Chapter 6.00

DEFENSES

Table of Instructions

6.01 DEFENSE THEORY

(1) That concludes the part of my instructions explaining the elements of the crime. Next I will explain the defendant's position.

(2) The defense says

_____

_____

_____.

Committee Commentary 6.01
(current through December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit has not reviewed this instruction directly. The court's approach to defense theory instructions continues as it was described in the 1991 Committee Commentary. As to whether an instruction should be given, the court still relies primarily on United States v. Duncan, 850 F.2d 1104, 1117 (6th Cir. 1988). *See* United States v. Becker, 1998 WL 13408 at 4, 1998 U.S. App. LEXIS 485 at 11 (6th Cir. 1998)(unpublished). In United States v. O'Neal, 1999 WL 777307, 1999 U.S. App. LEXIS 23517 (6th Cir. 1999)(unpublished), the panel explained the law as follows: "Although a jury instruction 'should not be given if it lacks evidentiary support or is based upon mere suspicion or speculation,' if there is even weak supporting evidence, '[a] trial court commits reversible error in a criminal case when it fails to give an adequate presentation of a theory of defense.'" 1999 WL at 1, 1999 LEXIS at 3, *quoting* United States v. James, 819 F.2d 674, 675 (6th Cir. 1987) and United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986). In *O'Neal*, the panel concluded that the trial court properly refused a defense instruction because it was not supported by the evidence.

Where the proposed instruction does not state a distinct legal theory, the Sixth Circuit has held that an instruction need not be given and the issue should be left to argument. The court explained, "Although a district court is required to instruct the jury on the theory of defense, it is not error to refuse to give 'instructions which merely represent a defendant's view of the facts of the case,' rather than a distinct legal theory." United States v. Chowdhury, 169 F.3d 402, 407 (6th Cir. 1999), *quoting* United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997). *See also* United States v. Mack, 159 F.3d 208, 218 (6th Cir. 1998)(no error when trial court refused defense theory instruction because proposed instruction was not statement of law but rather denial of charges and it contained statements the defendant would have made if he had testified).

As to the content of the defense theory instruction, the Sixth Circuit continues to rely on United States v. Blane, 375 F.2d 249, 252 (6th Cir. 1967). *See, e.g.*, *Becker*, 1998 WL at 4, 1998, 1998 LEXIS at 10. *Blane* is discussed in the 1991 Committee Commentary.

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When a defense theory finds some support in the evidence and the law, the defendant is entitled to some mention of that theory in the district court's instructions. United States v. Duncan, 850 F.2d 1104, 1117 (6th Cir.1988), United States v. Garner, 529 F.2d 962, 970 (6th Cir.), cert. denied, 429 U.S. 850, 97 S.Ct. 138, 50 L.Ed.2d 124 (1976). The test for determining whether some mention of the defense theory must be included is not whether the evidence presented in support of the theory appears reasonable. Duncan, supra at 1117. "It is not for the judge, but rather for the jury, to 'appraise the reasonableness or the unreasonableness of the evidence' relating to the (defense) theory." Id. Instead, the test is whether "there is 'any foundation in the evidence' sufficient to bring the issue into the case, even if that evidence is 'weak, insufficient, inconsistent, or of doubtful credibility'." Id. Accord Garner, supra at 970.

But the district court does not have to accept the exact language of a proffered instruction on the defense theory. United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir.1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985); United States v. Blane, 375 F.2d 249, 252 (6th Cir.), cert. denied, 389 U.S. 835, 88 S.Ct. 41, 19 L.Ed.2d 96 (1967). It is sufficient if the court's instructions, as a whole, adequately cover the defense theory. Blane, supra at 252. As stated by the Sixth Circuit in McGuire:

"A criminal defendant has no right to select the particular wording of a proposed jury instruction. As long as the instruction actually given is a correct statement of the law, fairly presents the issues to the jury, and is substantially similar to the defendant's proposed instruction, the district court has great latitude in phrasing it." Id. at 1201.

The defense theory must, however, be stated "clearly and completely." Smith v. United States, 230 F.2d 935, 939 (6th Cir.1956).

See generally the Committee Comment to Eighth Circuit Instruction 4.00, the Introductory Comment to the Ninth Circuit's Specific Defenses Chapter 6.00 and Devitt and Blackmar Instruction 13.07.

6.02 ALIBI

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

(2) The government has the burden of proving that the defendant was present at that time and place. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty.

Committee Commentary 6.02
(current through December 31, 2007)

The Committee made no change in the instruction.

Panels of the Sixth Circuit have endorsed Pattern Instruction 6.02 twice. A panel endorsed the instruction in United States v. Lennox, 1994 WL 242411, 1994 U.S. App. LEXIS 13489 (6th Cir. 1994)(unpublished). The trial court gave Pattern Instruction 6.02, and the question was whether it was error to refuse defendant's proposed additional statement that there is no negative implication to the word "alibi" and that an alibi is a proper and legitimate claim in a defense of an indictment. The panel held it was not error to refuse this statement because the Pattern Instruction made it "abundantly clear" that the government continuously bore the burden of proof beyond a reasonable doubt. *Lennox*, 1994 WL at 5, 1994 LEXIS at 15. The panel stated, "Because this district court's actual jury instructions, taken as a whole, adequately informed the jury of the relevant considerations, and provided a sound basis in the law to aid the jury in reaching its decision, the district court did not err...." *Id.*

In Moore v. United States, 1998 WL 537589, 1998 U.S. App. LEXIS 18795 (6th Cir. 1998)(unpublished), a panel affirmed the district court's conclusion that the pattern instruction adequately described the alibi defense. The panel stated, "The district court properly rejected [the defendant's inadequacy] claim because the trial court gave the pattern instruction for an alibi defense that is recommended in our circuit." *Moore*, 1998 WL at 3, 1998 LEXIS at 9, *citing* Pattern Instruction 6.02.

In United States v. McCall, 85 F.3d 1193 (6th Cir. 1996), the court did not review the pattern instruction as such but did cite it for authority in describing the "primary function" of an alibi instruction as being "to remind the jury as to the government's burden of demonstrating all elements of the crime beyond a reasonable doubt, including defendant's presence at the crime scene...." *Id.* at 1196, *citing* Pattern Instruction 6.02. The issue in *McCall* was whether failure to give an alibi instruction was plain error. The court noted that Sixth Circuit authority established that such a failure might be plain error. *Id.*, *citing* United States v. Hamilton, 684 F.2d 380, 385 (6th Cir. 1982). However, the court went on to hold that failure to give an alibi instruction is not plain error when two conditions are met. The court stated, "[W]e hold that omission of the [alibi] instruction is not plain error, as long as the jury is otherwise correctly instructed concerning the government's burden of proving every element of the crime charged, and the defendant is given a full opportunity to present his alibi defense in closing argument." *McCall,* 85 F.3d at 1196.

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If requested, an alibi instruction is required when the nature of the offense charged requires the defendant's presence at a particular place or time, and the alibi tends to show his presence elsewhere at all such times. United States v. Dye, 508 F.2d 1226, 1231 (6th Cir.1974), cert. denied, 420 U.S. 974, 95 S.Ct. 1395, 43 L.Ed.2d 653 (1975).

The instruction must tell the jurors that the government has the burden of proof and must meet the reasonable doubt standard concerning the defendant's presence at the relevant time and place. "The defense can easily backfire, resulting in a conviction because the jury didn't believe the alibi rather than because the government has satisfied the jury of the defendant's guilt beyond a reasonable doubt, and it is the trial judge's responsibility to avoid this possibility." United States v. Robinson, 602 F.2d 760, 762 (6th Cir.), cert. denied, 444 U.S. 878, 100 S.Ct. 165, 62 L.Ed.2d 107 (1979). Failure to give the instruction when appropriate evidence has been presented is plain error. United States v. Hamilton, 684 F.2d 380, 385 (6th Cir.), cert. denied, 459 U.S. 976, 103 S.Ct. 312, 74 L.Ed.2d 291 (1982).

The use of "on or about" instructions may pose special problems in alibi cases. See Committee Commentary 2.04 and, in particular, United States v. Neuroth, 809 F.2d 339, 341-342 (6th Cir.) (en banc), cert. denied, 482 U.S. 916, 107 S.Ct. 3190, 96 L.Ed.2d 678 (1987).

See generally Fifth Circuit Instruction 1.34, Seventh Circuit Instruction 4.03, Eighth Circuit Instruction 9.07, Ninth Circuit Instruction 6.01, Eleventh Circuit Special Instruction 10 and Federal Judicial Center Instruction 53.

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 informer 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 December 31, 2007)

Paragraphs (3) and (5) of this instruction have been amended to reflect Jacobson v. United States, 503 U.S. 540, 548-49 (1992). In *Jacobson*, the Court held that to be convicted, a defendant must be predisposed to commit the criminal act prior to first being approached by government agents. 503 U.S. at 549. In the wake of *Jacobson*, panels of the Sixth Circuit stated that Pattern Instruction 6.03 was not erroneous. *See, e.g.*, United States v. Wood, 1996 WL 394025, 3, 1996 U.S. App. LEXIS 19099, 7 (6th Cir. 1996)(unpublished); United States v. Zaia, 1994 WL 478707, 5, 1994 U.S. App. LEXIS 24346, 15-16 (6th Cir. 1994)(unpublished). But in several cases, the court suggested amending the instruction to avoid any potential ambiguity. *See* United States v. Anderson, 76 F.3d 685, 690 (6th Cir. 1996)("might be desirable to conform to the Supreme Court's language"); United States v. Sherrod, 33 F.3d 723, 726 (6th Cir. 1994)("We do recommend, however, that Pattern Instruction 6.03 be amended to clarify the ambiguity noted herein."). The words added to 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, *supra* at 726, and because it is consistent with a plain English approach.

In defining predisposition, the Sixth Circuit continues to rely 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). As the 1991 Committee Commentary points out, the pattern instruction added 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.*

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).

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Before the Supreme Court's decision in Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988), it was well-established that a defendant must admit all of the elements of the offense before he would be entitled to an entrapment instruction. E.g., United States v. Prickett, 790 F.2d 35 (6th Cir.1986); United States v. Whitley, 734 F.2d 1129 (6th Cir.1984). In Mathews, 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.

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, supra, 485 U.S. at 62-63, 108 S.Ct. at 886. Accord United States v. Nelson, 922 F.2d 311, 317 (6th Cir.1990). Although predisposition is the key element in an entrapment defense, Instruction 6.03 avoids the term because it could confuse the jury.

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. Leja, 563 F.2d 244 (6th Cir.1977), cert. denied, 434 U.S. 1074, 98 S.Ct. 1263, 55 L.Ed.2d 780 (1978). See also Seventh Circuit Instruction 4.04 and Eighth Circuit Instruction 9.01 (No entrapment even if the government provided a favorable opportunity to commit the offense, made committing the offense easier, or even participated in acts essential to the offense).

Although there is some authority that police overinvolvement in a crime may bar conviction on due process grounds, case law indicates that a successful defense on such grounds will be exceptionally rare. E.g., Hampton v. United States, 425 U.S. 484, 495 n. 7, 96 S.Ct. 1646, 1652 n. 7, 48 L.Ed.2d 113 (1976); United States v. Leja, supra, 563 F.2d at 247 (Rubin, J. dissenting).

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), cert. denied, 480 U.S. 936, 107 S.Ct. 1580, 94 L.Ed.2d 770 (1987). The government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. E.g., United States v. Jones, 575 F.2d 81, 83-84 (6th Cir.1978).

In United States v. Nelson, supra, 922 F.2d at 317, the Sixth Circuit pointed out five factors identified by the Seventh Circuit as relevant in determining whether a defendant was predisposed. 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. Instruction 6.03 adds a sixth factor--whether the defendant engaged in similar criminal activity before or after the government's involvement.

See generally Fifth Circuit Instruction 1.28, Seventh Circuit Instruction 4.04, Eighth Circuit Instruction 9.01, Ninth Circuit Instruction 6.02, Eleventh Circuit Special Instruction 9 and Federal Judicial Center Instruction 54.

6.04 INSANITY

(1) One of the questions in this case is whether the defendant was legally insane when the crime was committed. Here, unlike the other matters I have discussed with you, the defendant has the burden of proving this defense, and he must prove it by clear and convincing evidence. This does not require proof beyond a reasonable doubt; what the defendant must prove is that it is highly probable that he was insane.

(2) A mental disease or defect by itself is not a defense. For you to return a verdict of not guilty because of insanity, the defendant must prove both of the following by clear and convincing evidence:

(A) First, that he had a severe mental disease or defect when he committed the crime; and

(B) Second, that as a result of this mental disease or defect, he was not able to understand what he was doing, or that it was wrong.

(3) Insanity may be temporary or permanent. You may consider evidence of the defendant's mental condition before, during and after the crime in deciding whether he was legally insane when the crime was committed.

(4) In making your decision, you are not bound by what any of the witnesses testified. You should consider all the evidence, not just the opinions of the experts.

(5) So, you have three possible verdicts--guilty; not guilty; or not guilty only by reason of insanity. Keep in mind that even though the defendant has raised this defense, the government still has the burden of proving all the elements of the crime charged beyond a reasonable doubt.

Committee Commentary 6.04
(current through December 31, 2007)

The Committee made two substantive changes in this instruction.

First, former paragraph (5), which explained the sentencing impact of a not guilty by reason of insanity (NGI) verdict, has been deleted in the wake of Shannon v. United States, 512 U.S. 573 (1994). In *Shannon*, the Court concluded that the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (IDRA), generally does not require that juries be instructed on the consequences of a verdict of NGI. The Court's concern was that the result of giving such an instruction would be "to draw the jury's attention toward the very thing – the possible consequences of its verdict – it should ignore." *Shannon*, 512 U.S. at 586. The Court ruled that an instruction on the consequences of an NGI verdict should not be given as a matter of general practice but may be given when necessary under certain limited circumstances. *Id*. at 587. The Court described those limited circumstances: "If, for example, a witness or prosecutor states in the presence of the jury that a particular defendant would 'go free' if found NGI, it may be

necessary for the district court to intervene with an instruction to counter such a misstatement. The appropriate response...will vary.... We note this possibility merely so that our decision will not be misunderstood as an absolute prohibition on instructing the jury with regard to the consequences of an NGI verdict." *Id.* at 587-88.

The Use Note discussing former paragraph (5) has also been deleted.

The second substantive change is the inclusion of language on the clear and convincing evidence standard in paragraph (1). The defendant has the burden of proving the insanity defense by a standard of "clear and convincing" evidence. 18 U.S.C. § 17(b). This standard has not changed from the 1991 edition version of this instruction. The Sixth Circuit has not defined this standard in a criminal case. In a civil case, United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981), the Sixth Circuit discussed the clear and convincing standard of proof by using the terms "highly probable" to describe it. Most pattern instructions do not include a definition of "clear and convincing" proof in their insanity instructions, including the Fifth, Seventh, Eighth and Eleventh Circuits. O'Malley's Federal Jury Practice (formerly Devitt & Blackmar) and the First and Ninth Circuits do include definitions of the clear and convincing standard; they define it as evidence that makes a fact "highly probable." See Kevin F. O'Malley et al., Federal Jury Practice and Instructions (5th ed. 2000), § 19.03; First Circuit Criminal Instructions 5.07 (1998); Ninth Circuit Instruction No. 6.4 (2000). The Committee decided to incorporate the definition of clear and convincing evidence as "highly probable" in paragraph (1) of the instruction. In addition, the Committee added the language in paragraph (1) indicating that clear and convincing evidence is a lower standard of proof than beyond a reasonable doubt. The rationale is that this relationship between the two standards of proof might not be clear to jurors just from the names of the standards.

Aside from these substantive changes, the language of paragraphs (1) and (2) was altered slightly to make the language smoother.

The Sixth Circuit has not discussed this instruction specifically.

In United States v. Kimes, 246 F.3d 800 (6th Cir. 2001), the court stated:

> It is important ... to distinguish between two different types of mental defect defense. The first, sometimes called the "diminished responsibility" defense, applies where the defendant's mental condition "completely absolves him of criminal responsibility regardless of whether or not guilt can be proven." (*citing* United States v. Fazzini, 871 F.2d 635, 641 (7th Cir. 1989)). The second, often referred to as the "diminished capacity" defense, applies "where the defendant claims only that his mental condition is such that he or she cannot attain the culpable state of mind required by the definition of the crime." (*citing Fazzini*, 871 F.2d at 641).

Kimes, 246 F.3d at 805-06.

In United States v. Gonyea, 140 F.3d 649 (6th Cir. 1998), the court described the difference between the insanity defense and diminished capacity. "The insanity defense ... 'is

not concerned with the mens rea element of the crime; rather, it operates to completely excuse the defendant whether or not guilt can be proven.'" *Id.* at 651, *quoting* United States v. Twine, 853 F.2d 676, 678 (9th Cir. 1988). Therefore, "insanity is a defense to all crimes, regardless of whether they require general or specific intent. By contrast, the diminished capacity defense ... is not an excuse. Rather, it 'is directly concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime.' (citation omitted) [Thus] diminished capacity is a defense only to specific intent crimes...." *Gonyea,* 140 F.3d at 651, *quoting* United States v. Twine, *supra*.

The *Gonyea* court concluded that defendant's right to pursue a diminished capacity approach survived enactment of the IDRA, United States v. Gonyea, *supra* at 650 n.3, *citing* United States v. Newman, 889 F.2d 88, 91 (6th Cir. 1989), but the diminished capacity approach can be used only for specific intent crimes. *Gonyea,* 140 F.2d at 651.

One concern raised when the defendant can use a diminished capacity approach is explained well by the First Circuit in the Committee Commentary to Instruction 5.07, Insanity. The Committee states, "If evidence tends to show that a defendant failed to understand the 'nature and quality' of his/her conduct, that evidence will not only tend to help prove an insanity defense but it will also typically tend to raise reasonable doubt about the requisite culpable state of mind." The Committee noted that the "overlap problem" could be solved by adequate instructions given by the trial judge. This conclusion was based upon the Supreme Court's opinion in Martin v. Ohio, 480 U.S. 228, 234 (1987), which provides that the trial judge must adequately convey to the jury that evidence supporting an affirmative defense may also be considered, where relevant, to raise reasonable doubt as to the requisite state of mind. The Sixth Circuit has not discussed this aspect of *Martin* in any greater detail, but a panel of the court has indicated some concern with the diminished capacity defense. *See* United States v. Willis, 1999 WL 591440, 6, 1999 U.S. App. LEXIS 18298, 17-18 (6th Cir. 1999)(unpublished)("[Diminished capacity defense] is a potentially misleading use of the term 'defense.' We think it is important to distinguish between the use of psychological testimony to negate an element of the crime and the use of such testimony as an affirmative defense to the crime.")

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Before passage of the Comprehensive Crime Control Act of 1984, the burden of going forward was initially on the defendant and then, after introduction of some evidence of insanity, it shifted back to the prosecution. Once the issue of insanity was raised, the burden was on the government to show sanity beyond a reasonable doubt, and the jury had to be so instructed.

The Comprehensive Crime Control Act of 1984 made the insanity defense an affirmative defense and imposed on the defendant the burden of proving the defense by "clear and convincing" evidence. 18 U.S.C. § 17(b) (formerly 18 U.S.C. § 20(b)). See United States v. Amos, 803 F.2d 419, 421 (8th Cir.1986). The statute also makes it clear that the defendant's inability to appreciate the nature and quality or the wrongfulness of his acts must have been the result of a "severe" mental disease or defect. 18 U.S.C. § 17(a) (formerly 18 U.S.C. § 20(a)). This was intended to ensure that nonpsychotic behavior disorders such as "immature personality"

or a pattern of "antisocial tendencies" cannot be used to raise the defense, and that the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, do not constitute insanity. See S.R.Rep. No. 225, 98th Cong., 1st Sess. reprinted in 1984 U.S.Code Cong. & Adm.News 3182, 3407-3412. The statute in its entirety states:

"(a) Affirmative defense.--It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.--The defendant has the burden of proving the defense of insanity by clear and convincing evidence."

Another section of the Act added Section 4242 to Title 18, providing for a jury verdict of "not guilty only by reason of insanity." Before passage of the 1984 Act, there was no procedure for commitment to mental institutions of persons who were acquitted solely by reason of insanity and who were dangerous. Section 4243 of the Act set out a procedure by which a person found not guilty only by reason of insanity may be committed by the court, and may be released only if he proves "that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another." If the person was found not guilty by reason of insanity of an offense involving bodily injury, or serious damage to property, or a substantial risk of bodily injury or serious damage to property, then he must prove this by clear and convincing evidence to obtain his release. If the person was found not guilty by reason of insanity of any other offense, then he must only prove this by a preponderance of the evidence.

The House Committee endorsed the procedure used in the District of Columbia where the jury was instructed as to the effect of a verdict of not guilty by reason of insanity. H.R.Rep. No. 1030, 98th Cong., 2d Sess, 1984 U.S.Code Cong. & Adm.News 3182, 3422.

The Ninth and Eleventh Circuits have held that a defendant is entitled to an instruction on the insanity defense only if sufficient evidence has been presented to permit a reasonable jury to find that insanity has been shown with "convincing clarity." United States v. Whitehead, 896 F.2d 432, 435 (9th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 342, 112 L.Ed.2d 306 (1990); United States v. Owens, 854 F.2d 432, 435 (11th Cir.1988).

In United States v. Medved, 905 F.2d 935, 940-941 (6th Cir.1990), petition for cert. filed, No. 90-6566 (Dec. 19, 1990), the Sixth Circuit upheld instructions telling the jury to consider all the evidence, not just the expert testimony, in determining if the defense had been established.

See generally Fifth Circuit Instruction 1.33, Eighth Circuit Instruction 9.03, Ninth Circuit Instruction 6.03, Eleventh Circuit Special Instruction 11 and Federal Judicial Center Instruction 55.

6.05 COERCION/DURESS

(1) One of the questions in this case is whether the defendant was coerced, or forced, to commit the crime. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) Coercion can excuse a crime, but only if the following five factors are met:

(A) First, that the defendant reasonably believed there was an imminent threat of death or serious bodily injury [to himself] [to another];

(B) Second, that the defendant had not recklessly or negligently placed himself [another] in a situation in which it was probable that he would be forced to choose the criminal conduct;

(C) Third, that the defendant had no reasonable, legal alternative to violating the law;

(D) Fourth, that the defendant reasonably believed his criminal conduct would avoid the threatened harm; and

(E) Fifth, that the defendant did not maintain the illegal conduct any longer than absolutely necessary.

(3) If the defendant proves by a preponderance of the evidence the five elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the five factors are more likely true than not true.

Use Note

In paragraph (2)(A), use the bracketed option that fits the facts.

Committee Commentary 6.05
(current through December 31, 2007)

This instruction has been redrafted to include the elements of the defense in the text of the instruction. The elements were identified in United States v. Riffe, 28 F.3d 565, 569 (6th Cir. 1994) as follows:

(1) that defendant was under an unlawful and present, imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;

(2) that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

(3) that the defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm;
(4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm;
(5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

United States v. Riffe, *supra* at 569, *quoting* United States v. Newcomb, 6 F.3d 1129, 1134-35 (6th Cir. 1993) and *citing* United States v. Singleton, 902 F.2d 471, 472-73 (6th Cir. 1990).

These elements have been inserted into the text of the instruction with some plain English drafting. The Committee does not intend the redrafted instruction to make any change in the law. Rather, the Committee intends the instruction to reflect elaborations in the case law that have developed since 1991.

The title of the instruction has been changed from "Coercion or Duress" to "Coercion/Duress" to indicate that the instruction covers a single defense.

The Use Note has been modified to fit the redrafted instruction.

The 1991 version of the instruction has not been reviewed as a whole by the Sixth Circuit. A panel of the court did approve one portion of the 1991 version of the instruction. The language in former paragraph (3) on the reasonableness of the defendant's belief that committing the crime was the only way to save himself was cited with approval in United States v. Waddell, 1994 WL 279390, 7-10, 1994 U.S. App. LEXIS 16047, 27-30 (6th Cir. 1994)(unpublished).

The court continues to hold that the duress defense requires a threat of physical harm. *See* United States v. Huff, 1998 WL 385555, 5, 1998 U.S. App. LEXIS 14988, 10 (6th Cir. 1998)(unpublished)(affirming refusal to give duress instruction because no evidence of a threat of physical harm).

In order to raise the defense and warrant an instruction, the defendant need only present some evidence, even weak evidence, of all five elements of the defense. United States v. Riffe, *supra* at 570, *citing Newcomb*, 6 F.3d at 1132. *See also* United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976), discussed in 1991 Commentary.

As to the standard of proof, once an instruction is warranted, paragraph (3) places the burden on the defendant based on Dixon v. United States, 126 S. Ct. 2437, 2447-48 (2006). In *Dixon*, the Court held that in a prosecution of firearms offenses under 18 U.S.C. §§ 922(n) and 922(a)(6), the defendant has the burden of proving the defense of duress by a preponderance of the evidence. The Court indicated that the burden of proof for duress would be on the defendant for most offenses. The Court explained, "In the context of the firearms offenses at issue – as will usually be the case, given the long-established common-law rule – we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence." *Dixon, supra*. The definition of the preponderance standard in paragraph (4) is based on United States v. Ward, 68 F.3d 146, 148-49 (6th Cir. 1995); and United States v.

Walton, 908 F.2d 1289, 1301-02 (6th Cir. 1990).

1991 Edition

A defense of duress or coercion requires an immediate threat of death or serious bodily harm which forces the defendant to commit the criminal act, and the situation must be one in which there was no opportunity to avoid the danger. United States v. Campbell, 675 F.2d 815, 820-21 (6th Cir.), cert. denied, 459 U.S. 850, 103 S.Ct. 112, 74 L.Ed.2d 99 (1982). The threat of death or serious bodily harm may be a threat against another. In United States v. Garner, 529 F.2d 962, 969-70 (6th Cir.), cert. denied, 429 U.S. 850, 97 S.Ct. 138, 50 L.Ed.2d 124 (1976), a coercion instruction was required when a defendant alleged that she committed the illegal acts because of anonymous threats against her daughter.

A preliminary burden is placed on the defendant to introduce facts sufficient to trigger consideration of the defense by way of an instruction. Even when the supporting evidence is weak or of doubtful credibility, its presence requires an instruction. United States v. Garner, supra, 529 F.2d at 970. Once the instruction is triggered, the burden is on the government to prove beyond a reasonable doubt the absence of coercion. United States v. Campbell, supra, 675 F.2d at 821.

In United States v. Martin, 740 F.2d 1352, 1361 (6th Cir.1984), the Sixth Circuit approved the following coercion instruction:

"Coercion or compulsion may provide a legal excuse for the crime charged in the indictment. To provide a legal excuse for any criminal conduct, however, the compulsion must be present and immediate and of such a nature to induce a well-founded fear of impending death or serious bodily injury. The alleged fact that a defendant is told he will suffer incarceration if he does not engage in criminal activity provides no legal excuse for committing a crime."

In cases involving any justification-type defense to a charge of possession of a firearm by a felon, significant modifications must be made in this instruction. See United States v. Singleton, 902 F.2d 471, 472-473 (6th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 196, 112 L.Ed.2d 158 (1990). See also United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir.1991) (proffered defense of temporary innocent possession).

See generally Seventh Circuit Instruction 4.05, Eighth Circuit Instruction 9.02, Ninth Circuit Instruction 6.04, Eleventh Circuit Special Instruction 12 and Federal Judicial Center Instruction 56.

6.06 SELF-DEFENSE

(1) One of the questions in this case is whether the defendant acted in self-defense.

(2) A person is entitled to defend himself against the immediate use of unlawful force. But the right to use force in self-defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.

(3) The government has the burden of proving that the defendant did not act in self-defense. For you to find the defendant guilty, the government must prove that it was not reasonable for him to think that the force he used was necessary to defend himself against an immediate threat. Unless the government proves this beyond a reasonable doubt, you must find him not guilty.

Committee Commentary 6.06
(current through December 31, 2007)

The Committee made no change in the instruction. The Committee also decided that no change in or addition to the 1991 Committee Commentary is warranted.

1991 Edition

As with most affirmative defenses, once the defendant raises the defense the government must establish beyond a reasonable doubt that the defendant's action was not in self-defense. Including a specific statement of the burden of proof in a self-defense instruction is preferable to relying on a general burden of proof instruction. DeGroot v. United States, 78 F.2d 244 (9th Cir. 1935); United States v. Corrigan, 548 F.2d 879 (10th Cir.1977); United States v. Jackson, 569 F.2d 1003 (7th Cir.), cert. denied, 437 U.S. 907, 98 S.Ct. 3096, 57 L.Ed.2d 1137 (1978).

Sixth Circuit decisions indicate that a defendant is limited in using force in self-defense to those situations where there are reasonable grounds for believing that such force is necessary under the circumstances. See United States v. Guyon, 717 F.2d 1536, 1541 (6th Cir.1983), cert. denied, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984).

See generally Seventh Circuit Instruction 4.01, Eighth Circuit Instruction 9.04 and Ninth Circuit Instruction 6.05.

6.07 JUSTIFICATION

(1) One of the questions in this case is whether the defendant was justified in committing the crime. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) For you to return a verdict of not guilty because of a justification defense, the defendant must prove the following five factors by a preponderance of the evidence:

(A) First, that the defendant reasonably believed there was an imminent threat of death or serious bodily injury [to himself] [to another];

(B) Second, that the defendant had not recklessly or negligently placed himself [another] in a situation in which it was probable that he would be forced to choose the criminal conduct;

(C) Third, that the defendant had no reasonable, legal alternative to violating the law;

(D) Fourth, that the defendant reasonably believed his criminal conduct would avoid the threatened harm; and

(E) Fifth, that the defendant did not maintain the illegal conduct any longer than absolutely necessary.

(3) If the defendant proves by a preponderance of the evidence the five elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the five factors are more likely true than not true.

Use Note

In paragraph (2)(A), use the bracketed option that fits the facts.

Committee Commentary 6.07

(current through December 31, 2007)

This instruction is new in 2007. It is based on United States v. Newcomb, 6 F.3d 1129 (6th Cir. 1993) and United States v. Singleton, 902 F.2d 471 (6th Cir. 1990). *See also* United States v. DeJohn, 368 F.3d 533 (6th Cir. 2004).

The court first recognized the defense of justification in *Singleton* in a prosecution of a felon in possession of a firearm under 18 U.S.C. § 922. The court stated, "The Sixth Circuit has not yet ruled on whether a felon can ever be justified in possession of a firearm. We hold that a defense of justification may arise in rare situations." *Singleton*, 902 F.2d at 472, *citing* United

States v. Gant, 691 F.2d 1159 (5th Cir. 1982) and United States v. Agard, 605 F.2d 665 (2d Cir. 1979). The court stated that the defense should be construed narrowly and then adopted the four factor test from *Gant*. *Singleton*, 902 F.2d at 472-73, *citing Gant*, 691 F.2d at 1162-63. The court concluded it was not error to refuse an instruction on the justification defense in this case because the defendant failed to show that he did not maintain possession of the firearm any longer than was absolutely necessary. *Singleton*, 902 F.2d at 473.

In *Newcomb*, the court elaborated on the justification defense established in *Singleton*. The court defined it as having five factors: the original four from *Gant* and the fifth added in *Singleton* that the defendant did not maintain the illegal conduct any longer than absolutely necessary. *Newcomb*, 6 F.3d at 1134-35 and 1134 n.4 ("This circuit ... has clearly identified five distinct factors."). The court listed the elements of the defense:

> (1) that defendant was under an unlawful and present, imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
> (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
> (3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; ...
> (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm; [and
> (5)] that the defendant ... did not maintain the illegal conduct any longer than absolutely necessary.

Newcomb, 6 F.3d at 1134-35 (internal quotations and punctuation omitted), *quoting* United States v. Singleton, *supra* at 472-73. The court held that the justification defense applies not only when the defendant acts to avoid harm to himself but also when he acts to avoid harm to third parties, and concluded it was error to omit an instruction on the justification defense. *Newcomb*, 6 F.3d at 1135-36.

In paragraphs (2)(A) through (E), the five elements of the defense are taken from *Newcomb*, 6 F.3d at 1134-35. Some of the language was simplified consistent with a plain English approach.

Paragraph 2(A) has been drafted to reflect the *Newcomb* court's holding that the justification defense applies not only when the defendant acts to avoid harm to himself but also when he acts to avoid harm to third parties. *Newcomb*, 6 F.3d at 1135-36. On this issue, the *Newcomb* court explained that the language of United States v. Bailey, 585 F.2d 1087, 1110-11 (D.C.Cir. 1978) (Wilkey, J., dissenting) was broad enough to allow the defense to include fear on behalf of a third party, *Newcomb*, 6 F.3d at 1135 n.5, and further stated that most other circuits would treat this issue the same way. *Id.* at 1136. *See also* United States v. O'Neal, 1999 WL 777307, 1-2, 1999 U.S. App. LEXIS 23517, 4 (6th Cir. 1999)(unpublished). *But see* United States v. Lacy, 1991 WL 256553, 4, 1991 U.S. App. LEXIS 28776, 10 (6th Cir. 1991)(unpublished) (justification defense not triggered by defense of third parties). The pattern instruction follows the more recent case of *Newcomb*, so paragraph 2(A) is not limited to finding

a threat to the defendant.

"Instructions on the defense are proper if the defendant has produced evidence upon which a reasonable jury could conclude by a preponderance of the evidence that each of the ... five circumstances exist ...." United States v. Hargrove, 416 F.3d 486, 490 (6th Cir. 2005). Paragraphs (1) and (2) place the burden on the defendant of proving the defense of justification by a preponderance of the evidence. United States v. Brown, 367 F.3d 549, 556 (6th Cir. 2004), *citing Singleton*, 902 F.2d at 472. The definition of the preponderance standard in paragraph (4) is based on United States v. Ward, 68 F.3d 146, 148-49 (6th Cir. 1995) and United States v. Walton, 908 F.2d 1289, 1301-02 (6th Cir. 1990).

In *Newcomb*, the court described the difference between the defenses of justification and necessity. Justification and necessity are not interchangeable; rather, necessity is a type of justification. The court explained:

> "Justification," and its counterpart, "excuse," are terms for general categories of defenses. "Justification" pertains to the category of action that is exactly the action that society thinks the actor should have taken, under the circumstances; "excuse," on the other hand, denotes a more grudging acceptance of an action, where society wishes the actor had not done what he did, but will not hold him blameworthy. ... "[N]ecessity" is ... a particular example of a defense that, when proved, will justify the defendant's action. ... "[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils....". The precise content of the necessity defense has altered substantially over recent years. We will use the broader term of justification in discussing [the] proffered defense in an attempt to avoid confusion.

6 F.3d at 1133 (citations omitted). In view of this explanation, the Committee also used the broader term of justification.

Singleton, Newcomb, Wolak, Lacy and *O'Neal* are all firearms possession cases, so the question arises whether the justification defense exists outside this context. Although the Sixth Circuit has not ruled explicitly, United States v. Milligan, 17 F.3d 177 (6th Cir. 1994) implies that the justification defense is not limited to firearms possession crimes. In *Milligan*, the district court gave a necessity defense instruction on mail and wire fraud, the jury convicted the defendant, and the Sixth Circuit held there was enough evidence to support the jury's rejection of the necessity defense. *Id.* at 181. On the conspiracy count, the district court refused to give a necessity instruction, and the Sixth Circuit affirmed this ruling on two grounds: the defendants failed to produce sufficient evidence that they ceased the criminal activity as soon as a safe opportunity arose, and conspiracy is a continuing offense. *Id.* at 182. *Milligan* indicates that district courts should be wary of giving necessity defense instructions for conspiracy charges, but it also indicates that the justification defense is not limited to firearms possession crimes.

6.08 FRAUD – GOOD FAITH DEFENSE

(See Instruction 10.04.)

Committee Commentary 6.08
(current through December 31, 2007)

Instruction 10.04 states a good faith defense to be used in conjunction with the elements instructions for mail, wire and bank fraud only; it does not articulate a general good faith defense. Instruction 10.04 is cross-listed here in Chapter 6 because it covers a defense, but its applicability is limited to those fraud crimes in Chapter 10.

6.09 ENTRAPMENT BY ESTOPPEL

(1) One of the questions in this case is whether the defendant reasonably relied on a government announcement that the criminal act was legal. This defense is called entrapment by estoppel. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) For you to return a verdict of not guilty based on the defense of entrapment by estoppel, the defendant must prove the following four factors by a preponderance of the evidence:

(A) First, that an agent of the United States government announced that the charged criminal act was legal.

(B) Second, that the defendant relied on that announcement.

(C) Third, that the defendant's reliance on the announcement was reasonable.

(D) Fourth, that given the defendant's reliance, conviction would be unfair.

(3) If the defendant proves by a preponderance of the evidence the four elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the four factors are more likely true than not.

Committee Commentary 6.09
(current through December 31, 2007)

This instruction is new in 2008. It is based on United States v. Levin, 973 F.2d 463 (6th Cir. 1992) (*citing* United States v. Smith, 940 F.2d 710 (1st Cir. 1991)). *See also* United States v. Triana, 468 F.3d 308 (6th Cir. 2006) and United States v. Blood, 435 F.3d 612 (6th Cir. 2006).

"Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official to his detriment." *Triana*, 468 F.3d at 316 (*citing* Cox v. Louisiana, 379 U.S. 559 (1965)). The defense rests "upon a due process theory . . . focusing on the conduct of the government officials rather than on the defendant's state of mind." *Blood*, 435 F.3d at 626 (*citing* United States v. Batterjee, 361 F.3d 1210, 1218 (9th Cir. 2004)). The "underlying concept is that, under certain circumstances, an individual may be entitled reasonably to rely on the representations of an authorized government official as to the legality of his conduct." *Id*. Since the Due Process Clause requires that citizens have fair warning as to what is illegal, "[o]rdinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." *Levin*, 973 F.2d at 467.

The Sixth Circuit first recognized the defense of entrapment by estoppel in *Levin*, 973 F.2d 463 (6th Cir. 1992). The court defined the defense as consisting of four factors: "To determine the availability of the defense, the court must conclude that (1) a government must

have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and, (4) given the defendant's reliance, the prosecution would be unfair." *Id.* at 469 (citations omitted).

In paragraphs 2(A) through (D), the four elements of the defense are based on this holding. Some of the language was simplified consistent with a plain English approach.

Paragraph 2(A) specifies that an agent of the United States government must announce that the charged criminal act was legal. The term "United States government" reflects the case law which specifies that the entrapment-by-estoppel defense will not shield a defendant from federal prosecution when the representations of legality were made by state officers. United States v. Hurst, 951 F.2d 1490, 1499 (6th Cir. 1991); *see also* United States v. Ormsby, 252 F.3d 844, 846 (6th Cir. 2001).

Paragraph (2)(A), and the instruction generally, require that a government agent "announced" that the charged criminal act was legal. The terms "announced" and "announcement" are drawn from *Levin*, 973 F.2d at 468; *see also Triana*, 468 F.3d at 316 (quoting this term from *Levin*); *Blood*, 435 F.3d at 626 (same). Case law does not precisely define what constitutes an announcement. The Sixth Circuit has held that an announcement was established by official letters from Health Care Financing Administration "reimbursement specialists" approving the defendants' conduct. *Levin, supra* at 465. However, an announcement was not established by statements an FBI confidential informant made to defendants that a bank was legitimate and that the financing scheme had worked before. *Blood, supra* at 626. The Sixth Circuit has also held that probation officers' failure to prohibit defendant's involvement with federal health care programs was not an announcement because a government official did not *explicitly* tell defendant his actions were legal. *Triana, supra* at 316 (emphasis in original).

Paragraph 2(B) requires that the defendant actually rely on the government announcement at the time the offense was committed. The defense does not apply to a subsequent grant of authority. United States v. Lowenstein, 108 F.3d 80, 83 (6th Cir. 1997). Similarly, if the defendant was not aware of the representation at the time of the offense, the defense fails. *Id*.

As indicated in paragraph 2(C), the defense will only succeed when, in light of the agent's statement, the defendant's conduct is reasonable. *See Blood*, 435 F.3d at 626 (defendants could not have reasonably relied on statements by a party they did not know to be a government agent at the time of the reliance).

Paragraph 2(D) requires that conviction would be "unfair." Case law does not clearly define unfairness. *See, e.g., Pennsylvania Indus. Chem. Corp.*, 411 U.S. at 674-75; *Cox*, 379 U.S. at 570; *Raley*, 360 U.S. at 426; *Levin*, 973 F.2d at 466. However, the court has emphasized the government's role in actively misleading the defendant. As the court explained in *Levin*, because the defense is grounded "upon fundamental notions of fairness embodied in the Due Process Clause of the Constitution," *id*. at 468, "criminal sanctions are not supportable if they are to be imposed under 'vague and undefined' commands; or if they are 'inexplicably

contradictory'; *and certainly not if the Government's conduct constitutes 'active misleading.' "* *Id.* at 467 (citations omitted; emphasis in original).

Generally, the entrapment-by-estoppel defense developed in three Supreme Court cases: Raley v. Ohio, 360 U.S. 423 (1959); *Cox*, 379 U.S. 559; and United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973). In *Raley*, the defendants were convicted of contempt after they refused to answer the Ohio Un-American Activities Commission's questions about their alleged Communist party ties. The Court reversed the convictions, holding that the defendants had reasonably relied on the Commission's statements as to the right to refuse to answer. The Court noted that to uphold the convictions "would be to sanction an indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Id*. at 426. In *Cox*, *supra*, the Court reversed the defendant's conviction under a Louisiana statute that prohibited picketing "near" a courthouse. The Court cited *Raley* as an analogous case: "In effect, appellant was advised that a demonstration at the place it was held would not be one 'near' the courthouse within the terms of the statute. . . . The Due Process Clause does not permit convictions to be obtained under such circumstances." *Id*. at 570 (citations omitted). Finally, in *Pennsylvania Indus. Chem. Corp*., *supra*, the Court reversed the defendant's conviction and remanded the case to allow the defendant corporation to present evidence to satisfy an entrapment-by-estoppel defense when the defendant claimed reliance on erroneous agency regulations that permitted the discharge of pollutants into rivers.

The defendant bears the "threshold evidentiary burden" to prove that he is entitled to an instruction on the defense. *Triana*, 468 F.3d at 315 n.3 and 316. The case law does not clearly identify the amount of evidence that will satisfy this threshold requirement. *See, e.g., Triana*, 468 F.3d at 315 n.3 and 316 ("tenuous" evidence is not enough; defendant must show that an "evidentiary basis exists upon which the instruction can be issued") (citations omitted). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Matthews v. United States, 485 U.S. 58, 63 (1988); *see also Triana*, 468 F.3d at 315 ("A district court must grant an instruction on the defendant's theory of the case if the theory has some support in the evidence and the law.") (citation omitted). The Sixth Circuit and panels of the circuit have occasionally concluded that the threshold showing was not made and that the district court properly omitted an instruction on the defense. *See Hurst*, 951 F.2d at 1499; United States v. Haire, 2004 U.S. App. LEXIS 4183 at 17, 2004 WL 406141 at 5 (6th Cir. 2004) (unpublished); United States v. Gross, 1997 U.S. App. LEXIS 25318 at 3, 1997 WL 572938 at 1 (6th Cir. 1997) (unpublished). However, district courts are cautioned that "so long as there is even weak supporting evidence, '[a] trial court commits reversible error in a criminal case when it fails to [give] an adequate presentation of a theory of defense.'" *Triana*, 468 F.3d at 316 (*quoting* United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986)).

The defendant bears the burden of proving entrapment by estoppel by a preponderance of the evidence. United States v. Beaty, 245 F.3d 617, 624 (6th Cir. 2001). The definition of the preponderance standard in paragraph (4) is based on United States v. Ward, 68 F.3d 146, 148-49 (6th Cir. 1995) and United States v. Walton, 908 F.2d 1289, 1301-02 (6th Cir. 1990).

In contrast to the entrapment defense, the entrapment-by-estoppel defense does not depend on the defendant's pre-disposition to commit the offense. *See Blood*, 435 F.3d at 626 ("defendant's pre-disposition to commit an offense is not at issue in an entrapment by estoppel defense"). For this reason, the Sixth Circuit has been careful to distinguish entrapment from entrapment by estoppel. In *Blood* the district court's instruction, which incorporated both elements of entrapment and entrapment by estoppel, "*could* have [been] 'confusing'" (internal citations omitted) (emphasis added). *Id*. The court held the error was harmless, because the defendant presented no evidence to justify the estoppel defense. *Id*.

Other circuits recognize the defense of entrapment by estoppel under different names, including "reliance on public authority," United States v. Howell, 37 F.3d 1197 (7th Cir. 1994), "official misleading," "unconscionably misleading conduct," or "misleading government conduct defense," United States v. Batterjee, 361 F.3d 1210, 1216-17 (9th Cir. 2004).