

Chapter 8. Final Instructions: Defenses and Theories of Defense

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8.01 Theory of Defense

Comment

The defendant has a constitutional right to raise a legally acceptable defense and to present evidence in support of that defense. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973); *Washington v. Texas*, 388 U.S. 14, 18-19 (1967); *United States v. Pohlot*, 827 F.2d 889, 900-01 (3d Cir. 1987). When a defense is raised and supported by the law and the evidence, the jury should be instructed on the matter. *See, e.g., United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999) (“A defendant is entitled to an instruction on his theory of the case where the record contains evidentiary support for it.”); *Government of Virgin Islands v. Carmona*, 422 F.2d 95, 99 (3d Cir. 1970) (“As long as there is an evidentiary foundation in the record sufficient for the jury to entertain a reasonable doubt, a defendant is entitled to an instruction on his theory of the case.”).

In *United States v. Hoffecker*, 530 F.3d 137, 176-77 (3d Cir. 2008), the Third Circuit held that the trial court had properly refused to give the requested “theory of defense” instructions, because they were merely statements of the defense’s factual arguments. The court reasoned:

“A defendant is entitled to a theory of defense instruction if (1) he proposes a correct statement of the law; (2) his theory is supported by the evidence; (3) the theory of defense is not part of the charge; and (4) the failure to include an instruction of the defendant's theory would deny him a fair trial.” *United States v. Wren*, 363 F.3d 654, 664 (7th Cir.2004), *vacated on other grounds, Yarbor v. United States*, 543 U.S. 1101, 125 S.Ct. 1021, 160 L.Ed.2d 1005 (2005). As the Court of Appeals for the Fifth Circuit has pointed out, however, a defendant is not “entitled to a judicial narrative of his version of the facts, even though such a narrative is, in one sense of the phrase, a ‘theory of the defense.’” *United States v. Barham*, 595 F.2d 231, 244 (5th Cir.1979). . . .

Moreover, many of Hoffecker's “theory of the defense” instructions, such as the “mistake of fact” instruction and the “lack of intent to enter a conspiracy” instruction, duplicated other instructions that the District Court gave on the subject of criminal intent, such as the charges on “knowingly and willfully” and the “good faith defense” to fraud. In these circumstances, Hoffecker was not entitled to have the court charge the jury on his requested “theory of defense” instructions and the court did not abuse its discretion when it rejected the instructions.

Although Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1 *Federal Jury Practice and Instructions* (6th ed. 2006) [hereinafter O'Malley et al] § 19.01 and some of the other Circuits’ model instructions include a general theory of defense instruction (*see* Sixth Circuit 6.01 – Defense Theory), a general instruction is ordinarily unnecessary. *See* Eighth Circuit § 8.05; Ninth Circuit Introductory Comments to Chapter 6 (Specific Defenses). However, with the defendant’s consent, where the defendant asserts a legally recognized and factually supported theory of defense, the trial judge may want to tell the jury at an appropriate

time during the instructions:

(Name) has raised the defense of *(state the defense)*. *(State the defense)* is a legally recognized defense to a federal criminal charge. I will instruct you on the law defining this defense *(now)* *(shortly)*.

In no case may a defense instruction be given to the jury unless the defense is properly raised and the law and evidence support allowing the jury to consider it.

Theories of Defense: Failure of Proof Defenses. One theory of defense is an assertion that the evidence negates an element of the offense, or simply that the government has not proven each element beyond a reasonable doubt. *But see United States v. Pohlott*, 827 F.2d 889, 897 (3d Cir. 1987) (The Third Circuit held that the statutory provision precluding a defense of mental disease or defect other than the affirmative defense of insanity did not preclude the use of mental disease or defect evidence to prove lack of mens rea. The court reasoned that “properly understood, [use of mental disease or defect evidence to disprove mens rea] is therefore not a defense at all but merely a rule of evidence.”).

A “defense” that the government failed to prove the elements of the offense charged is generally covered by the explanation of the elements of the offense (*see* the substantive offense instructions in Chapter 6), and by the instructions on burden of proof and reasonable doubt. *See* Instructions 1.13; 3.06; Instruction 5.07 (Good Faith Defense). Also *see United States v. Hoffecker*, 530 F.3d at 177 (“many of Hoffecker’s “theory of the defense” instructions . . . duplicated other instructions that the District Court gave on the subject of criminal intent. . . .”); *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999) (“A court errs in refusing a requested instruction only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant.”).

Nevertheless, occasionally the trial court may want to instruct more specifically on a “failure of proof defense,” such as mistake of fact (or law), as follows:

The defendant *(name)* has raised as a defense that *(his)* *(her)* mistake about *(describe the alleged mistake)* shows that *(he)* *(she)* did not have the *(the mental state element of the offense charged; e.g., intent, knowledge, willfulness)* required to be guilty of *(state offense charged)*. It is the government’s burden to prove beyond a reasonable doubt that *(name)* had the *(mental state element)* required for *(offense charged)*. If, after considering all the evidence in this case, you have a reasonable doubt about whether *(name)* had the *(mental state element)* required for *(offense charged)*, because of *(name’s)* mistake or for any other reason, you must find *(name)* not guilty of that offense.

Affirmative Defenses. The other main theories or forms of defense are “affirmative defenses;” those defenses that exculpate the defendant even if the government proves each of the elements beyond a reasonable doubt. Common affirmative defenses are covered by the instructions in this Chapter. This Chapter also includes some other particular defenses not covered elsewhere.

Statute of Limitations. Although the statute of limitations is not an element of the offense, when the defendant raises the statute the government must prove that the prosecution was commenced within the statutory limitation period. *See* 18 U.S.C. Chapter 213 (Limitations). *See, e.g., United States v. Grunewald*, 353 U.S. 391, 396-97 (1957) (government must prove that conspiracy was still in existence and at least one overt act was performed within the period of limitations prior to the return of the indictment); *United States v. Steele*, 685 F.2d 793 (3d Cir. 1982) (same). The statute of limitations may be raised by pretrial motion under Fed. R. Crim. P. 12 or as a defense at trial. *See, e.g., Fed. R. Crim. P. 12(b)(2)* (Motions That May Be Made Before Trial) Advisory Committee Note (“In the other group of objections and defenses, which the defendant at his option may raise by motion before trial, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as . . . statute of limitations, . . .”); *United States v. Zavin*, 190 F. Supp. 393 (D.N.J.1961) (pretrial motion to dismiss indictment on ground prosecution was barred by limitations was authorized by Rule 12); *United States v. Dierker*, 164 F. Supp. 304 (W.D. Pa.1958) (statute of limitation is a matter of defense usually to be determined at trial); *United States v. Haramic*, 125 F. Supp. 128 (W.D. Pa.1954) (whether statute of limitations defense should be determined before trial or at trial is within discretion of the court). When raised as a defense at trial, the statute of limitations may involve questions of fact for the jury and therefore, the trial judge may need to instruct the jury regarding this defense.

(revised 12/09)

8.02 Alibi

(Name) has raised a defense of alibi to Count(s) (Nos.) of the indictment, and you have heard evidence that (name) was not present at the time and place where the offense(s) charged is (are) alleged to have been committed. The government has the burden to prove beyond a reasonable doubt each of the elements of the offense(s), including that (name) was present at the time and place where the offense is alleged to have occurred. (Name) does not have to prove an alibi or that (he) (she) was not present.

If, after considering all the evidence in this case regarding Count(s) (Nos.) of the indictment, you have a reasonable doubt about whether (name) was present at the time and place where the offense(s) charged was (were) committed, you must find (name) not guilty of that (those) offense(s).

Comment

See 1A O'Malley et al, supra, § 19.07; Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 8.02. For variations in other Circuits, *see* Sixth Circuit § 6.02; Eighth Circuit § 9.07; Ninth Circuit § 6.01; Eleventh Circuit Inst 14.

In *United States v. Simon*, 995 F.2d 1236, 1243 (3d Cir. 1993), the Third Circuit explained:

This court has long held that where, as here, a defendant asserts the defense of alibi, a jury instruction must make clear that the defendant need only raise a *reasonable doubt* in the jurors' minds as to whether he was present at the scene of the charged offense at the time the offense was committed. *See United States v. Booz*, 451 F.2d 719, 723 (3d Cir.1971), *cert. denied*, 414 U.S. 820, 94 S.Ct. 45, 38 L.Ed.2d 52 (1973) (citing *United States v. Barrasso*, 267 F.2d 908, 910-911 (3d Cir.1959)).

Accordingly, a defendant is entitled to a specific instruction that “*on the issue of alibi*, the government has to convince the jury beyond a reasonable doubt that the alibi was not true.” *Booz*, 451 F.2d at 723. *See also Barrasso*, 267 F.2d 908, 910-911 (3d Cir.1959) (quoting *United States v. Marcus*, 166 F.2d 497, 503-504 (3d Cir.1948), specific instruction must be given to inform the jury “that the government's burden of proof covers the defense of alibi, as well as all other phases of the case”). We require such a specific instruction regarding an alibi defense because “the jury is likely to become confused about the burden of proof when an appellant offers this type of evidence.” *Booz*, 451 F.2d at 723.

With respect to the specific instruction in the case before it, the Third Circuit in *Simon* concluded, “when the trial judge instructed the jury that ‘[y]ou have to decide who you believe and how much of what is said by any witness you believe,’ the court failed to set forth the government's burden of proof in relation to the alibi defense, as is expressly required under *Booz* and *Barrasso*. . . . In *Barrasso*, as here, such an instruction ‘may well have suggested to the jury that the accused bore the burden of persuasion on the alibi defense,’ and was, therefore, in error.” 995 F.2d at 1243, quoting *United States v. Barrasso*, 267 F.2d 908, 910-911 (3d Cir.1959) (error to charge that “alibi, *if you believe the testimony as to [the defendant's] being elsewhere*, is a perfectly good defense,” and that *[i]f you believe that*, that ends it....” (emphasis added)). The *Simon* court also concluded that the error in the alibi instruction could not be cured by the trial judge’s general instructions on the government’s burden of proof beyond a reasonable doubt. 995 F.2d at 1244, citing and quoting *Booz*, 451 F.2d at 723 (“The insufficiency of the charge of the trial court is not cured by the more general language in the charge that the burden never shifts from the government.”); *Barrasso*, 267 F.2d at 910-11 (insufficient charge on alibi was not “cured by a quite proper and forceful general instruction stating in clear language that throughout the case the burden remains on the government to convince the jury of guilt beyond a reasonable doubt”). Ultimately, however, the court held in *Simon* that the error in the alibi instruction was harmless. *Id.* at 1244-47.

Notice of Alibi Defense. Federal Rule of Criminal Procedure 12.1(a) provides for notice of an alibi defense. If the government requests in writing that the defendant notify the government of any intended alibi defense, the defendant must, within 10 days, provide written notice of the defense, stating each place where the defendant claims to have been at the time of the alleged offense, and the name, address, and telephone number of each alibi witness on whom the defendant intends to rely. If defendant complies, a reciprocal disclosure requirement is triggered, and both parties have a continuing duty to disclose. Fed. R. Crim. P. 12.1(b)-(c). If a party fails to comply, “the court may exclude the testimony of any undisclosed witness regarding the defendant’s alibi. This rule does not limit the defendant’s right to testify.” Fed. R. Crim. P. 12.1(e).

Cases in Which Alibi Defense May be Inapplicable. For some offenses, such as conspiracy and ongoing fraudulent activity, there may not be a specific time and place when and where the offense was committed, and therefore the defense of alibi may be inapplicable. Also, alibi may not be a defense when the defendant is charged with responsibility for an offense that was committed by another, such as *Pinkerton* liability for a crime committed by a co-

conspirator, aiding and abetting an offense committed by another, or causing another to commit an offense.

8.03 Duress [Coercion]

(Name) has raised as a defense that (he) (she) committed the offense(s) charged in Count(s) (Nos.) of the indictment because (he) (she) was acting under duress [was coerced into committing the offenses charged in the indictment]. If you find that the government proved beyond a reasonable doubt that (name) committed the offense(s) charged, then you must consider whether (name) committed the offense(s) under duress [was coerced into committing the offense(s)]. If you find that the government proved (name) committed the offense(s) charged and you also find that (name) proved that (he) (she) was acting under duress [was coerced], then you must find (name) not guilty of the charge(s).

To find that (name) is not guilty of the offense(s) charged in Count(s) (Nos.) of the indictment because of duress [coercion], you must find that (name) proved by a preponderance of the evidence each of the following four elements:

First, that (name) was under an immediate, unlawful threat of death or serious bodily injury to (himself) (herself) or to others;

Second, that (name) had a well-grounded [reasonable] fear [belief] that the threat would be carried out if (he) (she) did not commit the offense(s) [criminal acts];

Third, that (name's) criminal action was directly caused by the need to avoid the threatened harm and that (name) had no reasonable, lawful opportunity to avoid the threatened harm without committing the offense(s) [criminal acts];

that is, that *(name)* had no reasonable lawful opportunity both to refuse to do the criminal act and also to avoid the threatened harm; and

Fourth, that *(name)* had not recklessly placed *(himself)* *(herself)* in a situation in which *(he)* *(she)* would be forced *[it was probable that *(he)* *(she)* would be put in a position of having to choose whether]* to engage in criminal conduct.

***(Name)* has the burden of proving the defense of duress *[coercion]* by a preponderance of the evidence. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to *(name)* and the credible evidence that is favorable to the government on opposite sides of a scale, the scale would have to tip somewhat on *(name's)* side in order for you to find that *(name)* is not guilty because of duress *[coercion]*. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that *(name)* has not proved the defense of duress *[coercion]* by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.**

You should also remember that the fact that *(name)* raised this defense does not relieve the government of the burden of proving all the elements of the offense(s)

charged beyond a reasonable doubt.

Comment

See 1A O'Malley et al, supra, § 19.02; Sand et al, supra, 8-6. For variations in other Circuits, see First Circuit § 5.05; Fifth Circuit § 1.36; Sixth Circuit § 6.05; Seventh Circuit § 6.08; Eighth Circuit § 9.02; Ninth Circuit §§ 6.5, 6.6; Tenth Circuit § 1.36; Eleventh Circuit Inst. 16.

Duress and Justification. Although the Third Circuit treats duress and justification (necessity) as having the same elements, separate instructions are provided for these defenses – Duress (this instruction) and Justification (Necessity) (Instruction 8.04). Which instruction to use will depend on how the defense is stated in a particular case.

In *United States v. Alston*, 526 F.3d 91, 94 n.3 (3d Cir. 2008) (holding that the danger posed by verbal threat was not sufficiently immediate to support a “justification” defense to a felon in possession of a firearm charge), the Third Circuit reaffirmed that, “[t]he defenses of duress, necessity, and justification have generally all been analyzed in terms of justification. See *United States v. Paolello*, 951 F.2d 537, 540 (3d Cir.1991).” In *Paolello* (holding that the trial court erred in failing to explicitly instruct on the defense of “justification” to a felon in possession of a firearm charge), the court treated these defenses as having the same elements, stating, “[w]hile the defenses of justification and duress were at one time distinct as duress excused criminal actions performed under an unlawful threat of imminent death or serious bodily injury caused by human forces whereas justification excused criminal conduct in response to a threat of death or serious bodily harm caused by natural forces, ‘[m]odern cases have tended to blur the distinction between duress and necessity.’ *United States v. Bailey*, 444 U.S. 394, 410, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980). See also 1 L. Sand et al., *Modern Federal Jury Instructions* ¶ 8.06, 8-22 (1991) (treating duress and justification the same).” 951 F.2d at 540. Also see, e.g., *United States v. Reed*, 173 Fed. Appx. 184, (3d Cir. 2006) (not precedential) (quoting the *Paolello* elements for the justification to a felon in possession of a firearm charge); *United States v. White*, 75 Fed. Appx. 894, 897 (3d Cir. 2003) (not precedential) (same); *United States v. Miller*, 59 F.3d 417, 422 (3d Cir. 1995) (citing *Paolello* as adding a fourth element to the requirements for duress). But see *United States v. Dodd*, 225 F.3d 340, 349 n.6 (3d Cir. 2000) (In discussing the burden of proof on the defense of justification in a felon in possession of firearm case, the Third Circuit noted, “We include a description of these duress and coercion cases merely as an example of the variety with which courts have treated the burden of persuasion on common-law affirmative defenses. We do not believe that the duress and coercion cases are sufficiently similar to the justification scenario so as to be dispositive of this case, even were these duress and coercion cases to be uniform in their allocation of the burden of persuasion. Cf. Paul H. Robinson, 1 *Criminal Law Defenses* § 25(b), at 96 (1984) (placing duress and coercion in the ‘excuse’ category of defenses, a broad category separate from the ‘justification’ category).”). In addition to Sand Inst. 8-6, other Circuits also treat duress,

justification, and necessity the same in their model instructions. *See* Fifth Circuit § 1.36; Eleventh Circuit Inst. 16.

As noted by the Third Circuit in *Paolello*, traditionally duress or coercion applied to cases in which the defendant committed the offense charged because another person unlawfully threatened him or her with imminent death or serious bodily harm. Necessity, on the other hand, applied where the defendant was justified in committing the offenses because of the imminent threat of death or serious harm caused by natural, non-human forces. *United States v. Paolello*, 951 F.2d at 540. In theory, duress excuses criminal conduct that would otherwise be culpable because society recognizes that there may be situations in which no ordinary person would be able to resist another's unlawful threats to life. *See, e.g.*, Joshua Dressler, UNDERSTANDING CRIMINAL LAW, 325-26 (4th ed. 2006) ("Duress: Justification or Excuse?"); MODEL PENAL CODE AND COMMENTARIES, § 2.09 at 373-75. Necessity justifies conduct that society recognizes was necessary to protect life, usually the defendant's life; justified conduct is not culpable and therefore it is not criminal. Although the Third Circuit applies the same elements to both duress (coercion) and justification (necessity), the traditional distinction discussed above seems to have been followed in the few cases that have reached the court. *Compare, e.g., United States v. Dodd*, 225 F.3d 340 (3d Cir. 2000), and *United States v. Paolello*, 951 F.2d 537 (3d Cir. 1991) (defense of justification asserted to charges of felon in possession of a firearm based on evidence that defendants found the firearms under circumstances that would have created dangers to the public if they had not taken possession) *with, e.g., United States v. Miller*, 59 F.3d 417 (3d Cir. 1995), and *United States v. Santos*, 932 F.2d 244 (3d Cir.1991) (defense asserted duress based on evidence that defendants committed the criminal acts because of abuse and coercion by their husbands).

Justification has often been asserted as a defense to a charge of felon in possession of a firearm under 18 U.S.C. § 922(g). In *United States v. Alston*, the Third Circuit recognized that, "18 U.S.C. § 922(g) does not provide for a justification defense. Although the Supreme Court has questioned 'whether federal courts ever have authority to recognize a necessity defense not provided by statute,' *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001), several courts of appeals, including our own, have recognized that justification is a valid defense to a felon-in-possession charge *See generally Paolello*, 951 F.2d at 540-43; *United States v. Dodd*, 225 F.3d 340 (3d Cir.2000)." *United States v. Alston*, 526 F. 3d at 94. The court in *Alston* also noted, however, that at least as to this offense, "we followed other courts finding the justification defense should be construed narrowly. *See [Paolello]* at 542 ('The restrictive approach is sound. Congress wrote section 922(g) in absolute terms, banning any possession of firearms by all convicted felons.')." *id.* at 94-95, and that, "[t]he defense is rarely granted." *Id.* at 94 n. 5.

Elements of the defense of duress. The Supreme Court has not definitively articulated the elements of the defense of duress. In *United States v. Dixon*, 126 S.Ct. 2437, 2440 n.2 (2006), the Court noted:

There is no federal statute defining the elements of the duress defense. We have not specified the elements of the defense, *see, e.g., United States v. Bailey*, 444 U.S. 394,

409-410, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980), and need not do so today. Instead, we presume the accuracy of the District Court's description of these elements: (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and, (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm.

In *United States v. Bailey*, 444 U.S. 394, 409-11 (1980), the Supreme Court also recognized the overlap between defenses of duress, necessity, and justification:

Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the 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. . . .

Modern cases have tended to blur the distinction between duress and necessity. . .

We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under § 751(a). Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, “a chance both to refuse to do the criminal act and also to avoid the threatened harm,” the defenses will fail. LaFave & Scott 379.

The Third Circuit has repeatedly articulated the elements of this defense as they are set forth in this instruction. Thus, in *United States v. Alston*, 526 F.3d at 95 (footnote omitted), the court stated, “In *Paolello*, we incorporated a test for justification that had been adopted by other courts of appeals:

- (1) he was under unlawful and present threat of death or serious bodily injury;
- (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
- (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and
- (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Paolello, 951 F.2d at 540.” In a footnote to the second element, the court added “Although our sister circuits have adopted what is essentially the same test, some circuits have found this element also extends to negligent conduct. . . . Other circuits have adopted our approach, which requires reckless conduct.” *United States v. Alston*, 526 F.3d at 95 n.6 (citations omitted). Also see, e.g., *United States v. Miller*, 59 F.3d 417, 422 (3d Cir. 1995) (holding that the district court properly barred the defense of duress to charges of bank fraud and interstate transportation of a stolen vehicle, where defendant/wife had a reasonable opportunity to avoid the harm allegedly threatened by her husband, who was in jail, many miles away, by notifying the authorities); *United States v. Paolello*, 951 F.2d at 540 (in holding that the trial judge erred in failing to instruct on justification defense to felon in possession of firearm charge, the Third Circuit emphasized that “there [must] be a ‘direct causal relationship between the criminal action and the avoidance of the threatened harm.’”)

Burden of proof. The burden of proof as to duress is less than clear. In *United States v. Dixon*, the Supreme Court held that ordinarily the federal constitution does not require the government to disprove duress: “The jury instructions in this case . . . did not run afoul of the Due Process Clause when they placed the burden on petitioner to establish the existence of duress by a preponderance of the evidence.” 126 S.Ct. at 2442. The Court reasoned, “[I]ike the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to ‘avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.’ [*United States v. Bailey*, 444 U.S., at 402.]” *Id.* The Court in *Dixon* also rejected the defendant’s argument that the burden had to be on the government as a matter of federal statutory law, stating “Congress can, if it chooses, enact a duress defense that places the burden on the Government to disprove duress beyond a reasonable doubt. In light of Congress’ silence on the issue, however, it is up to the federal courts to effectuate the affirmative defense of duress as Congress ‘may have contemplated’ it in an offense-specific context. . . . In the context of the firearms offenses at issue – *as will usually be the case, given the long-established common-law rule [that the defendant has the burden of proving affirmative defenses such as duress]* – we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence.” *Id.* at 2447-48 (emphasis added).

The Third Circuit does not seem to have addressed the burden of proof with respect to duress, although it has stated that the burden is on the defendant to prove justification, at least when raised as a defense to a felon in possession of a firearm charge. In *United States v. Alston*, the court stated, “The defendant has the burden of proving this affirmative defense by a preponderance of the evidence.” 526 F.3d at , citing *United States v. Dodd*, 225 F.3d 340, 350 (3d Cir. 2000). In *Dodd*, although the court observed that decisions regarding duress and justification defenses do not necessarily control each other, it concluded “that a rule that places the burden of persuasion on the defendant with regard to a justification defense to a felon-in-possession charge is constitutionally permissible, consonant with the common law, preferable for practical reasons, and faithful to the strictness of the statute into which we have read this justification defense.” *Id.* at 348-49 (footnotes omitted). Thus, like the Supreme Court

in *Dixon*, the Third Circuit has addressed the issue of burden of proof on affirmative defenses in the context of the specific offense charged in the case before the court. However, it seems safe to predict that the court's burden of proof analyses would ordinarily apply to all offenses absent an explicit statement by Congress. Also *see, e.g., United States v. Paolello*, 951 F.2d at 541 (in recognizing justification or duress as defenses available to a felon in possession of a firearm charge, the Third Circuit reasoned, "[t]he courts have justified this conclusion on the ground that Congress legislated against the backdrop of the common law which has historically recognized this defense. *Accord, United States v. Bailey*, 444 U.S. at 415 n. 11, 100 S.Ct. at 637 n. 11 ('Congress in enacting criminal statutes legislates against the background of Anglo-Saxon common law').").

(revised 12/09)

8.04 Justification [Necessity]

(Name) has raised as a defense that (he) (she) was justified [by necessity] in committing the offense(s) charged in Count(s) (Nos.) of the indictment. If you find that the government proved beyond a reasonable doubt that (name) committed the offense(s) charged, then you must consider whether (name's) actions were justified [by necessity], as I will define that for you. If you find that the government proved that (name) committed the offense(s) charged and you also find that the (name) proved that (he) (she) was justified [by necessity] in committing the offense(s), then you must find (name) not guilty of the charge(s).

To find that (name's) actions were justified [by necessity], and therefore that (he) (she) is not guilty of the offense(s) charged in Count(s) (Nos.) of the indictment, you must find that (name) proved by a preponderance of the evidence each of the following four elements:

First, that (name) was under an immediate, unlawful threat of death or serious bodily injury to (himself) (herself) or to others;

Second, that (name) had a well-grounded [reasonable] fear [belief] that the threat would be carried out if (he) (she) did not commit the offense(s) [criminal acts];

Third, that (name's) criminal action was directly caused by the need to avoid the threatened harm and that (name) had no reasonable, lawful opportunity to avoid the threatened harm without committing the offense(s) [criminal acts];

that is, that *(name)* had no reasonable lawful opportunity both to refuse to do the criminal act and also to avoid the threatened harm; and

Fourth, that *(name)* had not recklessly placed *(himself)* *(herself)* in a situation in which *(he)* *(she)* would be forced *[it was probable that *(he)* *(she)* would be put in a position of having to choose whether]* to engage in criminal conduct.

***(Name)* has the burden of proving the defense of justification *[necessity]* by a preponderance of the evidence. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to *(name)* and the credible evidence that is favorable to the government on opposite sides of a scale, the scale would have to tip somewhat on *(name's)* side in order for you to find *(name)* not guilty because of justification *[necessity]*. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that *(name)* has not proved the defense of justification *[necessity]* by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.**

You should also remember that the fact that *(name)* asserts this defense does not relieve the government of the burden of proving all the elements of the offense(s)

charged beyond a reasonable doubt.

Comment

See Sand et al, supra, 8-6. For variations in other Circuits, *see* Fifth Circuit § 1.36; Sixth Circuit § 6.07; Eleventh Circuit Inst. 16.

Whether the trial judge should use the bracketed [*by necessity*] will depend on whether that language is used by the parties at trial. For further discussion of the elements and the burden of proof for duress (coercion) and justification (necessity), *see* Comment to Instruction 8.03.

8.04 Justification [Necessity]

(Name) has raised as a defense that (he) (she) was justified [by necessity] in committing the offense(s) charged in Count(s) (Nos.) of the indictment. If you find that the government proved beyond a reasonable doubt that (name) committed the offense(s) charged, then you must consider whether (name's) actions were justified [by necessity], as I will define that for you. If you find that the government proved that (name) committed the offense(s) charged and you also find that the (name) proved that (he) (she) was justified [by necessity] in committing the offense(s), then you must find (name) not guilty of the charge(s).

To find that (name's) actions were justified [by necessity], and therefore that (he) (she) is not guilty of the offense(s) charged in Count(s) (Nos.) of the indictment, you must find that (name) proved by a preponderance of the evidence each of the following four elements:

First, that (name) was under an immediate, unlawful threat of death or serious bodily injury to (himself) (herself) or to others;

Second, that (name) had a well-grounded [reasonable] fear [belief] that the threat would be carried out if (he) (she) did not commit the offense(s) [criminal acts];

Third, that (name's) criminal action was directly caused by the need to avoid the threatened harm and *that* (name) had no reasonable, lawful opportunity to avoid the threatened harm without committing the offense(s) [criminal acts]; that is, that (name) had no reasonable lawful opportunity both to refuse to do the criminal act and also to avoid the threatened harm; and

Fourth, that (name) had not recklessly placed (himself) (herself) in a situation in which (he) (she) would be forced [it was probable that (he) (she) would be put in a position of having to choose whether] to engage in criminal conduct.

(Name) has the burden of proving the defense of justification [necessity] by a preponderance of the evidence. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to (name) and the credible evidence that is favorable to the government on opposite sides of a scale, the scale would have to tip somewhat on (name's) side in order for you to find (name) not guilty because of justification [necessity]. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that (name) has not proved the defense of justification [necessity] by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.

You should also remember that the fact that (name) asserts this defense does

not relieve the government of the burden of proving all the elements of the offense(s) charged beyond a reasonable doubt.

Comment

See Sand et al, *supra*, 8-6. For variations in other Circuits, *see* Fifth Circuit § 1.36; Sixth Circuit § 6.07; Eleventh Circuit Inst. 16.

Whether the trial judge should use the bracketed [*by necessity*] will depend on whether that language is used by the parties at trial. For further discussion of the elements and the burden of proof for duress (coercion) and justification (necessity), *see* Comment to Instruction 8.03.

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. 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).

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." *Id.*

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). 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:

"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.”

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 predisposition 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. 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). . . .

As we have quoted before,

“[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.”

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. 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.).

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.” *Id.* 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.

Entrapment by Estoppel. The entrapment defense described in this instruction should not be confused with the 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 *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.

(revised 12/09)

8.06 Insanity

(Name) has raised as a defense that *(he) (she)* was insane at the time the offense(s) charged in Count(s) *(Nos.)* of the indictment was *(were)* committed. A defendant is not guilty of an offense if he or she was insane when the offense(s) was committed.

Insanity means that at the time of the commission of the acts constituting the offense(s), as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his or her criminal acts. *(Name)* has the burden of proving by clear and convincing evidence that *(he) (she)* was insane at the time of the offense(s).

To prove insanity, *(name)* must prove by clear and convincing evidence:

First, that *(name)* suffered from a severe mental disease or defect at the time the act(s) constituting the offense(s) was *(were)* committed; and

Second, that as a result of that severe mental disease or defect *(name)* was unable to appreciate the nature and quality of *(his) (her)* acts or was unable to appreciate the wrongfulness of *(his) (her)* acts [*that (he) (she) was doing something wrong*].

By “severe mental disease or defect,” I do not mean any particular medical term. [*However, the mere fact that a person may repeatedly engage in criminal conduct does not by itself justify a finding that he or she was insane.*]

[“Unable to appreciate,” as used in this instruction, means that *(name)* did not know or did not understand the nature and quality or the wrongfulness of *(his) (her)* acts.]

[“Nature and quality of *(his) (her)* acts” means the physical nature and consequences of what *(he) (she)* was doing. Therefore, in order to find that *(name)* was unable to appreciate the nature and quality of *(his) (her)* acts, you must find clear and convincing evidence that *(name)* did not know or did not understand the physical nature and the consequences of what *(he) (she)* was doing.]

[The term “wrongful” means contrary to or against generally accepted standards of right and wrong. Therefore, in order to find that *(name)* was unable to appreciate the wrongfulness of *(his) (her)* acts, you must find clear and convincing evidence that *(name)* did not know or did not understand that the acts were contrary to generally accepted standards of right and wrong. Evidence that the *(name)* knew and understood that *(his) (her)* conduct was against the law may be considered by you in determining whether *(name)* appreciated that *(his) (her)* conduct was contrary to public morality.]

(Name’s) burden to prove insanity by clear and convincing evidence means that, in order to find that *(name)* is not guilty by reason of insanity you must find, based on the evidence, that it is highly probable that *(he) (she)* was insane at the time of the offense(s). Clear and convincing evidence is evidence that produces in your mind a firm and clear belief that *(name)* was insane at the time of the offense(s). Clear and convincing evidence is a lower standard than proof beyond a reasonable

doubt [*, but a higher standard than a preponderance of the evidence*].

In making your decision, you may consider evidence of (*name's*) mental condition before or after the offense charged, and you may consider not only the statements and opinions of any experts who have testified, but also all of the other evidence received in the case.

You have been provided with a verdict form to use to record your verdict. As shown on the form, you may unanimously reach one of three verdicts: “guilty,” “not guilty,” or “not guilty only by reason of insanity.” If you find, based on all the evidence including the evidence related to insanity, that the government failed to prove each of the elements of the offense(s) beyond a reasonable doubt, then you must find (*name*) not guilty, without regard to the insanity defense. If you find that the government proved the elements beyond a reasonable doubt and you also find that (*name*) proved insanity by clear and convincing evidence, then you must find (*name*) not guilty only by reason of insanity. However, if you find that the government proved the elements beyond a reasonable doubt and you find that (*name*) has not proved insanity by clear and convincing evidence, then you should find (*name*) guilty.

Comment

See 1A O’Malley et al, supra, §§ 19.03, 20.02; Sand et al, supra, 8.09. For variations in other Circuits, *see* First Circuit § 5.07; Fifth Circuit § 1.34; Sixth Circuit § 6.04; Eighth Circuit § 9.03; Ninth Circuit § 6.4; Tenth Circuit § 1.34; Eleventh Circuit Inst. 15.

Insanity Defense Reform Act (IDRA). The IDRA established the federal insanity defense. 18 U.S.C. § 17 provides:

(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.

18 U.S.C. § 4242 provides further:

(a) Motion for pretrial psychiatric or psychological examination. – Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with

the court, pursuant to the provisions of section 4247(b) and (c).

(b) Special verdict. – If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant –

- (1) guilty;
- (2) not guilty; or
- (3) not guilty only by reason of insanity.

The insanity test under the IDRA largely codifies the traditional common law insanity test derived from *M’Naghten’s Case*, 8 Eng. Rep 718 (1843). See *Clark v. Arizona*, 126 S. Ct. 2709, 2719-22 (2006) (holding that the federal constitution does not require states to adopt any particular definition of legal insanity, discussing the *M’Naghten* rule and other insanity rules that have been accepted in various American jurisdictions).

“Mental Disease or Defect;” “Appreciate;” “Nature and Quality of Acts;” “Wrongfulness.” Important terms within the statutory insanity defense, such as “mental disease or defect,” “appreciate,” “nature and quality of (his) (her) acts,” and “wrongfulness,” have not been defined by the Supreme Court or by the Third Circuit. These terms are also not defined in O’Malley, Sand, or the model instructions of the other Circuits. Generally, Sand states that “[t]he better practice is for the court not to go beyond the recommended language in defining what may or may not constitute legal insanity.” 1 L. Sand et al., *Modern Federal Jury Instructions*, Comment to Instruction 8-10, at 8-70 (1991). Definitions of these terms are included here in brackets. They should be used only on request and when there is a meaningful dispute about the applicability of these terms under the evidence in the case.

Legal insanity requires a “severe mental disease or defect,” but the medical definitions of these concepts do not alone define legal insanity, and the federal courts have rarely attempted to define those terms. See, e.g., Joshua Dressler, *UNDERSTANDING CRIMINAL LAW*, at 374 (4th ed. 2006); Wayne R. LaFave, *CRIMINAL LAW* (4th ed. 2003) (while “[t]here has never been a clear and comprehensive determination of what type of mental disease or defect is required . . . it would seem that any mental abnormality . . . will suffice *if* it has caused the consequences described. . . .”). Professor LaFave notes that ““there has been almost no judicial definition of mental disease. . . .” and “when a jury is instructed. . . , the usual practice is merely to recite the ‘disease of mind’ element to the jury. No effort is made to define or explain what qualifies as a mental disease.” *Id.* at 377, n 15, citing A. Goldstein, *THE INSANITY DEFENSE* 23 (1967).

With respect to the bracketed language in the fifth paragraph regarding “severe mental disease or defect,” see, e.g., *United States v. Austin*, 533 F.2d 879, 885 (3d Cir. 1976) (Third Circuit upheld an instruction stating that, “As used in these instructions the terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct,” noting that this language instructed the jury that such conduct is alone not enough, but may be considered with other conduct indicating mental disease or defect, and that this instruction was expressly approved in *United States v. Currens*, 290 F.2d 751 (3d Cir.

1961).).

With respect to the meaning of “appreciate” and “nature and quality,” *see, e.g.*, O’Malley § 19.03 (“*Second*: As a result of this severe mental disease or defect, [he] [she] was not able to understand what [he] [she] was doing or to understand that what [he] [she] was doing was wrong.” (emphasis added)); LaFave, *CRIMINAL LAW* at 383-84, 399.

The bracketed definition of “wrongfulness” is based on *United States v. Ewing*, 494 F.3d 611 (7th Cir. 2007). In *Ewing*, the Seventh Circuit held, “that wrongfulness for purposes of the federal insanity defense statute is defined by reference to objective societal or public standards of moral wrongfulness, not the defendant's subjective personal standards of moral wrongfulness. As such, . . . the government's instruction appropriately focused the insanity inquiry on Ewing's ability to appreciate moral wrongfulness, without making knowledge of the law conclusive as to his understanding of wrongfulness.” *Id.* at 621. The Seventh Circuit reasoned that this objective societal or public morality definition “best comports with the rules established in *M’Naghten’s Case*, . . . [and] is consistent with the holdings of American courts that analyzed the issue prior to 1984, when Congress adopted the IDRA. . . . [Further,] [t]here is nothing in the IDRA to suggest that wrongfulness should be interpreted more broadly than or contrary to the traditional understanding of the *M’Naghten* test.” *Id.* at 620-21. The court also noted that only the Eighth Circuit had defined the term wrongfulness since the passage of the IDRA, and that court also concluded that the term had the broader meaning of moral rather than criminal wrongfulness. *See United States v. Dubray*, 854 F.2d 1099 (8th Cir.1988).

The definition of wrongfulness is bracketed in the instruction because, as the *Ewing* court cautioned, “not every insanity defense case calls for an instruction on the distinction between moral and legal wrongfulness like the one used here. *See Dubray*, 854 F.2d at 1101 (‘The jury should be instructed on the distinction between moral and legal wrongfulness . . . only where the evidence at trial suggests that this is a meaningful distinction in the circumstances of the case.’)” 494 F. 3d at 622.

Burden of Proof. With respect to the constitutionality of placing on the defendant the burden of proof regarding insanity, the Supreme Court explained in *Patterson v. New York*, 432 U.S. 197, 204-05 (1977):

At issue in *Leland v. Oregon* [343 U.S. 790 (1952)] was the constitutionality under the Due Process Clause of the Oregon rule that the defense of insanity must be proved by the defendant beyond a reasonable doubt. . . . [T]he Court refused to strike down the Oregon scheme, saying that the burden of proving all elements of the crime beyond reasonable doubt, including the elements of premeditation and deliberation, was placed on the State under Oregon procedures and remained there throughout the trial. To convict, the jury was required to find each element of the crime beyond a reasonable doubt, based on all the evidence, including the evidence going to the issue of insanity. Only then was the jury “to consider separately the issue of legal sanity per se. . . .” *Id.*, at 795, 72 S.Ct. at 1006. . . . Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it

dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of *Leland v. Oregon*, *Rivera v. Delaware*, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976). . . .

Clear and Convincing Evidence. The Third Circuit has not defined “clear and convincing evidence” in the context of the insanity defense. In a recent not precedential opinion, the court stated:

Although we have not yet addressed the clear and convincing standard in the context of the IDRA, there can be no question that proof by clear and convincing evidence is a more stringent standard than proof by a preponderance of the evidence. *See United States v. Brennan*, 326 F.3d 176, 200 n. 7 (3d Cir.2003). . . . In a slightly different context, the Supreme Court of New Jersey has supplied a useful definition of clear and convincing evidence as that which

produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

In re Jobes, 108 N.J. 394, 529 A.2d 434, 441 (1987) (internal quotation marks omitted). The Pennsylvania Supreme Court has similarly defined clear and convincing evidence as evidence sufficient to “enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. . . . It is not necessary that the evidence be uncontradicted . . . provided it ‘carries conviction to the mind’ or carries ‘a clear conviction of its truth.’ . . .” *In re Adoption of J.J.*, 511 Pa. 590, 515 A.2d 883, 886 (1986) (citations omitted). We find these definitions appropriate here.

United States v. Askari, 222 Fed. Appx. 115, 119 (3d Cir. 2007) (not precedential). O’Malley and other circuits define clear and convincing evidence by explaining that the defendant must show that it is highly probable that he or she was insane at the time of the offense. *See, e.g.*, O’Malley § 19.03; Sixth Circuit § 6.04; Ninth Circuit § 6.4. *Also see Colorado v. v. New Mexico*, 467 U.S. 310, 316 (1984) (Supreme Court stated that diversion of interstate water would be judged by a clear and convincing evidence standard, defined as meaning that “a diversion of interstate water should be allowed only if Colorado could place in the ultimate fact finder an abiding conviction that the truth of its factual contentions are ‘highly probable.’ *See C. McCormick*, Law of Evidence § 320, p. 679 (1954).”).

Consequences of Not Guilty By Reason of Insanity Verdict. In *United States v. Shannon*, 512 U.S. 573 (1994), the Supreme Court held that in most cases the trial judge should not instruct the jury on the consequences of a not guilty by reason of insanity verdict: “Although we conclude that the IDRA does not require an instruction concerning the consequences of an NGI verdict, and that such an instruction is not to be given as a matter of general practice, we recognize that an instruction of some form may be necessary under certain 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, of course, will vary as is necessary to remedy the specific misstatement or error. 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.” 512 U.S. at 587-88.

Evidence of Mental Abnormality to Negate Mens Rea. 18 U.S.C. § 17(a), which provides for the affirmative defense of insanity, also provides that “Mental disease or defect does not otherwise constitute a defense.” Nevertheless, in *United States v. Pohlot*, 827 F.2d 889, 890 (3d Cir. 1987), the Third Circuit held:

We conclude that although Congress intended § 17(a) to prohibit the defenses of diminished responsibility and diminished capacity, Congress distinguished those defenses from the use of evidence of mental abnormality to negate specific intent or any other mens rea, which are elements of the offense. While the contours of the doctrines of diminished responsibility and diminished capacity are unclear, the defenses that Congress intended to preclude usually permit exoneration or mitigation of an offense because of a defendant’s supposed psychiatric compulsion or inability or failure to engage in normal reflection; however, these matters do not strictly negate mens rea.

The court continued:

[W]e agree that the Congressional prohibition of diminished responsibility defenses requires courts to carefully scrutinize psychiatric defense theories bearing on mens rea. . .

In light of the strong danger of misuse, we join other circuits that have directed district courts to examine proffered psychiatric testimony carefully “to determine whether proof offered is grounded in sufficient scientific support to warrant use in the courtroom, and whether it would aid the jury in deciding the ultimate issues.”. . . Courts should also be careful in deciding whether to issue jury instructions or to permit defense arguments directing the jury to consider whether any evidence of mental abnormality negates mens rea. Notions of intent, purpose and premeditation are malleable and at their margins imprecise. But the limits of these concepts are questions of law. *District courts should admit evidence of mental abnormality on the issue of mens rea only when, if believed, it would support a legally acceptable theory of lack of mens rea.*

827 F.2d at 890, 905-06 (emphasis added; citations omitted). See *Arizona v. Clark*, 126 S. Ct 2709, 2724-37 (2006) (holding no federal constitutional violation where state law excluded evidence of a defendant’s mental capacity owing to mental illness or defect on the issue of mens rea).

In *Pohlot* itself, the court found that admission of the evidence and consideration by the jury was not warranted. The court stated: “[O]nly in the most extraordinary circumstances could a defendant actually lack the capacity to form mens rea as it is normally understood in American law. Even the most psychiatrically ill have the capacity to form intentions, and the

existence of intent usually satisfies any mens rea requirement. . . . Mens rea is generally satisfied . . . by any showing of purposeful activity, regardless of its psychological origins.” 827 F.2d at 903-04 (citations omitted). In *Pohlot*, the defendant argued that while he attempted to hire a person to kill his wife, he was experiencing a fantasy in which he actually aimed to reunite with his wife. The Third Circuit held that in this circumstance the district court correctly declined to instruct the jury that it could consider whether the defendant's mental state negated mens rea. “[I]t is clear that Pohlot acted with considerable awareness of what he was doing and with considerable purpose. Pohlot engaged in careful activity, over a lengthy period of time, sending first a deputy and then engaging in several phone calls and personal meetings all directed at one purpose: hiring someone to murder his wife. Pohlot came to a firm agreement, made payment, and expressed concern and took action to assure that the crime was not ultimately traced to him.” *Id.* at 906-07.

Under *Pohlot*, in the “rare case” (*see* 827 F.2d at 900) in which evidence of mental abnormality has been admitted in support of a legally acceptable theory of lack of mens rea, the trial court should give an instruction similar to the instruction on voluntary intoxication (drug use), *see United States v. Pohlot*, 827 F.2d at 897 n.3 (“The distinction is analogous to the use of evidence of intoxication.”), as follows:

You have heard evidence that (*name*) may have had a mental abnormality [*mental disease or defect*] at the time of the offense(s) charged in Count(s) (*Nos.*) of the indictment. A mental disease or defect, or a mental abnormality, is not in itself a legal defense to an offense [*unless it results in insanity, which I have described for you.*] However, a mental abnormality [*mental disease or defect*] may show that (*name*) did not have the state of mind that the government must prove in order to find (*name*) guilty of the offense(s) charged, as I have described it to you..

If you find, based on the evidence presented, that (*name*) had a mental abnormality [*mental disease or defect*] at the time of the offense(s), you may find that (*name*) did not have the state of mind required for the offense(s) charged. On the other hand, even if you believe that (*name*) had some mental abnormality [*mental disease or defect*], you may still find that (*he*) (*she*) was capable of and did have the required state of mind for the offense(s) charged. As I have explained to you, if after considering all the evidence you find that the government proved each element of the offense(s), including the state of mind element, beyond a reasonable doubt, then you should find (*name*) guilty, but if you find that the government has failed to prove each element beyond a reasonable doubt, then you must find (*name*) not guilty.

If the evidence supports an instruction on mental abnormality as it relates to a “legally acceptable theory of lack of mens rea,” under *Pohlot*, and also supports an affirmative defense of insanity, the trial court should instruct both on the possibility that the defendant’s mental abnormality negated the required mens rea and on the affirmative defense of insanity, and must carefully explain the different burdens of proof on these two “defenses.” *See, e.g., United States v. Pohlot*, 827 F.2d at 901 (“[T]he mere fact that a defendant has the right to introduce psychiatric evidence in support of the affirmative defense of insanity does not justify barring the

evidence from negating the government's case in chief. The Supreme Court has indicated that although a state may constitutionally shift the burden of proving insanity to the defendant, *Leland v. Oregon*, . . . , it did not sanction, and probably would not sanction, a jury charge that prevented a jury from considering evidence of mental abnormality in determining whether the state had proven premeditation and deliberation beyond a reasonable doubt. . . . [In *Martin v. Ohio*, 480 U.S. 228, (1987)] [t]he Court indicated . . . that a state's right to shift the burden on self-defense does not include the right to prevent a defendant from showing self-defense in an effort to prove that she did not act with the mens rea).

8.07 Voluntary Intoxication [Drug Use]

You have heard evidence that (name) may have been intoxicated [drunk] [high on drugs] at the time of the offense(s) charged in the indictment. Intoxication or drunkenness [or drug use] is not itself a legal defense to a criminal charge. However, intoxication or drunkenness [drug use] may show that (name) did not have the intent to commit the offense that the government must prove in order to find (name) guilty.

If you find based on the evidence presented that (name) was intoxicated [drunk] [high on drugs] at the time of the offense, you may find that (name) did not have the intent required for the offense charged, as I described that to you. On the other hand, even if you believe that (name) was intoxicated [drunk] [high on drugs] to some degree, you may still find that (he) (she) was capable of and did have the required intent. As I have explained to you, if after considering all the evidence you find that the government proved each element of the offense, including the intent element, beyond a reasonable doubt, then you should find (name) guilty, but if you find that the government has failed to prove each element beyond a reasonable doubt, then you must find (name) not guilty.

Comment

See 1A O'Malley et al, supra, § 19.05; Sand et al, supra, 8.03. For variations in other Circuits, *see* First Circuit § 5.03; Seventh Circuit § 6.09; Eighth Circuit § 9.06; Ninth Circuit § 6.8.

Whether voluntary intoxication or drug use is recognized as a defense depends on whether the relevant mental state element of the offense(s) charged is characterized as general or specific intent. In *United States v. Williams*, 892 F.2d 296, 303 (3d Cir, 1989), the Third Circuit

held that the district court correctly excluded evidence of the defendant's intoxication, introduced for the purpose of negating mens rea, because the offense charged (possession of a firearm by a convicted felon) was a "general intent offense." The court stated:

Evidence of voluntary intoxication can be introduced to negate the specific intent required to commit a particular crime. . . . For general intent crimes, evidence of voluntary intoxication is not an acceptable method of negating the required intent.

[Defendant] argues that our decision in *United States v. Pohlot*, 827 F.2d 889 (3d Cir.1987), *cert. denied*, 484 U.S. 1011, 108 S.Ct. 710, 98 L.Ed.2d 660 (1988) [*see* discussion in Comment to Instruction 8.05], requires a different result. We disagree. *Pohlot* interpreted the Insanity Defense Reform Act, 18 U.S.C. § 17 (Supp. V 1987), as excluding all evidence of mental abnormality "that does not support a legally acceptable theory of lack of mens rea." 827 F.2d at 906. For crimes of general intent, voluntary intoxication is not an acceptable theory of lack of mens rea. This is not because general intent crimes require no proof of mens rea, but because the relevant mens rea has been established by a common law presumption, i.e., a person who voluntarily becomes intoxicated is presumed to intend all the actions that follow.

In *United States v. Davis*, 183 F.3d 231, 253 (3d Cir. 1999), the Third Circuit held that the trial judge did err in failing to instruct on intoxication, where "[a]ll of the charged crimes [obstruction of justice] were specific intent crimes, and intoxication can negate specific intent. *See United States v. Williams*, 892 F.2d 296, 303 (3d Cir.1989)." After discussing the evidence that supported giving an intoxication instruction, the court continued (183 F.3d at 254):

In order to justify an intoxication instruction, most courts have held that a defendant needs more than evidence of intoxication. He also needs some evidence of interference with his ability to form the relevant intent. *See, e.g., United States v. Nacotee*, 159 F.3d 1073, 1076 (7th Cir.1998); *United States v. Washington*, 819 F.2d 221, 225 (9th Cir.1987). In *Government of the Virgin Islands v. Carmona*, [422 F.2d 95 (3d Cir. 1970)], however, we apparently set forth a different rule, as we found an intoxication instruction required in a felony murder case when the only evidence of intoxication was that the defendant had a large amount to drink. . . .

It may be that our rule is not substantially different than that of other circuits, in that it is often difficult to determine what might qualify as evidence of interference with ability to form intent. *Carmona* endorses the conclusion, justified by much human experience, that heavy drinking may interfere with a person's ability to form a specific intent.

Specific Intent and General Intent. Whether an offense is a "general intent offense" or a "specific intent offense" is determined by the meaning of the mental state requirement. Generally, where the mental state element requires the government to prove that the defendant actually or specifically wanted, desired, or meant to engage in the prohibited conduct or to cause the required result, it is called "specific intent." On the other hand, where the mental state

element requires the government to prove simply that the defendant was aware that he or she was committing the prohibited conduct or would cause the result, or consciously disregarded or should have avoided the risk of harm, then it is called “general intent.” *See, e.g.*, Instruction 5.03 (Intentionally) and Comment; *United States v. Bailey*, 444 U.S. 394, 405 (1980). (The Supreme Court observed that “specific intent” corresponds loosely to “purposely” under the Model Penal Code and “general intent” is loosely comparable to “knowingly” under the Code. The Court also noted that generally for federal crimes “intent” may be proved by evidence that the defendant acted either purposely or knowingly, but for a narrow class of crimes (e.g., murder, conspiracy, attempt) specific intent or purposely (conscious object) is required.); MODEL PENAL CODE AND COMMENTARIES, § 2.02, at 234 (“[T]his distinction [between purposely and knowingly] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient. But there are areas where the discrimination is required and is made under traditional law, which uses the awkward concept of ‘specific intent.’”); Joshua Dressler, UNDERSTANDING CRIMINAL LAW, 147 (4th ed. 2006) (“[There is no universally accepted meaning of the terms. Sometimes, courts draw the following distinction: An offense is ‘specific intent’ if the crime requires proof that the actor’s conscious object, or purpose, is to cause the social harm set out in the definition of the offense. In contrast, a crime is ‘general intent’ in nature if the actor can be convicted upon proof of any lesser state of mind, such as when he causes the harm knowingly, recklessly, or negligently.”) The case law has often been confusing with respect to whether offenses are characterized as general or specific intent. *See, e.g.*, *United States v. Bailey*, 444 U.S. at 403-04 (Supreme Court recognized that the Model Penal Code’s more precise articulation of state of mind (culpability) elements exemplified the modern movement away from the common law specific and general intent distinction).