

## **ENTRAPMENT**

Entrapment is a defense to be raised at trial, not by a pretrial motion to dismiss. To raise an entrapment issue, the defendant must introduce "some evidence of inducement by a government agent or one acting at his direction." *Commonwealth v. Shuman*, 391 Mass. 345, 351 (1984), quoting *Kadis v. United States*, 373 F.2d 370, 374 (1st Cir. 1967). The "threshold level for showing inducement in entrapment cases is very low."

*Commonwealth v. Thompson*, 382 Mass. 379, 384-385 (1981). In determining whether the defendant has met his initial burden, the trial judge should not consider the credibility of the evidence. See *Commonwealth v. Tracey*, 416 Mass. 528, 536 (1993).

Once the defendant has presented evidence of inducement (even if solely through the defendant's own testimony), the Commonwealth must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. See *Commonwealth v. Miller*, 361 Mass. 644, 652 (1972).

**The defendant has denied they are guilty of the crime(s) charged in this complaint. The defendant asserts that if they committed the offense of \_\_\_\_\_, they did so only because they were entrapped into committing it. A person is entrapped if law enforcement officials, either directly or through an agent, induced a person to commit a crime which they would not otherwise have committed.**

**If there is some evidence that law enforcement induced the defendant to commit this crime and that the defendant had no previous intention of committing it, then the Commonwealth must prove beyond a reasonable doubt that the defendant was not entrapped by law enforcement. To prove the defendant was not entrapped, the Commonwealth must prove beyond a reasonable**

**doubt one of two things:**

- 1) the defendant was not induced by a law enforcement official (a person acting at the direction of a law enforcement official), or**
- 2) the defendant was predisposed to commit the crime.**

**Inducement by law enforcement officials (or their agents) may take many forms, including, for example:**

- aggressive persuasion;**
- coercive encouragement;**
- lengthy negotiations;**
- pleading or arguing with the defendant;**
- repeated or persistent solicitation;**
- playing on the defendant's sympathy or other emotions;**
- promises of rewards; or**
- and any other evidence of such inducement.**

*Commonwealth v. Tracey*, 416 Mass. 528, 536 (1993).

**A request by law enforcement officials for the defendant to engage in criminal activity, standing alone, is not sufficient**

**evidence of entrapment. In the course of their duties, law enforcement officials may use undercover methods to apprehend persons engaged in criminal activities, as long as they merely afford opportunities for the commission of the offense by one ready and willing to commit it.**

**A predisposition may be established by evidence that the defendant was ready and willing to commit the crime when the opportunity arose. Willingness to commit a crime may be shown by evidence of ready acceptance of the opportunity to engage in criminal conduct, (the defendant's prior similar conduct), or by other direct or circumstantial evidence. It is not entrapment if a person is already ready and willing to commit a crime if the opportunity presents itself, and law enforcement merely provides the opportunity or facilities to do so.**

*Where there is some evidence of defendant's substance use disorder:*

**If there is evidence law enforcement officials (a person acting at the direction of a government agent) knew the defendant had a substance use disorder and exploited that knowledge to induce the defendant to commit a crime,**

**you may consider that as a factor in deciding whether the defendant was entrapped.**

See *Commonwealth v. Coyne*, 44 Mass. App. Ct. 1, 4 (1997) (failure to include reference to defendant's addiction in instruction on entrapment did not create substantial risk of miscarriage of justice). See also *Commonwealth v. Quirk*, 27 Mass. App. Ct. 258, 263 (1989) (declining to consider whether "addiction has any place in instructions on entrapment").

**If the Commonwealth has proved beyond a reasonable doubt that the defendant was not entrapped, and all the elements of the crime have also been proved beyond a reasonable doubt, then you should return a verdict of guilty. On the other hand, if there is a reasonable doubt as to whether the defendant was induced to commit the crime by a government agent or was not predisposed to commit the crime, or if the Commonwealth has failed to prove any element beyond a reasonable doubt, then you must find the defendant not guilty.**

#### SUPPLEMENTAL INSTRUCTION

1. Prior convictions for similar crimes or similar bad acts. **In this case, the Commonwealth has introduced some evidence to show that the defendant was predisposed to commit the charged crime because (the defendant was previously convicted of**

**[e.g. the same offense as is charged here]] (the defendant had committed similar bad acts in the past). You may consider that evidence solely on the issue of whether the defendant was predisposed and ready to commit the offense with which they are charged. You are not to consider it for any other purpose.**

If relevant, see Instruction 3.800 (Reputation of Defendant).

See *Commonwealth v. Dentin*, 477 Mass. 248, 251 (2017) (prior convictions may not be too remote in time from the alleged conduct; the court must “consider whether sufficiently similar prior bad acts are recent enough that they remain probative of the defendant’s predisposition to commit the charged crime”; “the bad acts must be sufficiently similar of the crime charged to ensure that their probative value outweighs the strong likelihood of prejudice.”); *Commonwealth v. Buswell*, 468 Mass. 92, 106 (2014). See also *Commonwealth v. Vargas*, 417 Mass. 792, 796-797 (1994) (where entrapment defense offered to drug distribution charge, evidence of prior distribution or possession to distribute, but not of simple possession, is relevant to predisposition).

**2. Where a third party is involved:**

**To qualify as entrapment, the inducement must have been committed by a government agent or a person acting at the direction of a government agent. Entrapment may be found where there is evidence of either of the following:**

- 1) the government’s inducement of a third party (another person) was communicated to the defendant, or**
- 2) the government recruited the third party (other person) to induce the defendant to join in the commission**

**of the crime.**

**Entrapment is not shown where a government agent induces a third party (another person) to commit a crime, and the third party (other person), responding to pressure, acts on their own to induce the defendant to participate in the crime.**

*Commonwealth v. Coyne*, 44 Mass. App. Ct. 1, 5 (1997); *Commonwealth v. Silva*, 21 Mass. App. Ct. 536, 548 (1986). See n. 3, below.

NOTES:

1. **Defendant's testimony as to police statements and as to his state of mind not hearsay.** The defendant's testimony as to what government agents said to him is offered to show inducement, rather than for the truth of the statements, and therefore is not hearsay. The defendant must be permitted to testify as to what his intent and motives were prior to any government inducement. *Commonwealth v. Thompson*, 382 Mass. 379, 383-384 (1981).
2. **Entrapment claim while denying commission of crime.** A defendant may request a jury charge on entrapment, if supported by the evidence, without having admitted to committing the crime. *Mathews v. United States*, 485 U.S. 58 (1988); *Tracey*, 416 Mass. at 533-535.
3. **Indirect entrapment through middleman.** A third party is a government agent only if he or she has been offered or asked for something; "[c]ooperation with the government in hope of favor is not sufficient." *Commonwealth v. Colon*, 33 Mass. App. Ct. 304, 305 (1992). An entrapment defense is available if government agents intentionally recruit a middleman to entrap the defendant, or if the middleman communicates to the defendant the government's inducement to him, but not if the middleman takes it upon himself to induce the defendant to commit the crime. See *Commonwealth v. Coyne*, 44 Mass. App. Ct. 1, 5 (1997); *Commonwealth v. Silva*, 21 Mass. App. Ct. 536, 548 (1986).
4. **Outrageous governmental conduct.** A claim of egregious government conduct is not a jury question and is to be determined on due process grounds by the judge alone on a pretrial motion to dismiss or, in cases of delayed disclosure, on a motion for a required finding. *Commonwealth v. Monteagudo*, 427 Mass. 484, 485-487 & n.4 (1998).