ENTRAPMENT

The defendant asserts that if he (she) committed this crime, he (she) did so only because he (she) was entrapped into committing it.

Entrapment occurs when a person who had no previous intention to violate the law is persuaded to commit a crime by an officer of the government. As a matter of public policy, you must find the defendant not guilty if you find that he (she) was entrapped into committing this crime.

The rule against entrapment is part of our law because the function of law enforcement is to prevent crime and to apprehend criminals. The state cannot tolerate having its officers instigating crime by implanting criminal ideas in innocent minds and thereby bringing about offenses that otherwise would never occur.

However, please notice that the rule against entrapment comes into play only when a government officer implants the idea of committing a crime in an *innocent* mind, the mind of a person who was not already predisposed to commit such a crime. It is not entrapment if a person is already ready and willing to commit such a crime if the opportunity presents itself, and the officer merely provides the opportunity or facilities

to do so.

The issue is not whether the police brought about this particular offense, but whether the police brought about the defendant's disposition to commit such a crime. For that reason, there is nothing improper about the police setting traps to catch those who are already disposed toward committing a crime. The police may validly use undercover methods — for example, decoys or false identities — in order to trap unwary criminals. What they may not do is to entrap unwary *innocent* persons.

It is up to you as the jury to determine whether or not the actions of the police in this case amounted to entrapment. You must ask yourselves: Did the criminal intent in this case originate with the defendant or with the police? Was the defendant an innocent person who initially was not ready or willing to break the law, but was enticed or ensnared into committing a crime by the police? Or, on the other hand, was the defendant already ready and willing to commit a crime such as this if the opportunity presented itself, and the police merely provided that opportunity?

See Instruction 3.120 (Intent).

The burden is on the Commonwealth to prove beyond a reasonable

doubt that the defendant was *not* entrapped by a government agent. The Commonwealth may do this *either* by proving that there was no inducement by a government agent or someone acting at the request of a government agent, *or* by proving that the defendant was predisposed to commit the crime. If it is clear beyond a reasonable doubt that the defendant was not entrapped, then you may find the defendant guilty, provided that all the elements of the crime have also been proved beyond a reasonable doubt. On the other hand, if you are left with a reasonable doubt as to whether the defendant was willing to commit the crime apart from any persuasion by the police, then you must find the defendant not guilty.

In order to raise an entrapment defense, evidence of inducement (beyond mere solicitation) by a government agent must be presented at trial. The prosecution is then required to prove beyond a reasonable doubt that the defendant was already predisposed to commit the crime, i.e., "ready and willing to commit the crime whenever the opportunity might be afforded." *Commonwealth v. Doyle,* 67 Mass. App. Ct. 846, 859, 858 N.E.2d 1098, 1108 (2006).

Commonwealth v. Vargas, 417 Mass. 792, 632 N.E.2d 1223 (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); *Commonwealth v. Tracey,* 416 Mass. 528, 537 n.10, 624 N.E.2d 84, 89 n.10 (1993) (whether inducer was government agent or acting at government request is jury question); *Commonwealth v. Shuman,* 391 Mass. 345, 350-353, 462 N.E.2d 80, 83-84 (1984); *Commonwealth v. Thompson,* 382 Mass. 379, 381-386, 416 N.E.2d 497, 499-501 (1981); *Commonwealth v. Miller,* 361 Mass. 644, 650-653, 282 N.E.2d 394, 399-400 (1972); *Commonwealth v. Harvard,* 356 Mass. 452, 458-461, 253 N.E.2d 346, 350-351 (1969); *Doyle, supra* (affirming instruction which largely tracks language of model instruction); *Commonwealth v. Coyne*, 44 Mass. App. Ct. 1, 6, 686 N.E.2d 1321, 1324 (1997) (*Vargas* rule applicable to prior distribution of different Class B drugs); *Commonwealth v. Penta,* 32 Mass. App. Ct. 36, 47, 586 N.E.2d 996, 1002 (1992) (there are two elements to an entrapment defense: inducement by a government agent, and defendant's lack of predisposition); *Commonwealth v. Quirk,* 27 Mass. App. Ct. 258, 263, 537 N.E.2d 597, 600 (1989) (reserving decision on whether defendant's drug addiction has any place in jury

charge on entrapment); *Commonwealth v. LaBonte,* 25 Mass. App. Ct. 190, 194, 516 N.E.2d 1193, 1196 (1987); *Commonwealth v. Silva,* 21 Mass. App. Ct. 536, 547-550, 488 N.E.2d 34, 41-42 (1986). While entrapment is not a defense of constitutional magnitude, *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637 (1973), relevant Federal decisions include *Russell; Jacobson v. United States,* 503 U.S. 540, 112 S.Ct. 1535 (1992) (prosecution must prove that defendant's willingness was independent of and not product of government's attention); *Osborn v. United States,* 385 U.S. 323, 87 S.Ct. 429 (1966); *Sherman v. United States,* 356 U.S. 369, 372, 78 S.Ct. 819 (1958); *Sorrells v. United States,* 287 U.S. 435, 451, 53 S.Ct. 210, 212 (1932); *United States v. Murphy*, 852 F.2d 1 (1st Cir. 1988); *Kadis v. United States,* 373 F.2d 370 (1st Cir. 1967).

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." Mere evidence of a request or solicitation is not itself sufficient to show inducement, but only a little more is required, e.g., pleading or arguing, lengthy negotiations, aggressive persuasion, coercive encouragement, or repeated or persistent solicitation, importuning, and playing on sympathy or other emotion. See, e.g., *Commonwealth v. Remedor,* 52 Mass. App. Ct. 694, 703, 756 N.E.2d 606, 613 (2001). In determining whether the defendant has met this burden, the judge should not consider the credibility of the evidence. Once the defendant has presented evidence of inducement (even solely through the defendant's own testimony), the Commonwealth must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *Tracey,* 416 Mass. at 536, 624 N.E.2d at 89; *Shuman,* 391 Mass. at 351-352, 462 N.E.2d at 83-84.

Commonwealth v. Harding, 53 Mass. App. Ct. 378, 383 n.3, 759 N.E.2d 1203, 1207 n.3 (2001), cites with apparent approval a five-factor test for determining predisposition from *United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir. 1997): "(1) the defendant's character and reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement."

SUPPLEMENTAL INSTRUCTION

Prior convictions or reputation for similar crimes. **In this case, the Commonwealth has introduced evidence (that in the past the defendant was convicted of** ___*[e.g. the same offense as is charged here]*___ **) (about the defendant's reputation for** _____ **). You may consider that evidence solely for whatever light it sheds on the issue of whether the defendant was predisposed and ready to commit the offense with which he (she) is charged. You are not**

to consider it for any other purpose.

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

Miller, 361 Mass. at 652, 282 N.E.2d at 400; *Commonwealth v. DeCastro,* 24 Mass. App. Ct. 937, 938, 509 N.E.2d 25, 26-27 (1987); *Commonwealth v. DiCato,* 19 Mass. App. Ct. 40, 43, 471 N.E.2d 755, 758 (1984).

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. *Thompson,* 382 Mass. at 383-384, 416 N.E.2d at 500.

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, 108 S.Ct. 883 (1988); *Tracey,* 416 Mass. at 533-535, 624 N.E.2d at 87-89.

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, 598 N.E.2d 1143, 1144 (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. *Silva, supra.*

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, 693 N.E.2d 1381, 1382-1284 (1998).