

5.2 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:

- > First, whether the defendant demonstrated reluctance to commit the offense;
- > Second, the defendant's character and reputation;
- > Third, whether government agents initially suggested the criminal activity;
- > Fourth, whether the defendant engaged in the criminal activity for profit; and
- > Fifth, 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. Demma*, 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 [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. 1999).

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 pressured the defendant to commit the crime.

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

When the propriety of a government agent’s conduct is an issue, see Instruction 3.10 (Government’s Use of Undercover Agents and Informants).

Revised Sept. 2018