

UNDERSTANDING AFFIRMATIVE DEFENSES

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I. Legal Groundwork For Affirmative Defenses

A. What is an Affirmative Defense?

An affirmative defense is one which provides a defense without negating an essential element of the crime charge. To establish an affirmative defense the defendant must place before the jury sufficient proof to generate a jury instruction on the particular defense theory sought. Normally, an affirmative defense is expressly designated as affirmative by statute, or is a defense involving an excuse or justification peculiarly within the knowledge of the accused.

B. How is an Affirmative Defense different from a “Regular” Defense?

The presumption of innocence is legally all a defendant needs to be acquitted. The defense is reasonably free to argue the Government has failed to prove any essential element of the crime charge reasonable doubt (BRD) and jury may find a defendant not guilty. This tact does not require the defense to produce any evidence. The judge must instruct the jury on the government’s burden, presumption of innocence, unanimity and proof beyond a reasonable doubt. A defendant is entitled to a theory of defense instruction “as long as it is legally valid and there is sufficient evidence, viewed in the light most favorable to the defendant, to permit a reasonable juror to credit the defendant’s theory.” *United States v. Joselyn*, 99 F.3d 1182, 1194 (1st Cir. 1996); *United States v. Meade*, 110 F.3d 190, 201 (1st Cir. 1997); *U.S. v. Reed*, 991 F.2d 399, 400 (7th Cir. 1993).

An affirmative defense is one which requires the actual production of evidence, be it testimonial or physical. The evidence can be adduced through cross examination of Government witnesses or produced after the close of the Government’s case in chief. Affirmative defenses do not directly attack an element of the crime but provide either justification for the conduct or some other legally recognized approach to undermining the charge. A defendant must generate an affirmative defense instruction.

C. Types of Defenses

There are two categories of defense.

1. I did not do it defenses, and
2. I did it but defenses.

Affirmative defenses are available in both categories.

i. I Did Not Do It

An alibi defense is an “I did not do it defense.” We could rest there, but with the addition of an alibi we go farther, we show we were elsewhere so **could not** have done it. The defense has affirmatively chosen to take on the burden of proving the defendant was elsewhere when the crime occurred. If we produce this evidence, then we are entitled to a special or additional jury instruction.

“One of the issues in this case is whether the defendant was present at the time and place of the alleged crime. If, after considering all the evidence, you have a reasonable doubt that the defendant was present, then you must find the defendant not guilty.” First Circuit Pattern Instruction 5.01.

Notice how the instruction focuses the jury. If they have a reasonable doubt on the defendant’s presence, they **MUST** find not guilty. If, however they find presence, the jury still must go on to look at each and every element of the offense.

With an “I did not do it” affirmative defense, you concede nothing and you strengthen your not guilty position by giving the jury a specific reason.

ii. I Did It But

Many more affirmative defenses fall into the “I did it but” category. Insanity, entrapment, self defense, necessity, duress, are many of the statutory affirmative defenses. In these situations, there is a major strategic aspect to deciding on the defense. Assertion of the specific affirmative defense essentially concedes that the defendant was involved in the conduct alleged. While the government must still prove each element assertion of many affirmative defenses tells the jury the government is in fact correct as to much of the charge, **BUT**, there is a fact or facts which serve to exonerate the conduct. Self defense is an affirmative defense to assault, but by asserting self defense the defendant admits to the assault then gives a legal reason why guilt does not attach to the conduct. If the jury rejects the self defense argument, they are supposed to still find proof BRD of all the elements. Once you have put on your self defense claim, do you think a jury will spend much time on deciding if assaultive conduct actually occurred? I don’t think so. In an I did it but case, the defense is generally hanging the whole case on the jury accepting the affirmative defense presented. Sure there are exceptions to every rule but

realistically how many jurors will accept arguments in the alternative. I did not assault her, but if I did it was in self defense. I don't think that works with a jury. Maybe in a bench trial but even federal judges are human. In deciding to present an affirmative defense review these issues with the client. I suggest you have a letter explaining the issues to them.

D. Burdens

The term "affirmative defense" seems inextricably tied to arguments about burden shifting. Three different burdens exist; burden of proof (always on the government), burden of production (normally on the defense), and burden of persuasion (normally back on the government). The burden of proof to prove the essential elements of the crime charged BRD starts with and ALWAYS stays with the Government. The burden of production to generate an affirmative defense is on the defense. This is constitutional because the defense is not negating an essential element of the crime charged. The standard, meaning the quantum of evidence needed, varies with the particular affirmative defense. Generally it is either by a preponderance, or by clear and convincing. Once the defense has met this burden of producing an affirmative defense, the Government has the additional burden of persuading the jury not just as to each element of the crime BRD, but also to persuade the jury to reject the affirmative defense BRD as well.

I. Burden of Proof

Presenting an affirmative defense offers no relief to the government in what they must prove. *Patterson v. New York*, 432 U.S. 197 (1977). Rather, if the defense generates an affirmative defense, **the government must then disprove the defense generally beyond a reasonable doubt.** *Mullaney*, 421 U.S. at 704; *U.S. v. Jackson*, 569 F.2d 1003, 1008 n.12 (7th Cir. 1978)(emphasis added).

Affirmative defenses are the result of the common law merging with statutes and the modern rules of criminal procedure. At common law, the burden of defenses was generally on the defendant. This remained the case at the time the bill of rights was adopted. Fifth and fourteenth amendment jurisprudence have changed common law. It is now "black letter law" that the government has the burden to prove each and every element of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *In re Winship*, 397 U.S. 358, 364 (1970); *Davis v. U.S.*, 160 U.S. 469 (1895). This burden never shifts to the defendant who maintains a presumption of innocence throughout the trial. *Wilbur v. Mullaney*, 496 F.2d 1303, 1307 (1st Cir. 1974), affirmed, 421 U.S. 684 (1975). Generally, if a crime is a specific intent crime, then the government must prove beyond a reasonable doubt that the defendant acted with an improper purpose. An affirmative defense which undermines intent provides a complete defense by undermining an essential element of the charge by the government beyond a reasonable doubt. *In re Winship* 397 U.S. 358 (1970). It is an unconstitutional shift of the burden if a defendant must prove his innocence by negating an element of the statute. *Mullaney v. Wilbur*, 421 U.S. 684, 702 (1975).

There remains a distinction between the burden of pleading and burden of proof. If a defense is labeled an “Affirmative Defense” then the government need not plead it, as it is not an element of the offense. It has long been established that “the burden of proof is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime.” *Davis v. United States*, 160 U.S. 469, 487 (1895). The defendant does have the option, under some circumstances, to introduce evidence to show “affirmatively that he was not criminally responsible for his acts.” *Davis* at 478.

ii. Burden of Production

The level of evidence required to generate an affirmative defense, often called the “burden of production” varies with the defense. For some defenses it is by a “preponderance,” (entrapment, *Jacobson v. U.S.*, 112 S.Ct. 1535 (1992) while other defenses require “clear and convincing evidence” (normally a statutory requirement, such as insanity, 18 U.S.C. § 17(b)).

The First Circuit has suggested, although not made a definitive finding, that the court needs to examine both the particular crime and the particular defense at issue in assigning the burden of proof. The court indicates there may be a difference in those cases which require a *mens rea* when compared to those that are general intent. *U.S. v. Diaz*, 285 F.3d 92, 96-97 (1st Cir. 2002).

iii. Statutes may set burden of production

The legislature may establish the specific elements of a crime and may also, if it chooses, create specific affirmative defenses. As to those established affirmative defenses the legislature may by statute require a criminal defendant to bear the burden of establishing that defense. *Martin v. Ohio*, 480 U.S. 228, 233, 94 L. Ed. 2d 267, 107 S. Ct. 1098 (1987); *Patterson*, 432 U.S. at 210. The Supreme Court has upheld legislative creation of the burden of production against constitutional challenges, reasoning that the federal Constitution requires that the government bear the burden only as to the elements of the charged crime and that the legislature's definition of the elements of a criminal offense usually is dispositive. *Martin*, 480 U.S. at 232-33; *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986).

As one court observed, “Congress, however, routinely creates exceptions to criminal liability for various offenses. Most of these exceptions do not contain language indicating that they are affirmative defenses rather than elements of the offense. Nevertheless, the courts generally interpret them as affirmative defenses.” *United States v. Kloess*, 251 F.3d 941, 945 (11th Cir. 2001), (finding the safe harbor of 18 U.S.C. § 1515 (c), and affirmative defense to an obstruction charge.)

iv. Burden of Persuasion

At common law, the defendant bore the burden of pleading and proving all affirmative defenses. This allocation of the burden was found constitutional in *Patterson v. New York*, 432 U.S. 197, 202 (1997). The *Patterson* court recognized the trend toward requiring the government to bear the burden of persuasion on some affirmative defenses. *Patterson*, note 10. Any defense which tends to negate an element of the crime charged, sufficiently raised by the defendant, **must be disproved by the government**. *Patterson*, 206-207 (emphasis added). “The due process clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the defense makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the defense makes the difference between guilt and innocence.” *Patterson* at 226.

If the defendant introduces evidence that has the effect of negating any element of the offense, the government must disprove that defense beyond a reasonable doubt.

“To find guilt, the jury had to be convinced that none of the evidence, **whether offered by the State or by Martin in connection with her plea of self-defense**, raised a reasonable doubt that Martin had killed her husband, that she had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design. It was also told, however, that it could acquit if it found by a preponderance of the evidence that Martin had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great bodily harm, and that she had satisfied any duty to retreat or avoid danger. The jury convicted Martin.” *Martin v. Ohio*, 480 U.S. 228 at 233(emphasis added).

II. Some Affirmative Defenses¹

In looking for a theory of defense it is helpful to review a list of recognized affirmative defenses. Reading the full language of the statute and related statutes under which a defendant is charged will often reveal potential affirmative defenses.

¹ For an excellent analysis of the major affirmative defenses see *Defending A Federal Criminal Case*, 2001 Ed., Federal Defenders of San Diego, Chapter 11, Affirmative Defenses in Federal Court, updated by Tony Cheng and Suzanne Lachelier. Credit is given to them for much of this section of my article. A second excellent source on affirmative defenses is the *Pike and Fischer BNA Criminal Practice Manual*, Vol. 2, section 61, Defenses. Both sources provide extensive bibliographies to assist in focusing on a specific defense.

A non-exhaustive list of recognized affirmative defenses;

- A. Alibi
- B. Battered Person Syndrome
- C. Duress
- D. Entrapment
- E. Entrapment by Estoppel
- F. Good Faith
- G. Impossibility, Factual or Legal
- H. Insanity
- I. Justification
- J. Necessity
- K. Outrageous Government Conduct
- L. Public Authority
- M. Reliance on the Advice of Counsel
- N. Self Defense
- O. Statute of Limitations
- P. Voluntary Intoxication

In looking for the law on affirmative defenses some good places to start are jury instruction treatises and the circuit pattern instructions and comments. Usually these will provide counsel with an understanding of what must be shown to generate a specific affirmative defense and prove case citation to the underlying authorities.²

A. Alibi

The essence of the alibi defense is the impossibility of the defendant's guilt based on his physical absence from the location of the crime. *Roper v. U.S.*, 403 F.2d 796, 798 (5th Cir. 1968). When alibi is the defense, an alibi instruction must be given when requested and generated. *U.S. v. Zuniga*, 6 F.3d 569, 571 (9th Cir. 1993). Along with a separate alibi instruction, the court is also required to instruct the jury that the government maintains the burden of establishing beyond a reasonable doubt of the defendant's presence at the location

² I find very helpful:

Federal Jury Practice and Instructions, O'Mally, Genig & Lee, 5th Ed.. West.

The First Circuit Pattern Instructions available online at:

www.med.uscourts.gov/Site/courtroompractices/juryinstructions.htm, and

<http://www.juryinstruction.com/> (Have to subscribe to this site)

of the crime. *U.S. v. Simon*, 995 F.2d 1236, 1243 (3rd Cir. 1993). When considering an alibi defense, be sure to review Federal Rule of Criminal Procedure 12.1. This is triggered by a written request from the government for defense notification of alibi. The government's request must include the time, date, and place of the alleged offense. Within ten days after receipt of such a request, the defense must provide a written response to the government attorney indicating the specific 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 upon whom the defendant intends to rely. If the defendant serves that response on the government, then the government must disclose in writing back to the defendant the name, address, and telephone number of each witness the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and each government rebuttal witness to the defendant's alibi defense. In my experience, the government does not always serve a request for alibi on defendants. Frequently, defendants in drug conspiracies present defense counsel with an alibi defense. It is very difficult to prevail on an alibi defense when a significant period of time is covered in the relevant charging instrument. While it may be true that a specific defendant was not in town on the day of the drug buy, or during some portion of the conspiracy, physical presence at the scene of the drug transaction is not an essential element to a drug conspiracy, and an alibi defense will not apply to most conspiracy cases. An alibi instruction may not be required if the prosecution does not need to prove the defendant's presence at the scene of the crime in order to make its case. *U.S. v. Anderson*, 654 F.2d 1264 (8th Cir. 1981), although if the government attempts to prove the conspiracy by showing the defendant's physical presence, an alibi may be allowed, *U.S. v. Burse*, 531 F. 2d 1176 (2nd Cir. 1971). Evidence sufficient to justify an alibi instruction may be generated purely through prosecution witnesses. *U.S. v. Mason*, 9092 F.2d 1434 (9th Cir. 1990); *U.S. v. Hairston*, 64 F.3d 491 (9th Cir. 1995).

B. Battered Woman (Person) Syndrome

Battered women's syndrome is sufficiently recognized by the present state of scientific knowledge to permit the admission of expert opinion testimony on the subject under Rule 702, Fed. R. Evid. *U.S. v. Taylor*, 820 F. Supp. 124, 127 (S.D. N.Y. 1993). See *Arcoren v. United States*, 929 F.2d 1235, 1241 (8th Cir. 1991); *Fennell v. Goolsby*, 630 F. Supp. 451, for additional citations of authority from Federal and State jurisdictions.

Many courts have said battered woman syndrome is not in and of itself a defense. "Battered woman syndrome is not a defense. Nancy Ogle, *Comment, Murder, Self-defense, and the Battered Woman Syndrome in Kansas, State v. Stewart*, 243 Kan. 639, 763 P.2d 572 (1988)], 28 Washburn L. J. 400, 401 (1989). It is some evidence to be considered to support a defense, such as self-defense, duress, compulsion, and coercion. Because women who suffer from the battered woman syndrome do not act in a typical manner as compared with women who do not suffer from it, evidence of the syndrome is used to explain their behavior. Evidence of the syndrome is presented through expert testimony to assist the jury's evaluation of the defendant's state of mind. *Id.*; *U.S. v. Brown*, 891 F. Supp. 1501, 1505 (D

KS, 1995). Courts have allowed battered woman testimony in specific intent crimes to show lack of intent. *U.S. v. Marenghi*, 893 F. Supp. 85, 91, notes 7, 8. (D. ME, 1995). But not all courts allow such testimony, see *Note: United States v. Willis* [38 F. 3d 170]: *No Room for the Battered Woman Syndrome in the Fifth Circuit ?*, 48 Baylor L. Rev. 317 (1996).

Issues to consider:

- a. Rule 12.2(b), are you attempting to offer, “expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt”? If so, the rule requires a defendant asserting such defense to give particularized notice. *Marenghi* at 91.
- b. Are you offering the evidence as a compulsion or duress defense? See *Supporting the Defense of duress: The admissibility of Battered Woman Syndrome*, 70 Temple L. Rev. 699 (1997)
- c. Is the evidence you want to offer relevant? Under Rule 401, to be relevant evidence must “relate to a fact that is of consequence to the determination of the action . . .” *U.S. v. Taylor*, 820 F. Supp. 124, (S.D. N.Y. 1993).
- d. An imperfect defense or one rejected by the jury may still be the basis for a downward departure, see *U.S. v. Whitetail*, 956 F. 2d 857, 861 (8th Cir. 1992)(pre-Protect Act).

C. Coercion and Duress

In assessing whether a defendant has established sufficient grounds to mount a duress defense, courts do not examine the defendant's subjective perceptions about whether the threat was likely to be acted upon or whether escape was possible. Rather, as suggested by our use of the qualifiers "well-grounded" and "reasonable" in describing the elements of the defense, see *Arthurs*, 73 F.3d at 448, the inquiry hypothesizes a defendant of ordinary firmness and judgment and asks what such a defendant was likely to have experienced or how such a defendant was likely to have acted, see 1 LaFave & Scott, *Substantive Criminal Law* § 5.3, at 619, 621 & n.30.1 (West 1996 & 2003 Supp.). See LaFave & Scott at 619 n.33 collecting cases where a duress defense was denied because the defendant had an opportunity but failed to avail himself of government protection), 2003 Supp. at 125 n.33; cf. *id.* at 622 (“It is . . . generally recognized that a defendant can lose [a duress] defense by his own fault in getting into the difficulty. Thus, . . . the duress defense is unavailable if the defendant recklessly placed himself in a situation in which it was probable that he would be subjected to duress.” *U.S. v. Castro-Gomez*, No. 01-2334 (1st Cir. February 23, 2004). Duress requires a showing of: (1) an immediate threat of death or serious bodily injury; (2) a well founded fear that the threat will be carried out, and (3) the lack of a reasonable opportunity to escape the threatened harm. *U.S. v. Paul*, 110 F.3d 869, 871 (2nd Cir. 1997).

D. Entrapment

Entrapment is called a defense, but once the defendant has made a threshold showing, the burden shifts to the government to prove beyond a reasonable doubt either that there was no

undue government pressure or trickery or that the defendant was predisposed. See *United States v. Rodriguez*, 858 F.2d 809, 815 (1st Cir. 1988); *U.S. v. Acosta*, 67 F.3d 334, 338 (1st Cir. 1995).

The legal tests for entrapment are well established. What is required is:

- a. that the government induces the offense, and
- b. that the defendant not be predisposed to commit it. See *Jacobson v. United States*, 503 U.S. 540, 118 L. Ed. 2d 174, 112 S. Ct. 1535 (1992).

For a discussion of inducement and predisposition see the decision of then Chief Judge (now Justice) Breyer in *United States v. Gendron*, 18 F.3d 955 (1st Cir.), cert. denied, 130 L. Ed. 2d 558, 115 S. Ct. 654 (1994). Although the entrapment doctrine is primarily concerned with curbing improper pressure by the government, a competing policy has led to the second requirement, namely, that the defendant also not be predisposed to commit the crime. The notion is that a defendant predisposed to commit the crime should not be relieved of responsibility “merely because the government gave the defendant too forceful a shove along a path that the defendant would readily have taken anyway” *Acosta* at 338. *Gendron* asks whether defendant would have been likely to commit the same crime without the undue pressure actually exerted. 18 F.3d at 962.

There is no defense of private entrapment, although some courts have allowed a claim of “derivative entrapment” in which the government uses a private party as its agent. See *U.S. v. Washington*, 106 F.3d 983, 993, note 6 (D.C. Cir 1997)(collecting cases).

E. Entrapment by Estoppel

Entrapment by estoppel is an affirmative defense and the burden is on the defendant to produce sufficient evidence to support a jury instruction on the defense. *U.S. v. Ellis*, 168 F.3d 558 (1st Cir. 1999). Entrapment by estoppel requires the defendant to establish (1) that a government official told him the act was legal; (2) that he relied on the advice; (3) that the reliance was reasonable; and (4) that, given the reliance, prosecution would be unfair. See *United States v. Smith*, 940 F.2d 710, 715 (1st Cir.1991). *Ellis* at 561. Compare this with *U.S. v. Stewart*, 185 F.3d 112, 124 (3rd Cir 1999), slightly different standard. The relied upon statement by the government agent must be made to the defendant, not to a third party. *U.S. v. Eaton*, 179 F.3d 1328, 1332 (11th Cir. 1999).

There is a circuit split on if the defense is limited to intent crimes or applies to strict liability offenses as well. Most of the cases are in the context of prohibited person prosecutions, 18 U.S.C. 922(g). Allowing the defense See, *U.S. v. Thompson*, 25 F.3d 1558, 1563-65. The defense of entrapment by estoppel focuses on the conduct of the government officials, not on the state of mind of the defendant. *U.S. v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990). “Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official.” *Id.* Because the defense of entrapment by estoppel “rests upon principles of fairness . . . it may be raised even in strict liability offense

cases.” *Id.* To disallow such a defense to be presented "would be to sanction an indefensible sort of entrapment by the State.” *Thompson* at 1564. But see *U.S. v. Funches*, 135 F.3d 1405, 1407 (11th Cir. 1998), disallowing the defense when Florida incorrectly told defendant he could have a gun and the prosecution was for violating federal, not Florida law.

F. Good Faith

The defense of good faith is a difficult one in part due to the well recognized maxim, “ignorance of the law is no defense”.³ Good faith can only be used in a specific intent crime and is used primarily in tax and financial fraud cases. Some courts hold that an adequate specific intent instruction is enough. *New England Enterprises, Inc. v. U.S.* 400 F.2d 58, 71 (1st Cir 1968); *U.S. v. Dockray*, 943 F.2d 152, 154-56 (1st Cir. 1991)(collecting cases pro and con a specific good faith instruction). Other circuits require an instruction that speaks directly to good faith, *U.S. v. Casperson*, 773 F.2d 216, 222-24 (8th Cir. 1985); *U.S. v. Hopkins*, 744 F.2d 716, 717-18 (10th Cir. 1984)(*en banc*), *U.S. v. Harting* 879 F.2d 765 (10th Cir. 1989)(reversing for failure to give a good faith instruction in a tax case).

Good faith, when asserted must be “objectively reasonable,” with the exception of “willful evasion” of tax cases, *U.S. v. Cheek*, 498 U.S. 192, 111 S. Ct. 604 (1991)(Cheek construed the word "willfully" in the tax evasion statute, 26 U.S.C. § 7201, 7203, and concluded that a good faith misunderstanding of the tax law need not be objectively reasonable to serve as a complete defense. 111 S. Ct. at 611). As the first circuit has since noted, the willfulness requirement in tax evasion serves a function unique in criminal law: it makes ignorance of the law a defense. *Id.* at 609; *Dockray* at 156. When good faith is asserted in tax fraud cases, *Cheek* requires the government to disprove the claimed good faith of the defendant. *Cheek*, 112 S.Ct. at 610-12.

Sample instruction - Good faith is inconsistent with an intent to defraud. Good faith is also inconsistent with an intent to obtain money or property by means of false and fraudulent pretenses or representations. The term “good faith” has no precise definition. However, “good faith” means among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another. Evidence of good faith can create a reasonable doubt that Defendant violated the mail fraud statute. It is important to bear in mind that Defendant has no burden to prove good faith. It is the government’s burden to prove to you, beyond a reasonable doubt, that Defendant acted with the intent to defraud and the intent to obtain money by means of false and fraudulent

³ “Ignorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can always be pretended.”, Thomas Jefferson, Letter to Andre Limozin, 22 Dec. 1787, in *Papers of Thomas Jefferson* 12:451 (Julian P. Boyd ed. 1955)

pretenses, representations, or promises. However, you may consider any evidence that Defendant was acting in good faith; and you may decide, in light of that evidence, that the government has not proved that Defendant acted with the intent to defraud and with intent to obtain money by false pretenses and fraudulent representations. In that case, you must acquit Defendant of violations of the mail fraud statute.

Adapted from O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, sec. 40.16 (5th Ed.)

G. Impossibility, Factual or Legal

The distinction between factual and legal impossibility has been described as “elusive at best” *United States v. Farmer*, 251 F.3d 510, 512 (5th Cir. 2001) citing, *United States v. Everett*, 700 F.2d 900, 905 (3rd Cir. 1983) (stating that the doctrine has become a "source of utter frustration" and a "morass of confusion"). Most federal courts have repudiated the distinction or have at least openly questioned its usefulness. See *Osborn v. United States*, 385 U.S. 323, 333, 87 S. Ct. 429, 434, 17 L. Ed. 2d 394 (1966) (questioning whether "the doctrine of 'impossibility' with all its subtleties" should have continued validity); *United States v. Powell*, 1 F. Supp. 2d 1419, 1421 (N.D. Ala. 1998), *aff'd*, 177 F.3d 982 ("In the Eleventh Circuit...traditional factual impossibility/legal impossibility analysis has been discarded"); *United States v. Darnell*, 545 F.2d 595, 597 (8th Cir. 1976) ("Beyond the logical problem is the pragmatic: the difficulty of categorization [of the two impossibilities]. The tidy dichotomy of the theoretician becomes obscure in the courtroom"); *United States v. Duran*, 884 F. Supp. 577, 580 n.5 (D.D.C. 1995), *aff'd*, 321 U.S. App. D.C. 47, 96 F.3d 1495 (D.C. Cir. 1996) ("Categorizing a case as involving legal versus factual impossibility is difficult, if not pointless"); *United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1979) (rejecting impossibility defense).

U.S. v. McInnis, 601 F.2d 1319 (5th Cir. 1979), affirmed the district court dismissal of a conspiracy to kidnap count on the ground of "legal impossibility" holding it is not an offense to conspire to do an act that, if completed, would not be a crime.

H. Insanity

The Insanity Defense Reform Act of 1984 passed on the heels of the acquittal of John Hinckley, Jr. for his attempted assassination of former President Ronald Reagan, significantly narrowed the definition of insanity. The most significant provisions of the IDRA are:

1. A limit on the definition of insanity to be used in federal court.
2. A shifting of the burden of proof to the defendant, who must prove insanity by clear and convincing evidence.
3. An amendment to Rule 704 of the Evidence Rules to limit the scope of expert testimony on the ultimate legal issue on mental state.

4. Add a federal civil commitment process for persons found to be suffering from a mental disease or defect.

The insanity defense is covered in detail in *Defending A Federal Criminal Case*, 2001 Ed., Federal Defenders of San Diego, Chapter 11. Insanity is designated by statute as an affirmative defense with the burden of proving the defense by clear and convincing evidence placed on the defendant. A defendant must show 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 wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.” 18 U.S.C. § 17.

In sustaining this burden, the defendant is further limited by Federal Rule of Evidence 704(b) which states:

“No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.”

The statute has served to preclude courts from considering diminished capacity or diminished responsibility as an affirmative defense excusing or justifying a defendant’s conduct. *U.S. v. Bennett*, 161 F.3d 171, 184 (3rd Cir. 1998), *U.S. v. Schneider*, 111 F.3d 197, 201 (1st Cir. 1997). However, psychiatric evidence remains admissible to negate the specific intent for a *mens rea* element for specific intent crimes. *Bennett* at 184-185. Counsel for the defendant must notify the government in writing of an intent to present an insanity defense within the time provided by the court for the filing of a pretrial motion, or later if the court so directs. See Federal Rule of Criminal Procedure 12.2. A copy of the notice must be filed with the clerk.

For an insanity jury instruction, the defendant must generate sufficient evidence to allow a reasonable jury to find that insanity has been established with “convincing clarity”. *U.S. v. Dixon*, 185 F.3d, 393, 403-4 (5th Cir. 1999); *U.S. v. Denny-Shaffer*, 2 F.3d 999, 1015-16 (10th Cir. 1993). The court is not required to instruct the jury regarding the consequences to the defendant of not guilty only by reason of insanity. *Shannon v. United States*, 512 U.S. 573 (1994). Hence, as a general rule, the defense will not be able to let the jury know about the civil commitment process which will result from an NGRI finding. The *Shannon* decision leaves a small opening for circumstances in which the government might open the door such as a government argument during closing that a defendant would “go free” if a jury returned an NGRI verdict. *Shannon* at 588.

I. Justification

Three circuit courts have explicitly considered whether the prosecution or the defense bears the burden of proof on a justification defense to a felon in possession charge and they have reached different conclusions. See *United States v. Dodd*, 225 F.3d 304, 350 (3rd Cir. 2000); *United States v. Deleveaux*, 205 F.3d 1292, 1300 (11th Cir. 2000); *United States v. Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996) (*per curiam*). The Third and Eleventh Circuits held that the defendant must prove the defense of justification by a preponderance of the evidence, while the Seventh Circuit ruled that the government must negate the defense beyond a reasonable doubt. The matter remains unresolved in the First Circuit. *United States v. Diaz*, 285 F.3d 92 (1st Cir. 2002).

J. Necessity

The necessity defense is available “when a person is faced with a choice of two evils and must then decide whether to commit a crime or an alternative act that constitutes a greater evil.” *U.S. v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985). The theory underlying the necessity defense is that the defendant's free will was properly exercised to achieve a greater good or avoid a greater harm. This differs from a duress defense which requires that a defendant's free will be overcome by an outside force. See *U.S. v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984).

To establish a defense of necessity, a defendant must, as a matter of law, establish the existence of four elements: “(1) that he was faced with a choice of two evils and he chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his or her conduct and the harm to be avoided; and (4) that there were no legal alternatives to violating the law. *U.S. v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989).

Courts have denied a medical necessity defense in marijuana cases. *U.S. v. McWilliams*, 1999 U.S. Dist. LEXIS 23275 (C.D. CA, 1999). The defense has been denied as to political protesters and civil disobedience. See *U.S. v. Schoon*, 995 F.2d 1238, 1239 (9th Cir. 1992); *U.S. v. Montanes-Sanes*, 135 F. Supp. 2d 281 (D. P.R. 2001).

K. Outrageous Government Conduct

Under the outrageous government conduct defense, a defendant argues that the government's involvement in creating his crime (*i.e.*, the means and degrees of inducement) was so great “that a criminal prosecution for the [crime] violates the fundamental principles of due process.”, *U.S. v. Russell*, 411 U.S. 423, 430, 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973) (“we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction”); *U.S. v. Luttrell*, 889 F.2d 806, 811 (9th Cir.), *vacated in part*, 923 F.2d 764 (9th Cir. 1991) (en banc). Many cases discuss failed

attempts to gain a dismissal but few document success. See *U.S. v. Warwick*, 167 F.3d 965, 975 (6th Cir. 1999).

The defendant must establish that the police misconduct rises to the level of a constitutional violation. The outrageous government conduct defense is distinct from the affirmative defense of entrapment, which requires the defendant to establish that he was not predisposed to commit the crime. See *United States v. Tucker*, 28 F.3d 1420, 1422 (6th Cir. 1994); *U.S. v. Garza-Juarez*, 992F.2d 896, 903 (9th Cir. 1993). Under the outrageous government conduct defense, conviction may be improper even if the evidence establishes a predisposition to commit the crime: this defense looks only at the government's conduct and determines whether it is sufficiently outrageous so as to violate the Constitution. See *United States v. Sneed*, 34 F.3d 1570, 1576 (10th Cir. 1994). The availability of the "outrageous government conduct" defense is a question of law to be reviewed *de novo*. See *Tucker*, 28 F.3d at 1421. In *Tucker*, the court expressly held that a defendant whose relied on inducement cannot avail himself of the outrageous government conduct defense. The *Tucker* ruled, as a matter of law, "government conduct that induces a defendant to commit a crime, even if labeled 'outrageous,' does not violate that defendant's constitutional right of due process." *Id.* at 1427. Since *Tucker*, courts have consistently rejected defendants' attempts to argue that the government's conduct in inducing them to commit the crimes charged was so outrageous as to deprive them of their constitutional rights. See, e.g., *United States v. Rogers*, 118 F.3d 466, 473 (6th Cir. 1997).

The defense is premised on the Due Process Clause which imposes limits upon how far the government may go in detecting crime, regardless of the character of the target. *U.S. v. So*, 755 F.2d 1350, 1353 (9th Cir. 1985); *U.S. v. Thoma*, 726 F.2d 1191, 1196 (7th Cir. 1981) (citing *U.S. v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983)); *U.S. v. Twigg*, 588 F.2d 373, 377 (3d Cir. 1978). The question of whether the involvement of government agents rises to the level of outrageous governmental conduct is a question of law reviewed *de novo*. *Garza-Juarez*, 992 F.2d at 903; *U.S. v. Citro*, 842 F.2d 1149 (9th Cir. 1988). Although the issue may be properly raised and decided by a pretrial motion to dismiss the indictment under Fed. R. Crim. P. 12(b), *U.S. v. Duncan*, 896 F.2d 271,274 (7th Cir. 1990) (outrageous government conduct claim must be made by pretrial motion), some courts have deferred ruling on the pretrial motion until after trial. See *U.S. v. Marcello*, 537 F. Supp. 402 (C.D. Cal. 1982) (court addressed defendants' motion to dismiss for government overreaching after trial). The court will view the evidence in the light most favorable to the government, and will accept the district court's factual findings unless they are clearly erroneous. *U.S. v. Emmert*, 829 F.2d 805, 810-11 (9th Cir. 1987).

L. Public Authority

Under the public authority defense, the defendant says that his actions were taken under color of public authority. See *United States v. Rosenthal*, 793 F.2d 1214, 1236-37 (11th Cir. 1986). A public authority defense requires notice under R.R. Crim. Pro. 12.3. The rule

provides, in part, that a “defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall . . . serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Within ten days after receiving defendants’ notice . . . the attorney for the Government shall serve upon the defendant or defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.”

The difference between the entrapment by estoppel defense and the public authority defense is slight. In the first, a government official commits an error and the defendant relies on it and thereby violates the law. In the second, a government official makes some statement or performs some act and the defendant relies on it, possibly mistakenly, and commits an offense in so doing. *U.S. v. Burrows*, 36 F.3d 875, 882 (9th Cir. 1994); *United States v. Neville*, 82 F.3d 750, 761 (7th Cir.), cert. denied, 519 U.S. 899, 136 L. Ed. 2d 177, 117 S. Ct. 249 (1996) (defense of "public authority" sometimes called "entrapment by estoppel"; generally, this defense permits an acquittal when the defendant was reasonably mistaken in believing her criminal activity was authorized by the government.) See also 24 *Moore's Federal Practice*, §§ 612.3.02[1] and 612.3.02[2] (3d ed. 1997) (Rule 12.3 applies to defenses based on exercise of public authority including: entrapment by estoppel, *United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990), and negation of mental state).

M. Reliance on the Advice of Counsel

Similar to a good faith defense, a defendant may be excused from wrongdoing if he or she acted on the basis of advice from his or her attorney. To rely on the advice of counsel defense, the defendant must show that: (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered to be competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report. *Liss v. U.S.*, 915 F.2d 287, 291 (7th Cir. 1990)

It is not for the judge, but rather for the jury, to ‘appraise the reasonableness or the unreasonableness of the evidence’ relative to a reliance theory, as to hold otherwise would be tantamount to a grant of partial summary judgment to the Government in a criminal case. *U.S. v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988), *overruled on other grounds sub nom. U.S. v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992). Any foundation in the evidence as to reliance on the advice of counsel is sufficient to merit a jury instruction on a reliance theory. *U.S. v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994).

A defendant may not, however, raise the reliance defense as to all crimes, *U.S. v. Remini*, 967 F.2d 754 (2^d Cir. 1992) (advice of counsel is no defense to act of contempt).

N. Self Defense

Use of force is justified when a person reasonably believes that it is necessary for the defense of self or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary in the circumstances. First Cir. Pattern Instruction 5.04. *U.S. v. Bello*, 194 F.3d 18, 26 (1st Cir. 1999).

O. Statute of Limitations

Most federal circuits have held that a statute of limitations defense goes not to jurisdiction of the court, but is an affirmative defense which must be raised or waived. See *U.S. v. Najjar*, 283 F.3d 1306 (11th Cir. 2002); *U.S. v. Jake*, 281 F.3d 123 (3rd Cir. 2002); *U.S. v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000). Once raised, if the evidence presents a conflict as to whether the offense occurred within the limitations period or not, it is for the jury to decide on the validity of the statute of limitations defense raised. *U.S. v. Edwards*, 968 F.2d 1148 (11th Cir. 1992).

P. Voluntary Intoxication

Voluntary intoxication may rebut proof of intent in a “specific intent” crime. *U.S. v. Sewell*, 252 F.3d 647, 650-51 (2nd Cir. 2001); *U.S. v. Oakie*, 12 F.3d 1436, 1442 (8th Cir. 1993). Unresolved is whether intoxication is a diminished capacity defense barred by the Insanity Reform Act of 1984, 18 U.S.C. § 17, see *U.S. v. Burns*, 15 F.3d 211, 218 n.4 (1st Cir. 1994). See First Cir. Pattern Instruction 5.03. Voluntary intoxication is not a defense to general intent crimes. *U.S. v. Reed*, 991 F.2d 399, 400 (7th Cir. 1993); *United States v. Fazzini*, 871 F.2d 635, 641 (7th Cir. 1989); *United States v. Williams*, 892 F.2d 296, 303 (3rd Cir. 1989) (stating that “for general intent crimes, evidence of voluntary intoxication is not an acceptable method of negating the required intent”), *cert. denied*, 496 U.S. 939, 110 L. Ed. 2d 668, 110 S. Ct. 3221 (1990); *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990); *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988).

III. Affirmative Defense Created by Statute

Examples of affirmative defenses contained within statutes:

- No posting of a notice exception to crime of possession of a firearm in a federal facility, *U.S. v. McArthur*, 108 F.3d 1350, 1353 (11th Cir. 1997).
- Prior felony expunged exception to a felon in possession of a firearm, *United States v. Jackson*, 57 F.3d 101, 1016 (11th Cir. 1995).
- Antique firearm exception to a felon in possession, *United States v. Laroche*, 723 F.2d 1541 (11th Cir. 1984).
- Consent exception to illegal wiretap. *United States v. McCann*, 465 F.2d 147, 162 (5th Cir. 1972).

- Physician exception to illegal dispensing of drugs. *U.S. v. Ramzy*, 446 F.2d 1184 (5th Cir. 1971).
- Lawful encouragement of truthful testimony defense to witness tampering. *U.S. v. Johnson*, 968 F.2d 208, 210-11 (2nd Cir. 1992)

Reading the statute and related definition section will reveal when affirmative defenses have been created by the legislature. A review of the circuit's pattern jury instructions for the specific offense charge will also provide a basis for research.