. United States v. Djokich, 693 F.3d 37, 46 n.5 (1st Cir. 2012) ("Djokich's proposed instruction was an inaccurate account of what would constitute inappropriate persuasion or inducement by the government, as it suggests that *any* inducement by the government is inappropriate. That is not the case; a defendant is only entrapped where the government utilizes *wrongful* persuasion or inducement." (citation omitted)).

(3) "Beyond showing that the government afforded him the opportunity to commit the crime, the defendant must adduce evidence that the government engaged in some find of 'overreaching conduct.'" United States v. Montoya, 844 F.3d 63, 67 (1st Cir. 2016) (quoting United States v. Diaz-Maldonado, 727 F.3d 130, 138 (1st Cir. 2013)). "Such conduct might include, for example, intimidation, threats, relentless insistence, or excessive pressure to participate in a criminal scheme." Id.

(4) "[H]olding out the prospect of illicit gain is not the sort of government inducement that can pave the way for an entrapment defense." United States v. Sánchez-Berríos, 424 F.3d 65, 76 (1st Cir. 2005).

(5) The defendant's "bare assertion that [the informant] called him several times and [the defendant] declined previous invitations to commit offenses does not amount to inducement." United States v. González-Pérez, 778 F.3d 3, 12 (1st Cir. 2015). "In analyzing whether there was improper inducement, the method of purportedly inducing a defendant is more important than the number of solicitations." Id.

(6) It may be necessary to conform the charge to the defendant's theory of defense:

> Of course, the district court has a great deal of latitude in formulating a charge. But taken as a whole, the examples given were *all* either coercion examples or involved abstractions ("dogged insistence") rather far from the examples of inducement by an undue appeal to sympathy, which the defendant expressly requested and which were more pertinent to his defense. By omitting any "sympathy" examples, the trial court may well have left the jury with the mistaken impression that coercion is a necessary element of entrapment and, in this case, such a misunderstanding could well have affected the outcome.

Montañez, 105 F.3d at 39; see also United States v. Terry, 240 F.3d 65, 70 (1st Cir. 2001); Gamache, 156 F.3d at 9-11.

(7) "[T]he government cannot prove predisposition if the defendant's willingness to commit the crime was itself manufactured by the government in the course of dealing with the defendant before he committed the crime charged." United States v. Alzate, 70 F.3d 199, 201 (1st Cir. 1995) (citing Jacobson v. United States, 503 U.S. 540, 549 & n.2 (1992)). If that is the issue, a more precise instruction is advisable. See id. But, although the predisposition must exist before the contact with government agents, behavior after the contact can be used as evidence of the pre-existing predisposition. Rogers, 121 F.3d at 17.

(8) For the elements of third-party or derivative entrapment, see United States v. Rivera-Ruperto, 846 F.3d 417, 429 (1st Cir. 2017) (quoting United States v. Luisi, 482 F.3d 43, 55 (1st Cir. 2007)):

> Under this theory, the conduct of a middleman is only attributable to the government where: (1) a government agent specifically targeted the defendant in order to induce him to commit illegal conduct; (2) the agent acted through the middleman after other government attempts at inducing the defendant had failed; (3) the government agent requested, encouraged, or instructed the middleman to employ a specified inducement, which could be found improper, against the targeted defendant; (4) the agent's actions led the middleman to do what the government sought, even if the government did not use improper means to influence the middleman; and (5) as a result of the middleman's inducement, the targeted defendant in fact engaged in the illegal conduct.

Except with respect to the "target" reference, the First Circuit approved the following instruction for "vicarious entrapment" as "consistent with our case law on the third-party entrapment defense":

> Inducement by a codefendant constitutes some vicarious entrapment by the government if the following three elements are met:

> First, that a government agent specifically identified the defendant as the desired target of the inducement or pressure;
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> second, that the government agent encouraged the codefendant to induce or pressure the defendant to commit the crime, or his government agent's handlers condoned the use of coercive inducements or pressure by the codefendant; and
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> third, the codefendant, in fact, applied pressure or an improper inducement to overcome the defendant's reluctance to become involved.

United States v. Turner, 501 F.3d 59, 70 (1st Cir. 2007) ("[E]ven if there was error [in the target requirement], and we are not saying that there was, the error was harmless").

(9) There is a separate defense known as entrapment by estoppel:

> Entrapment by estoppel requires [defendant] to establish: (1) that a government official told him the act was legal; (2) that he relied on the advice; (3) that the reliance was reasonable; and (4) that, given the reliance, prosecution would be unfair.

United States v. Ellis, 168 F.3d 558, 561 (1st Cir. 1999); accord United States v. Bunnell, 280 F.3d 46, 49-50 (1st Cir. 2002). On this defense, the defendant has the burden of proof. United States v. Villafane-Jimenez, 410 F.3d 74, 80 (1st Cir. 2005). The first element requires an "affirmative representation" that the conduct was legal. Id. at 80 n.7. According to United States v. Sousa, 468 F.3d 42, 46 (1st Cir. 2006) (citations omitted):

> A successful entrapment by estoppel defense generally requires that the misleading statement come from an official representing the sovereign bringing the prosecution, *i.e.*, a federal official. We did hold open the possibility in [United States v. Caron, 64 F.3d 713, 716-17 (1st Cir. 1995)] that entrapment by estoppel could be a defense to a federal crime where a state official affirmatively provides the defendant with misleading advice on the requirements of federal law.

(10) The Ninth Circuit has held that in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, 133 S. Ct. 2151 (2013), sentencing entrapment is a jury issue where it would result in a lower statutory sentencing range, United States v. Cortes, 732 F.3d 1078, 1091 (9th Cir. 2013), and suggested language for such an instruction. For First Circuit discussion of the judicial doctrine of sentencing entrapment or manipulation, see, e.g., United States v. Woods, 210 F.3d 70, 75 (1st Cir. 2000); United States v. Montoya, 62 F.3d 1, 3-5 (1st Cir. 1995).

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8.05 Entrapment

(Name) **has raised as a defense that** *(he) (she)* **was entrapped by** *[an agent of]* **the government to commit the offense***(s)* **charged in Count***(s) (Nos.)* **of the indictment. A defendant may not be convicted of a crime if he or she was entrapped by the government to do the acts charged. The government is permitted to use undercover agents, deception, and other means of providing opportunities for an unwary criminally-minded person to commit a crime, but the law does not permit the government to induce an unwary innocent person into committing a criminal offense.**

The defense of entrapment includes two inquiries:

First, did the government induce *(name)* **to commit the offense?**

Second, was *(name)* **predisposed, that is, ready and willing to the commit the offense before** *(he) (she)* **was first approached by the government?**

It is the government's burden to prove beyond a reasonable doubt that *(name)* **was not entrapped; it is not** *(name's)* **burden to prove that** *(he) (she)* **was entrapped. Thus, you may find** *(name)* **guilty of the offense charged in Count** *(No.)* **only if you find that, in addition to proving the elements of that offense, the government also proved beyond a reasonable doubt either (1) that the government did not induce the commission of the offense; or (2) that** *(name)* **was predisposed, meaning that** *(name)* **was ready and willing to commit the offense before the government** *[agents]* **first** *[approached]* **spoke to** *(him) (her)* **about the crime.**

You should first consider whether there is any evidence that the government induced *(name)* **to commit the offense. Government actions that could amount to inducement include persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. The government does not induce a person to commit an offense if the government merely approaches that person, or solicits, requests, or suggests that he or she commit the offense, or affords an opportunity or facilities to commit the offense. If you find that the government proved beyond a reasonable doubt that it did not induce** *(name)* **to commit the offense, then you should find that there was no entrapment and you need not consider this defense any further.**

However, if you do have a reasonable doubt about whether the government proved that it did not induce *(name)* **to commit the offense, then you must decide whether the government proved beyond a reasonable doubt that** *(name)* **was predisposed – that is, that** *(name)* **was ready and willing to commit the offense before the government first approached** *(him) (her)* **about it. In deciding this question, you should consider all the evidence, including any evidence about whether the government initially suggested the criminal activity; the nature of the government's inducement or persuasion; whether** *(name)* **had already formed an intent or design to commit the offense charged; whether** *(name)* **was engaged in an existing course of criminal conduct similar to the offense charged; whether** *(name)* **was engaged in criminal activity for profit; and whether** *(name)* **showed a willingness to commit the**

offense or showed any reluctance that was overcome by repeated government inducement or persuasion *[and evidence of (name's) character or reputation, including a prior record of criminal convictions]*. **If, after considering all the evidence, you have a reasonable doubt that** *(name)* **would have committed the offense charged without the government's inducement, you should find the defendant not guilty.**

Comment

See 1A O'Malley et al, supra, § 19.04; Sand et al, supra, 8-7. For variations in other Circuits, *see* Sixth Circuit § 6.03; Eighth Circuit § 9.01; Ninth Circuit §§ 6.2, 6.3; Eleventh Circuit Insts. 13.1, 13.2.

Elements of Entrapment. The defendant may properly assert an entrapment defense and require an instruction on it without having to admit all the elements of the offense; entrapment may be asserted along with other, inconsistent defenses. *See, e.g., Mathews v. United States*, 458 U.S. 58, 63 (1988). Although ultimately the government has the burden of persuasion on entrapment, the defendant has the burden of production. There are two elements of proof: (1) inducement by the government to commit the crime, and (2) the defendant's lack of predisposition to commit the crime. *United States v. Dennis*, 826 F.3d 683, 690 (3rd Cir. 2016). "A defendant who requests the District Court to instruct the jury on an entrapment defense has a 'burden of production' with regard to both elements." 826 F.3d at 690. Thus, to require the government to disprove the defense and to require an instruction on entrapment, "a defendant must produce sufficient evidence of inducement on the part of the government and a lack of predisposition on his own part." *United States v. Lakhani*, 480 F.3d 171, 179 (3d Cir. 2007), citing *Mathews v. United States*, 485 U.S. 58, 63 (1988); *United States v. Wright*, 921 F.2d 42, 44 (3d Cir. 1990). See also *United States v. McLean*, 702 Fed. Appx. 81 (3d Cir. 2017).

In *Sherman v. United States*, 356 U.S. 369, 371 (1957), the Supreme Court noted that "to determine whether entrapment has been established, a line must be drawn between a trap for the unwary innocent and the trap for the unwary criminal." The Court further defined this line by stating that the defense of entrapment has two elements: "[1] government inducement of a crime, and [2] a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. at 63.

Predisposition. Since the Supreme Court's decision in *United States v. Russell*, 411 U.S. 423 (1973), the focus has been on the defendant's predisposition, or lack of predisposition, to commit the offense charged. *See Russell*, 411 U.S. at 429. Thus, the Court in *Russell* stated that entrapment is relevant "only when the Government's deception actually implants the criminal design in the mind of the defendant." 411 U.S. at 426. That the government merely afforded opportunities for or facilitated the commission of an offense through trickery or deceit does not

establish entrapment. 411 U.S. at 435-36. In *Hampton v. United States*, 425 U.S. 484, 488-489 (1976), the Court noted: "In *Russell* we … reaffirmed … that the entrapment defense 'focus[es] on the intent or predisposition of the defendant to commit the crime,' *Russell*, … 411 U.S., at 429, 93 S. Ct., at 1641, 36 L. Ed. 2d, at 371, rather than upon the conduct of the Government's agents."

In *Jacobson v. United States*, 503 U.S. 540, 547 (1992), the Supreme Court reversed the defendant's conviction for receiving child pornography through the mail, where a sting operation consisted of twenty-six months of repeated government mailings and communications before the defendant finally ordered the child pornography, and the defendant possessed no allegedly pornographic material other than that purchased from the government. The Court stated, "[i]n their zeal to enforce the law, government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." 503 U.S. at 548. Furthermore, the Court acknowledged that the burden of proof on entrapment is ultimately on the government: "Where the Government has induced an individual to break the law and the defense of entrapment is at issue, the prosecutor must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents." 503 U.S. at 548.

Similarly, the Third Circuit has repeatedly observed that:

> "[T]he element of non-predisposition to commit the offense is the primary focus of an entrapment defense." *United States v. Fedroff*, 874 F.2d 178, 182 (3d Cir.1989); *see United States v. Gambino*, 788 F.2d 938, 944 (3d Cir.1986); *Jannotti*, 673 F.2d at 597. It is a "'relatively limited defense' that may defeat a prosecution only 'when the Government's deception actually implants the criminal design in the mind of the defendant.'" *Fedroff*, 874 F.2d at 181 (quoting *Russell*, 411 U.S. at 435-36, 93 S.Ct. 1637). Once properly raised by the defendant, "the [G]overnment has the burden to disprove the whole (entrapment) defense beyond a reasonable doubt." *Jannotti*, 673 F.2d at 597 (internal quotation marks omitted).

United States v. Lakhani, 480 F.3d 171, 178-79 (3d Cir. 2007).

In *United States. v. Dennis*, 826 F.3d 683 (3rd Cir. 2016), the defendant appealed a conviction for robbery, firearms and drug offenses in connection with a robbery at a stash house. The District Court denied the defendant's request for an entrapment instruction. The Third Circuit found sufficient evidence of lack of predisposition to warrant an entrapment instruction on the robbery and firearms charges, even though the defendant had a criminal record for drug offenses. The Court reversed the robbery and firearms convictions, but affirmed the drug conviction. In holding that the defendant had met his burden of production on lack of predisposition for robbery and firearms offenses, the Court cited evidence of the absence of robbery or violent crimes in the defendant's criminal history; the defendant's partially corroborated testimony of turning away three prior opportunities to join the government informant in robberies; the defendant's disavowal of violence on the stand; the defendant's

testimony that he has not owned a gun in many years; and the expert testimony of defendant's vulnerability to being persuaded due to his low IQ. 826 F.3d at 691-2. The District Court has discounted this evidence in denying the defendant's request for an entrapment instruction, citing evidence relating to the offenses as evidence of predisposition. The Third Circuit cautioned District Courts "to refrain from invading the province of the jury" holding:\

> Here, it was not for the District Court to decide the evidence ''cut both ways'' and draw a conclusion against Dennis. Similarly, it was impermissible for the Court to credit the Government's evidence when Dennis presented evidence to the contrary. Therefore, we conclude that the District Court did err by weighing evidence and by improperly drawing inferences against Dennis on the robbery and firearm charges.

United States v. Dennis, 826 F.3d at 693. Accord *United States v. McLean,* 702 Fed. Appx. 81, 86 (3d Cir. 2017) (non-precedential) (Third Circuit affirmed District Court's denial of defendant's request for entrapment instruction in case bearing some similarity to *Dennis* stating "Although he lacks any relevant criminal history, the ease with which the ATF was able to entice McLean's participation, his ensuing enthusiasm for the plot, and his rebuff of multiple opportunities to back out evidence his predisposition to the criminal conduct.")

The Third Circuit also discussed in *Lakhani* how the government may prove predisposition and some of the relevant factors:

> In *Gambino,* we agreed with the Second Circuit Court of Appeals in noting three ways in which the Government may do so: "'(1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement.'" 788 F.2d at 945 (quoting *United States v. Viviano,* 437 F.2d 295, 299 (2d Cir.1971)). We have also suggested several (somewhat overlapping) factors for consideration when making a determination on predisposition:
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> > "the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government."
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> *Fedroff,* 874 F.2d at 184 (quoting *United States v. Reynoso-Ulloa,* 548 F.2d 1329, 1336 (9th Cir.1977)).

United States v. Lakhani, 480 F.3d at 179. With respect to these factors, the court in *United States v. Federoff* noted that lack of a prior criminal record does not alone establish lack of pre-

disposition and that the most important factor is the defendant's reluctance to commit the offense. 874 F.2d at 183-84.

Government Inducement. The Supreme Court and Third Circuit have also discussed what may and may not constitute government inducement of a defendant to commit a crime. In *Mathews v. United States*, 485 U.S. at 66, the Supreme Court stated, "[o]f course, evidence that government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant such an instruction." In *United States v. El-Gawli*, 837 F.2d 142 (3d Cir. 1988), the Third Circuit approved the trial court's instruction that:

> A solicitation, request or approach by law enforcement to engage in criminal activity, standing alone, is not an inducement. . . . Inducement by law enforcement may take many forms, including persuasion, representation, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.

837 U.S. F.2d at 149. In *United States v. Dennis*, 826 F.3d 683 (3rd Cir. 2016), the Third Circuit held that the defendant met the burden of production on inducement, citing, among other factors: the central role that an informant played in getting the defendant to participate in the scheme; the fact that the defendant had no known connections to the crimes the government was investigating; that the defendant was only targeted after the informant produced the defendant's name in response to the federal agent's general inquiry about people he knew who were involved in robberies; the personal relationship between the informant and the defendant which allowed the informant to appeal to the defendant's sympathies based on a story about the informant's sick mother; that the informant recruited the defendant, set up the first meeting with the agent, drove the defendant to the meeting, and asked the defendant to ''play the role'' of a seasoned robber; and the substantial financial award discussed with the defendant. As the Court noted, "The Government's action exceeded a situation in which it merely opened up an opportunity for committing a crime. Here, the Government ment targeted an individual previously unknown to it and, with the help and persuasion of an informant who was a friend of the target, actively led him into the commission of a crime." 826 F.3d at 692-3. [Citation omitted] Also *see, e.g., United States v. Wright*, 921 F.2d 42, 45 (3d Cir. 1990) (holding that the mere fact that a government agent first suggested the illegal conduct is not enough to establish inducement).

Outrageous Government Conduct that Violates Due Process. In *United States v. Lakhani*, 480 F.3d 171 (3d Cir. 2007), the Third Circuit also discussed the related defense that the government's conduct with respect to the offense violated Due Process. The court first distinguished this Due Process defense from entrapment, noting that unlike entrapment which focuses on the defendant and his or her predisposition to commit the crime, "the defense of due process focuses exclusively on the conduct of the Government. If that conduct is 'so outrageous' as to be 'shocking to the universal sense of justice,' then the Due Process Clause can function as an 'absolut[e] bar [on] the [G]overnment from invoking judicial processes to obtain a conviction.' *United States v. Russell,* 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973)." 480 F.3d at 177-78. The court then explained the Due Process defense further:

> "[T]he judiciary is extremely hesitant to find law enforcement conduct so offensive that it violates the Due Process Clause." *United States v. Voigt*, 89 F.3d 1050, 1065 (3d Cir.1996). We have said that this principle is to be invoked only in the face of "the most intolerable government conduct," *Jannotti*, 673 F.2d at 608 – not "'each time the government acts deceptively or participates in a crime that it is investigating,'" *Nolan-Cooper*, 155 F.3d at 231 (quoting *United States v. Mosley*, 965 F.2d 906, 910 (10th Cir.1992)). Moreover, due process should not be used in this context "'merely as a device to circumvent the predisposition test [of] the entrapment defense.'" *Id.* (quoting *Mosley*, 965 F.2d at 910); *see Jannotti*, 673 F.2d at 608 ("We must be careful not to undermine the [Supreme] Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense."). In this spirit, we have been "admonished" not to "exercise 'a "Chancellor's foot'" veto over law enforcement practices of which [we might] not approve." Beverly, 723 F.2d at 12-13 (quoting *Russell*, 411 U.S. at 435, 93 S.Ct. 1637). . . .
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> As we have quoted before,
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> > "[a]lthough the requirement of outrageousness has been stated in several ways by various courts, the thrust of each of these formulations is that the challenged conduct must be shocking, outrageous, and clearly intolerable .... The cases make it clear that this is an extraordinary defense reserved for only for the most egregious circumstances."
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> *Nolan-Cooper*, 155 F.3d at 230-31 (alteration in original) (quoting *Mosley*, 965 F.2d at 910).

United States v. Lakhani, 480 F.3d at 180-81. Also *see, e.g., United States v. Stimler*, 864 F.3d 253, 273-274 (3rd Cir. 2017) (Third Circuit rejected outrageous conduct claim relating to undercover operation in that "the defendants used their own knowledge and connections to set up and carry out the unlawful conduct"); *United States v. Tolentino*, 486 Fed. Appx. 286, 288-89 (3d Cir. 2012) (non-precedential opinion discussing the outrageous conduct defense at length in holding that, even if the defendant did not waive the defense by failing to timely raise it, the government's alleged failure to supervise its confidential informant did not constitute outrageous conduct); *United States v. Hoffecker*, 530 F.3d 137, 154-55 (3d Cir. 2008) (affirming district court's finding that the government did not engage in outrageous conduct by using the defendant's one-time attorney as an undercover informant; "[t]o elevate a violation of the attorney-client privilege to a constitutional claim of outrageous misconduct, a defendant must demonstrate '(1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice.'" Quoting *United States v. Voigt*, 89 F.3d at 1067.); *United States v. Pitt*, 193 F.3d 751, 760–761 (3d Cir.1999).

In rejecting the Due Process defense in *Lakhani*, the Third Circuit distinguished *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the only case in which the Third Circuit has held

that the government's conduct offended Due Process. In *Twigg*, the government agent proposed to the defendants setting up a methamphetamine lab, acquired the production site and all the equipment and raw materials, and was in complete charge of the lab, while the defendants' assistance was minor and at the specific direction of the government agent. *Lakhani*, on the other hand, involved an international terrorism investigation in which the government agent solicited the defendant to acquire a missile, but the defendant eagerly agreed, made several trips to the Ukraine in search of the missile, relied on his own experience in the arms trade, communicated with three separate arms companies, falsified shipping documents, and deployed his own money laundering network. 480 F.3d at 182. The court noted that Due Process is not violated merely because the government is on both sides of the transaction (buyer and seller), and recognized "that where the Government is investigating 'fleeting and elusive crime(s),' it may 'require more extreme methods of investigating. . . ,'" (480 F.3d at 182-83, quoting *Twigg*, 588 F.2d at 378), and that "Government investigations of crimes that were 'difficult to uncover' because 'both parties to the transaction have an interest in concealment' would be given greater latitude."480 F.3d at 183, quoting *Jannotti*, 673 F.2d at 609.

It may be questioned whether any due process defense exists at all, independent of the entrapment defense, and whether even *Twigg* was correctly decided. In *United States v. Nolan-Cooper*, 155 F.3d 221, 229-31 (3d Cir. 1998), the court explained that the Supreme Court has seemingly disavowed the earlier dicta on which the due process theory rests, many circuits have refused to recognize the doctrine, and the theory, as of 1998, had been only applied one time in the United States to dismiss a criminal case. Accordingly, the court stated, "it appears that the viability of the doctrine is hanging by a thread." *Id.* at 230. The court added: "The First Circuit similarly has declared the outrageous government misconduct doctrine 'moribund' in light of the fact that, in practice, 'courts have rejected its application with almost monotonous regularity.' *United States v. Santana*, 6 F.3d 1, 4 (1st Cir.1993) ('The banner of outrageous misconduct is often raised but seldom saluted.')." *Nolan-Cooper*, 155 F.3d at 230. See *United States v. Fattah*, 858 F.3d 801, 813 (3d Cir. 2017) (non-precedential) ("Since *Twigg* was decided, this Court has repeatedly distinguished, and even questioned, its holding.")

Entrapment by Estoppel. The entrapment defense described in this instruction should not be confused with the affirmative defense of "entrapment by estoppel," which requires different elements. "The entrapment by estoppel defense applies where the defendant has established by a preponderance of the evidence that: (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement." *United States v. Stewart*, 185 F.3d 112, 124 (3d Cir.1999). Also *see, e.g., United States v. Langforddavis*, 454 Fed. Appx. 34 (3d Cir. 2011) (non-precedential) (holding no error to refuse to instruct the jury on this defense where no evidence to prove the elements); *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 313 (3d Cir. 1997) (thoroughly discussing the defense of "entrapment by estoppel"); Model Penal Code § 2.04(3)(b) (defining defense of reasonable reliance on an official statement of the law).

If the defense of entrapment by estoppel is properly raised, an appropriate instruction should be given.

Sentencing Entrapment. The entrapment defense described in this instruction also does not address sentencing entrapment (where official conduct leads a person otherwise indisposed to dealing in a larger quantity or different type of controlled substance to do so, resulting in a higher sentence) or sentencing factor manipulation (where the government unfairly exaggerates the defendant's sentencing range by engaging in a longer-than-needed investigation to increase the drug quantities for which the defendant is responsible). These doctrines are only relevant at sentencing, not during trial. Although other circuits have reached different conclusions about these doctrines, the Third Circuit has not needed to address the legal merits of either. *See, e.g.*, *United States v. Washington*, 869 F.3d 193, 209-213 (3d Cir. 2017); *U.S. v. Whitfield*, 649 Fed. Appx. 192, 199 (3d Cir. 2016) (non-precedential); *United States v. Chappelle*, 591 Fed. Appx. 71, 71-72 (3d Cir. 2015) (non-precedential); *United States v. Sed*, 601 F. 3d 224, 229-31 (3d Cir. 2010).

(Revised 11/2018)

A-6

1.30

ENTRAPMENT

The defendant asserts that he [she] was a victim of entrapment.

Where a person has no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers or their agents to commit a crime, that person is a victim of entrapment, and the law as a matter of policy forbids that person's conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a government agent to pretend to be someone else and to offer either directly or through an informer or other decoy, to engage in an unlawful transaction.

If you should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit such a crime as charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then you should find that the defendant is not a victim of entrapment.

If the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find the defendant not guilty.

The burden is on the government to prove beyond a reasonable doubt that the defendant:

1. was not induced to commit the offense by a government agent; or
2. had a predisposition or intention to commit that offense prior to being approached by a government agent.

You are instructed that a paid informer is an "agent" of the government for purposes of this instruction.

Note

There is no statutory defense of entrapment, it stems from *Sorrells v. United States*, 53 S. Ct. 210 (1932) (government must disprove inducement and predisposition, as Congress does not want to implant crime in innocent mind), An earlier version of this instruction, that required the government to prove that the defendant was predisposed apart from government inducement, has

been cited and approved in a number of cases. *See, e.g., United States v. Hidalgo*, 226 F. App'x 391, 397 (5th Cir. 2007); *United States v. Wise*, 221 F.3d 140, 154 (5th Cir. 2000); *United States v. Brace*, 145 F.3d 247, 256–57 (5th Cir. 1998); *United States v. Hernandez*, 92 F.3d 309, 311 (5th Cir. 1996). *United States v. Thompson*, 130 F.3d 676, 689 n. 29 (5th Cir. 1997), argued that a prior version of this jury instruction misstated the law, suggesting that between the requirements of predisposition and lack of inducement, the word "and" be replaced with "or." This change was made.

If there is sufficient evidence for a reasonable jury to rule in favor of the defendant on an entrapment theory, it is generally reversible error to refuse to submit a requested entrapment instruction to the jury. *See United States v. Theagene*, 565 F.3d 911, 918–24 (5th Cir. 2009); *United States v. Smith*, 481 F.3d 259, 262–63 (5th Cir. 2007); *United States v. Ogle*, 328 F.3d 182, 185 (5th Cir. 2003); *United States v. Gutierrez*, 343 F.3d 415, 419 (5th Cir. 1993). "The question is whether the defendant identified or produced 'evidence from which a reasonable jury *could* derive a reasonable doubt as to the origin of criminal intent and, thus, entrapment.' . . . This requires the defendant to make a prima facie showing of (1) his [her] lack of predisposition to commit the offense and (2) some governmental involvement and inducement more substantial than simply providing an opportunity or facilities to commit the offense.'' *Theagene*, 565 F.3d at 918 (citations omitted); *United States v. Cawthon*, 637 F. App'x 804, 806 (5th Cir. 2016) (discussing the required two prongs of predisposition and inducement); *United States v. Macedo-Flores*, 788 F.3d 181, 188 (5th Cir. 2015) ("Only after the defendant has made a prima facie showing of entrapment by showing both elements—lack of predisposition and governmental inducement—is the defendant entitled to an entrapment instruction by the court." (citing *United States v. Stephens*, 717 F.3d 440, 444 (5th Cir. 2013)).

For a discussion of the timing issue, *see Jacobson v. United States*, 112 S. Ct. 1535, 1540 (1992)(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 disposed to commit the criminal act prior to first being approached by government agents."); *Hernandez*, 92 F.3d at 310–11 (affirming the adequacy of this instruction with respect to the requirement expressed in *Jacobson*).

An issue may arise in a case in which a defendant denies the requisite intent to commit the crime in question or denies that he or she was involved in one or more of the acts essential to the commission of the charged crime and alternatively contends that he or she was in any event entrapped. In *Mathews v. United States*, 108 S. Ct. 883, 886 (1988), the Supreme Court held that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." Considering the unusual nature of such an alternative contention, on request of a defendant, the judge should consider giving a specific instruction to the effect that a defendant may deny that he or she engaged in the activity constituting the charged offense and alternatively plead entrapment.

A related defense is entrapment by estoppel, which is "applicable when a government official or agent actively assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues or initiates the conduct." *United States v. Jones*, 664

F.3d 966, 979 (5th Cir. 2011). In fact, the reliance defense is required by the constitutional guarantee of due process. *See Cox v. Louisiana*, 85 S. Ct. 476 (1965); *Raley v. Ohio*, 79 S. Ct. 1257 (1959). Similarly, a requested instruction on this defense should be given if there is "an evidentiary basis in the record which would lead to acquittal." *United States v. Spires*, 79 F.3d 464, 466 (5th Cir. 1996).

This circuit has never recognized the defense of sentencing entrapment; a circuit split exists as to that issue. *See Macedo-Flores*, 788 F.3d at 187 n.3 (collecting cases).

A-7

6.03 ENTRAPMENT

(1) One of the questions in this case is whether the defendant was entrapped.

(2) Entrapment has two related elements. One is that the defendant was not already willing to commit the crime. The other is that the government, or someone acting for the government, induced or persuaded the defendant to commit it.

(3) If the defendant was not already willing to commit the crime prior to first being approached by government agents or other persons acting for the government, and the government persuaded him to commit it, that would be entrapment. But if the defendant was already willing to commit the crime prior to first being approached by government agents or other persons acting for the government, it would not be entrapment, even if the government provided him with a favorable opportunity to commit the crime, or made the crime easier, or participated in the crime in some way.

(4) It is sometimes necessary during an investigation for a government agent to pretend to be a criminal, and to offer to take part in a crime. This may be done directly, or the agent may have to work through an informant or a decoy. This is permissible, and without more is not entrapment. The crucial question in entrapment cases is whether the government persuaded a defendant who was not already willing to commit a crime to go ahead and commit it.

(5) The government has the burden of proving beyond a reasonable doubt that the defendant was already willing to commit the crime prior to first being approached by government agents or other persons acting for the government. Let me suggest some things that you may consider in deciding whether the government has proved this:

(A) Ask yourself what the evidence shows about the defendant's character and reputation.

(B) Ask yourself if the idea for committing the crime originated with or came from the government.

(C) Ask yourself if the defendant took part in the crime for profit.

(D) Ask yourself if the defendant took part in any similar criminal activity with anyone else before or afterwards.

(E) Ask yourself if the defendant showed any reluctance to commit the crime and, if he did, whether he was overcome by government persuasion.

(F) And ask yourself what kind of persuasion and how much persuasion the government used.

(6) Consider all the evidence, and decide if the government has proved that the defendant was already willing to commit the crime. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty.

Committee Commentary 6.03
(current through July 1, 2019)

A valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. Mathews v. United States, 485 U.S. 58, 62-63 (1988). *See also* United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990).

In defining predisposition, the Sixth Circuit relies on the five factors identified in United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990). *See, e.g.,* United States v. Harris, 1995 WL 6220, 2-3, 1995 U.S. App. LEXIS 254, 6 (6th Cir. 1995) (unpublished) (*quoting* United States v. McLernon, 746 F.2d 1098, 1112 (6th Cir. 1984)). Those five factors are: (1) the character or reputation of the defendant; (2) whether the suggestion of the criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant evidenced reluctance to commit the offense but was overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government. *Nelson, supra* at 317. These five factors appear in plain English terms in parts (A), (B), (C), (E), and (F) of paragraph 5.

The pattern instruction adds a sixth factor, paragraph (D) ("Ask yourself if the defendant took part in any similar criminal activity with anyone else before or afterwards."). This addition has been specifically approved by a panel of the Sixth Circuit. United States v. Stokes, 1993 WL 312009, 3, 1993 U.S. App. LEXIS 21414, 9 (6th Cir. 1993) (unpublished). In *Stokes*, the panel explained that paragraph (D) concerns the evidence that may be considered when answering whether predisposition existed, and that "a jury may look at evidence of the defendant's character both before and after his arrest. Ex post facto evidence is relevant because it may shed light on whether defendant is the type of person who could commit the crime in question." *Id.*

In Jacobson v. United States, 503 U.S. 540 (1992), the Court refined the predisposition element, holding that to be convicted, a defendant must be predisposed to commit the criminal act prior to first being approached by government agents. *Jacobson*, 503 U.S. at 549. The words in paragraphs (3) and (5), "prior to first being approached by government agents or other persons acting for the government," are drawn from the *Jacobson* decision and from the modified instruction approved in United States v. Smith, 1994 WL 162584, 4, 1994 U.S. App. LEXIS 9914, 11 (6th Cir. 1994) (unpublished).

In paragraphs (2), (3) and (5), the instruction refers to the question of whether the defendant was "already willing" to commit the crime before being approached by government agents. In *Jacobson*, the Court used the term "predisposed" as opposed to "already willing." 503 U.S. at 549. The Committee decided to use the term "already willing" rather than "predisposed" because the Sixth Circuit has approved the use of "already willing," *see* United States v. Sherrod, 33 F.3d 723, 726 (6th Cir. 1994), and because it is consistent with a plain English approach.

In Mathews v. United States, 485 U.S. 58 (1988), the Supreme Court held that even if a defendant denies one or more elements of the crime for which he is charged, he is entitled to an

entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find that the government entrapped him.

As long as the defendant shows a predisposition to commit an offense, governmental participation in the commission of an offense by itself cannot be the basis of an entrapment defense. United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994); United States v. Leja, 563 F.2d 244 (6th Cir. 1977).

No instruction on entrapment need be given unless there is some evidence of both government inducement and lack of predisposition. United States v. *Nelson*, supra, 922 F.2d at 317. It is the duty of the trial judge to determine whether there is sufficient evidence of entrapment to allow the issue to go before the jury. If there is, then the burden shifts to the government to prove predisposition. United States v. Meyer, 803 F.2d 246, 249 (6th Cir. 1986). The government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *See, e.g.*, United States v. Jones, 575 F.2d 81, 83-84 (6th Cir. 1978).

The entrapment defense should not be confused with the defense of entrapment by estoppel. *See* United States v. Blood, 435 F.3d 612 (6th Cir. 2006) (noting distinction between the theories of the two defenses of entrapment and entrapment by estoppel). Entrapment by estoppel is covered in Instruction 6.09.

A-8

6.04 ENTRAPMENT—ELEMENTS

The government has the burden of proving that the defendant was not entrapped by [identify the actor[s]: *e.g.*, government agent, informant, law enforcement officer]. The government must prove beyond a reasonable doubt either:

1. [A] [government agent[s]; informant[s]; [or] law enforcement officer[s]] did not induce the defendant to commit the offense; or

2. The defendant was predisposed to commit the offense before he had contact with [government agent[s]; informant[s]; law enforcement officer[s]].

I will define what I mean by the terms "induce" and "predisposed."

Committee Comment

See *United States v. Mayfield*, 771 F.3d 417, 439–40 (7th Cir. 2014) (*en banc*).

6.05 ENTRAPMENT—DEFINITIONS OF TERMS

Definition of "induce":

[A] [government agent[s]; informant[s]; law enforcement officer[s]] "induce[s]" a defendant to commit a crime: (1) if [the] [agent[s]; informant[s]; [and/or] officer[s]] solicit[s] the defendant to commit the crime, and (2) does something in addition that could influence a person to commit a crime that the person would not commit if left to his own devices. This other conduct may consist of [repeated attempts at persuasion; fraudulent representations; threats; coercive tactics; harassment; promises of reward beyond what is inherent in the usual commission of the crime; pleas based on need, sympathy, or friendship; [insert specific other conduct at issue;] [or] [any [other] conduct that creates a risk that a person who would not commit the crime if left to his own devices will do so in response to the efforts of the [agent[s]; informant[s]; officer[s]].

[If the [agent[s]; informant[s]; officer[s]] merely initiated contact with the defendant; merely solicited the crime; or merely furnished an opportunity to commit the crime on customary terms, then the [agent[s]; informant[s]; officer[s]] did not induce the defendant to commit the crime.]

Definition of "predisposed":

A defendant is "predisposed" to commit the charged crime if, before he was approached by [a] [government agent[s]; informant[s]; law enforcement officer[s]], he was ready and willing to commit the crime and likely would have committed it without the intervention of the [agent[s]; informant[s]; officer[s]], or he wanted to commit the crime but had not yet found the means.

Predisposition requires more than a mere desire, urge, or inclination to engage in the charged crime.

Rather, it concerns the likelihood that the defendant would have committed the crime if [the] [agent[s]; informant[s]; officer[s]] had not approached him.

In deciding whether the government has met its burden of proving that the defendant was predisposed to commit the crime, you may consider the defendant's character [, or] reputation [, or] criminal history]; whether the government initially suggested the criminal activity; whether the defendant engaged in the criminal activity for profit; whether the defendant showed a reluctance to commit the crime that was overcome by persuasion by the [agent[s]; informant[s]; officer[s]]; and the nature of the inducement or persuasion that was used.

Committee Comment

See *United States v. Mayfield*, 771 F.3d 417, 434–36 (7th Cir. 2014) (*en banc*); *United States v. McGill*, 754 F.3d 452 (7th Cir. 2014) (reversing conviction for failure to give entrapment instruction). See also *Jacobson v. United States*, 503 U.S. 540 (1992) (predisposition must exist prior to the government's attempts to persuade the defendant to commit the crime). Regarding predisposition, the *en banc* court emphasized in Mayfield that the relevant inquiry is the defendant's predisposition to commit the charged crime, not just any crime. *Mayfield*, 771 F.3d at 438. In addition, "although the defendant's criminal history is relevant to the question of his predisposition, it's not dispositive." *Id*. (emphasis in original).

Entrapment is, generally speaking, a question for the jury, not the court. *Id*. at 439. "[T]he defendant is entitled to a jury instruction on the defense 'whenever there is sufficient evidence from which a reasonable jury could find entrapment.' " *Id*. at 440. "[T]o obtain a jury instruction and shift the burden of disproving entrapment to the government, the defendant must proffer evidence on both elements of the defense. But this initial burden of production is not great. An entrapment instruction is warranted if the defendant proffers some evidence that the government induced him to commit the crime and he was not predisposed to commit it. *Id*. (internal quotation marks and citations omitted).

Mayfield also addressed the question of whether the trial court

may, before trial, preclude the defendant from asserting an entrapment defense. The court stated:

> Though this practice is permissible, it carries an increased risk that the court will be tempted to balance the defendant's evidence against the government's, invading the province of the jury. In ruling on a pretrial motion to preclude the entrapment defense, the court must accept the defendant's proffered evidence as true and not weigh the government's evidence against it. This important point is sometimes obscured, subtly raising the bar for presenting entrapment evidence at trial.
>
> . . . The two elements of the entrapment inquiry are not equally amenable to resolution before trial. Predisposition rarely will be susceptible to resolution as a matter of law. Predisposition, as we've defined it, refers to the likelihood that the defendant would have committed the crime without the government's intervention, or actively wanted to but hadn't yet found the means. This probabilistic question is quintessentially factual; it's hard to imagine how a particular person could be deemed "likely" to do something as a matter of law. The inducement inquiry, on the other hand, may be more appropriate for pretrial resolution; if the evidence shows that the government did nothing more than solicit the crime on standard terms, then the entrapment defense will be unavailable as a matter of law.

Id. at 440–41.

The instruction's list of the types of actions that may constitute inducement includes "fraudulent representations," as the Seventh Circuit ruled in *Mayfield*. The court has not yet, however, definitively defined what types of fraudulent representations may qualify as the type of inducement giving rise to entrapment, as opposed to legitimate undercover investigation tactics. For this proposition, the court cited *United States v. Burkley*, 591 F.2d 903, 913 (D.C. Cir. 1978), which in turn notes that "not all fraudulent representations constitute inducement" and provides examples of some types that the D.C. Circuit believed would not qualify. *Id*. at n.18 (internal quotation marks omitted). The court may, of course, consider whether the evidence warrants making specific reference to "fraudulent representations" or whether some other factor listed in the instruction covers the type of inducement at issue (*e.g.*, a fake stash of drugs might be better characterized as a "promise of reward," a false suggestion of a gang reprisal might be better characterized as a "coercive tactic," etc.).

In addition, in a case in which an entrapment instruction is

given and Instruction 3.19 (Government Investigative Techniques) is requested, consideration should be given to whether Instruction 3.19 should be reworded so that it does not implicitly modify or undercut the entrapment instruction.

Regarding predisposition, if evidence of the defendant's character or criminal history is introduced, the court should consider giving a limiting instruction confining the use of the evidence to determination of predisposition and precluding its use for other purposes.

A-9

9.01 ENTRAPMENT[1]

One of the issues in this case is whether the defendant was entrapped. The [government] [prosecution] has the burden of proving beyond a reasonable doubt that the defendant was not entrapped by showing **either**: (1) the defendant was willing to commit (insert description of crime charged) before [he] [she] was approached or contacted by law enforcement agents[2] or someone acting for the government; **or** (2) the government, or someone acting for the government, did not persuade or talk the defendant into committing (insert description of crime charged). If you find that the [government] [prosecution] proved at least one of these two things beyond a reasonable doubt, then you must reject the defendant's claim of entrapment. If you find that the [government] [prosecution] failed to prove at least one of these two things beyond a reasonable doubt, then you must find the defendant not guilty.

The law allows the government to use undercover agents, deception, and other methods to present a person already willing to commit a crime with the opportunity to commit a crime, but the law does not allow the government to persuade an unwilling person to commit a crime. Simply giving someone a favorable opportunity to commit a crime is not the same as persuading [him] [her].

Notes on Use

1. When this instruction is submitted, the government's burden of proof that the defendant was not entrapped must be included in the elements instruction. *See* Instruction 3.09, *supra*. This instruction should immediately follow.

2. The Committee recommends that the law enforcement officer or agent who had contact with the defendant or who is shown by evidence to be responsible for inducing the defendant to commit a criminal act, designing the criminal act, etc., be identified by name and that his capacity as governmental agent, informant,

etc., be described. If "agency," rather than the conduct of an admitted agent, is an issue, a supplement to this instruction may be required.

Committee Comments

This instruction has been revised to conform to *Jacobson v. United States*, 503 U.S. 540, 547 n.1 (1992), which clarified the issue of "timing." *Jacobson* held that the government must prove that the defendant was disposed to commit the criminal act prior to first being approached by governmental agents. *Id., n.2; United States v. Loftus*, 992 F.2d 793 (8th Cir. 1993).

For general discussions of the law of entrapment, *see United States v. Norton*, 846 F.2d 521 (8th Cir. 1988), and *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985). "The purpose behind the entrapment defense is to prevent law enforcement officers from manufacturing crime." *United States v. Hinton*, 908 F.2d 355, 358 (8th Cir. 1990). The focus of the entrapment defense, however, is on the intent or predisposition of the defendant to commit the crime, rather than upon the conduct of the government's agents. *Hampton v. United States*, 425 U.S. 484, 488 (1976). Even after *Jacobson*, a defendant's ready response to an opportunity to commit an offense may show (1) that there was no "inducement," as well as (2) that the defendant was independently predisposed to commit the offense. *See, e.g., United States v. LaChapelle*, 969 F.2d 632 (8th Cir. 1992).

"Entrapment is an affirmative defense which consists of two elements: government action to induce or otherwise cause the defendant to commit the crime, and the defendant's lack of predisposition to commit the crime." *United States v. Pfeffer*, 901 F.2d 654, 656 (8th Cir. 1990) (citing *United States v. Foster*, 815 F.2d 1200, 1201 (8th Cir. 1987)). A defendant is entitled to an entrapment instruction when there is "sufficient evidence from which a reasonable jury could find entrapment." *United States v. Felix*, 867 F.2d 1068, 1074 (8th Cir. 1989) (quoting *Mathews v. United States*, 485 U.S. 58, 61 (1988)); *see also United States v. Kutrip*, 670 F.2d 870, 877 (8th Cir. 1982). *Cf. United States v. Osborne*, 935 F.2d 32, 38 (4th Cir. 1991) (seldom, if ever, appropriate to decide prior to trial that the defendant is not entitled to an entrapment instruction). (For a list of evidentiary factors that may assist in determining whether an entrapment instruction is appropriate, *see United States v. Dion*, 762 F.2d at 687–88.) The government is not required to prove predisposition unless there is evidence of government inducement to commit the offense. To show

inducement, there must be evidence of government conduct creating "a substantial risk that an undisposed person . . . would commit the offense." *United States v. Loftus*, 992 F.2d at 798; *United States v. Stanton*, 973 F.2d 608, 609 (8th Cir. 1992).

When entrapment is an issue to be resolved, it is ordinarily for the jury. *United States v. Hinton*, 908 F.2d at 357; *United States v. Pfeffer*, 901 F.2d at 656; *United States v. Williams*, 873 F.2d 1102, 1104 (8th Cir. 1989). A finding of entrapment as a matter of law, followed by judgment of acquittal, is appropriate when the evidence clearly shows (1) that the government induced the defendant to engage in the criminal conduct, and (2) that the defendant lacked the necessary predisposition to perform the criminal conduct. *United States v. Crump*, 934 F.2d 947, 956 (8th Cir. 1991); *United States v. Hinton*, 908 F.2d at 357; *see also United States v. Pfeffer*, 901 F.2d at 656. The court of appeals stated in *Crump*, 934 F.2d at 956, that the government's failure to establish the defendant's predisposition will result in reversal of a conviction only when the evidence clearly indicates:

> "[t]hat a government agent originated the criminal design; that the agent implanted in the mind of an innocent person the disposition to commit the offense; and that the defendant then committed the criminal act at the urging of the government." *United States v. Beissel*, 901 F.2d 1467, 1469 (8th Cir. 1990) (quoting *United States v. Resnick*, 745 F.2d 1179, 1186 (8th Cir. 1984)).

"The issue of whether an informant should be considered a government agent is generally an issue of fact for the jury." *United States v. York*, 830 F.2d 885, 889 (8th Cir. 1987) (citing *United States v. Hoppe*, 645 F.2d 630, 633 (8th Cir. 1981)). The entrapment defense does not extend to inducement by private citizens unless they are acting as agents of the government. *United States v. Leroux*, 738 F.2d 943, 947 (8th Cir. 1984). For a discussion of issues associated with activities of "private agents," standing to raise the entrapment defense, and "indirect entrapment," *see United States v. Neal*, 990 F.2d 355 (8th Cir. 1993); Marcus, *The Entrapment Defense*, §§ 802 and 803 (1989).

Mathews v. United States, 485 U.S. 58 (1988), holds that a defendant who denies the commission of the crime may nevertheless assert and have the jury instructed on the inconsistent defense of entrapment. However, for the defendant to be entitled to an instruction under these circumstances, there must be sufficient evidence from which a jury could find entrapment. *United States v. Felix*, 867 F.2d at 1074 n.11.

"Outrageous government conduct" in procuring the commission of an offense which would amount to a violation of due process, is frequently discussed, but infrequently (if ever) established. *See Gunderson v. Schlueter*, 904 F.2d 407, 410 n.8 (8th Cir, 1990); *United States v. Ford*, 918 F.2d 1343, 1349 (8th Cir. 1990), and *United States v. Musslyn*, 865 F.2d 945 (8th Cir. 1989). A claim of "outrageous conduct" is addressed to the court; no jury submission on the issue is required. *United States v. Dougherty*, 810 F.2d 763, 770 (8th Cir. 1987); *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976). The Eighth Circuit has acknowledged that "sentencing entrapment" may arise where outrageous official conduct has overcome the predisposition of a defendant to commit only low-quantity, low-value (thus lower offense level) crimes by inducing such a person to commit greater crimes subject to greater punishment under the Sentencing Guidelines. *United States v. Nelson*, 988 F.2d 798, 809 (8th Cir. 1993); *United States v. Stein*, 973 F.2d 600, 602 (8th Cir. 1992). These cases only recognize the possibility of "sentencing entrapment;" the opinions did not find it to exist. As a sentencing issue, "sentencing entrapment" would not be submitted to the jury.

A related issue may arise when the government agent engages in the conduct which forms the only basis for federal jurisdiction. *See United States v. Coates*, 949 F.2d 104 (4th Cir. 1991). Such issues are usually for the court and not a matter for jury instructions.

"Entrapment by estoppel" is a defense based on advice from a government official that certain conduct is legal. The defendant has the burden to establish that he was misled by the statements of a government official into believing his conduct was lawful. *United States v. Austin*, 915 F.2d 363 (8th Cir. 1990). The issue of "entrapment by estoppel" is a jury issue; however, Model Instruction 9.01 does *not* describe the defense. *Cf.*, the proposed (but not approved) instruction, in *United States v. LaChapelle*, 969 F.2d at 637.

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6.2 ENTRAPMENT

The defendant contends that [he] [she] was entrapped by a government agent. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. The government must prove either:

1. the defendant was predisposed to commit the crime before being contacted by government agents, or

2. the defendant was not induced by the government agents to commit the crime.

When a person, independent of and before government contact, is predisposed to commit the crime, it is not entrapment if government agents merely provide an opportunity to commit the crime. In determining whether the defendant was predisposed to commit the crime before being approached by government agents, you may consider the following:

1. whether the defendant demonstrated reluctance to commit the offense;

2. the defendant's character and reputation;

3. whether government agents initially suggested the criminal activity;

4. whether the defendant engaged in the criminal activity for profit; and

5. the nature of the government's inducement or persuasion.

In determining whether the defendant was induced by government agents to commit the offense, you may consider any government conduct creating a substantial risk that an otherwise innocent person would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.

Comment

When there is evidence of entrapment, an additional element should be added to the instruction on the substantive offense: for example, "Fourth, the defendant was not entrapped."

A defendant need not concede that he or she committed the crime to be entitled to an entrapment instruction. *United States v. Derma*, 523 F.2d 981, 982 (9th Cir. 1975); *cf. United States v. Paduano*, 549 F.2d 145, 148 (9th Cir. 1977). Only slight evidence raising the issue of entrapment is necessary for submission of the issue to the jury. *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003).

The government is not required to prove both lack of inducement and predisposition. *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995) ("If the defendant is found to be

predisposed to commit a crime, an entrapment defense is unavailable regardless of the inducement."); *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991) (in absence of inducement, evidence of lack of predisposition is irrelevant and the failure to give a requested entrapment instruction is not error).

There are a number of Ninth Circuit cases describing the five factors that should be considered when determining "predisposition." *See*, *e.g.*, *United States v. Mohamud*, 843 F.3d 420, 432-35 (9th Cir. 2016); *United States v. Gurolla*, 333 F.3d at 956, *United States v. Jones*, 231 F.3d 508, 518 (9th Cir. 2000).

The government must prove that the defendant was predisposed to commit the crime *prior* to being approached by a government agent. *Jacobson v. United States*, 503 U.S. 540, 553 (1992). However, evidence gained after government contact with the defendant can be used to prove that the defendant was predisposed before the contact. *Id.* at 550-53*; see also United States v. Burt*, 143 F.3d 1215, 1218 (9th Cir. 1998) (previous Ninth Circuit Entrapment Instruction 6.02 erroneous "because it failed to state clearly the government's burden of establishing 'beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by the [g]overnment agents.'" (citing *Jacobson*, 503 U.S. at 549). The Ninth Circuit has stated that an entrapment instruction should avoid instructing the jury that a person is not entrapped if the person was "already" willing to commit the crime because of the ambiguity resulting therefrom. *United States v. Kim*, 176 F.3d 1126, 1128 (9th Cir. 1993).

The final paragraph of the instruction, explaining inducement, appears repeatedly in the case law. *See, e.g., United States v. Williams*, 547 F.3d 1187, 1197 (9th Cir. 2008) (quoting *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994)).

See United States v. Spentz, 653 F.3d 815, 819-20 (9th Cir. 2011) (no abuse of discretion in denying defendant's request for entrapment jury instruction when only inducement for committing crime, other than being afforded opportunity to do so, is typical benefit from engaging in criminal act such as proceeds from robbery). When a case presents a *Spentz* issue, the Ninth Circuit has suggested adding the following language:

> It is not entrapment if a person is tempted into committing a crime solely on the hope of obtaining ill-gotten gain; that is often the motive to commit a crime. However, in deciding whether a law enforcement officer induced the defendant to commit the crime, the jury may consider all of the factors that shed light on how the officers supposedly persuaded or pressure the defendant to commit the crime.

United States v. Cortes, 732 F.3d 1078, 1087 (9th Cir. 2013).

When the propriety of a government agent's conduct is an issue, *see* Instruction 4.10 (Government's Use of Undercover Agents and Informants).

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1.27

ENTRAPMENT

As a defense to the crimes charged in the indictment, the defendant has asserted that he was entrapped.

The defendant was entrapped if

— the idea for committing the crime(s) originated with government agents, and

— the government agents then persuaded or talked the defendant into committing the crime(s), and

— the defendant was not already willing to commit the crime(s).

When a person has no previous intent or purpose to violate the law, but is induced or persuaded by officers or agents to commit a crime, he is entrapped and the law, as a matter of policy, forbids his conviction in such a case. On the other hand, when a person already has the readiness and willingness to violate the law, and the officers or agents merely provide him with an opportunity to commit the crime and do so even by disguise or ruse, there is no entrapment.

In order to return a verdict of guilty as to [the defendant] for the crime(s) of [name crime or crimes charged], you must find beyond a reasonable doubt that the defendant was not entrapped.

[Add as appropriate:

For purposes of this case, [_], the informant, was an agent of the law enforcement officers.]

Comment

The Committee has chosen not to use the word "predisposition" as it sounds overly technical and thus may be confusing to the average juror.

This instruction is based on *United States v. Scull*, 321 F.3d 1270, 1274-76 (10th Cir. 2003), and *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1262-63 (10th Cir. 1999) (and Tenth Circuit cases cited therein).

To establish a defense of entrapment, *Scull* seems to require proof of more than persuasion by the government agent. "'Inducement' is 'government

conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.'" 321 F.3d at 1275 (quoting *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986)). Inducement is neither established by evidence of solicitation, standing alone, nor "'by evidence that the government agent initiated the contact with the defendant or proposed the crime.'" *Id.* (quoting *Ortiz*, 804 F.2d at 1165).

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S13.1
Entrapment

"Entrapment" occurs when law-enforcement officers or others under their direction persuade a defendant to commit a crime that the defendant had no previous intent to commit.

The Defendant has claimed to be a victim of entrapment regarding the charged offense.

The law forbids convicting an entrapped defendant.

But there is no entrapment when a defendant is willing to break the law and the Government merely provides what appears to be a favorable opportunity for the defendant to commit a crime.

For example, it's not entrapment for a Government agent to pretend to be someone else and offer – directly or through another person – to engage in an unlawful transaction.

So a defendant isn't a victim of entrapment if you find beyond a reasonable doubt that the government only offered the defendant an opportunity to commit a crime the defendant was already willing to commit.

But if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty.

ANNOTATIONS AND COMMENTS

See United States v. Davis, 799 F.2d 1490, 1493-94 (11th Cir. 1986). *See also United States v. King*, 73 F.3d 1564, 1569-71 (11th Cir. 1996), *cert. denied*, 519 U.S. 886, 117 S. Ct. 220, 136 L. Ed. 2d 153 (1996).

However, in *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), the Supreme Court held that the necessary predisposition of the Defendant must have existed before the Defendant was approached by Government agents or cooperating informants, and in *United States v. Brown*, 43 F.3d 618, 628 n.8 (11th Cir. 1995), cert. denied, 516 U.S. 917, 116 S. Ct. 309, 133 L. Ed. 2d 212 (1995), the Court of Appeals upheld the sufficiency and correctness of the former instruction but implied that clarification might be appropriate in the light of *Jacobson*. The present reformulation of the instruction on entrapment makes that clarification.