FEDERAL CRIMINAL DEFENSES OUTLINE

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I. NOTICE AND PRETRIAL DEFENSES

A. ALIBI

An alibi defense can be presented if the "defendant was not present at the time when, or at the place where, the defendant is alleged to have committed the offense charged in the indictment."[1]

1. Elements

The alibi defense counsel attacks the government's proof as to the essential elements of the offense.[2]

2. Burden

The defendant must present an alibi defense, but the defendant does not carry the burden of proving the defense by a preponderance of the evidence.[3] The government has the burden of proving all of the elements of the offense beyond a reasonable doubt.[4]

3. Pretrial Considerations

a. Notice

Federal Rule of Criminal Procedure 12.1 requires notice of an alibi defense upon the government's request. Notice of an alibi defense is required in order to prevent delays at trial and unfair surprise to the prosecution.[5] The requirement that the defense disclose alibi witnesses does not deprive the accused of due process or a fair trial, nor does it compel him to be a witness against himself.[6] Upon the government's written demand for notice of an alibi defense, the defense must comply within fourteen

1. Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.35 (2001); *United States v. King*, 703 F.2d 119, 122 (5th Cir. 1983); *see also United States v. Chambers*, 922 F.2d 228, 240 (5th Cir. 1991); *Roper v. United States*, 403 F.2d 796, 798 (5th Cir. 1983) ("[T]he essence of alibi is the impossibility of the defendant's guilt based on his physical absence from the locus of the crime").

2. Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.35 (2001).

3. *United States v. Houston*, 434 F.2d 613, 614 (5th Cir. 1970); s*ee also United States v. Brown*, 49 F.3d 135, 137 (5th Cir. 1995); *Poole v. Georgia*, 551 F.2d 683, 685 (5th Cir. 1977) (per curiam) (upholding an alibi instruction where it did not shift the government's burden of proving guilt beyond a reasonable doubt).

4. *Id.*

5. *United States v. Vela*, 673 F.2d 86, 88 (5th Cir. 1982); *United States v. Benton*, 637 F.2d 1052, 1058–59 (5th Cir. 1981).

6. *Williams v. Florida*, 399 U.S. 78, 83–85 (1970).

days to be allowed to assert this defense.[7] The government, when requesting notice from the defense of an alibi defense, must describe the time, date, and place of the alleged offense. However, the government can describe a discrete temporal aspect of a conspiracy.[8] For example, in a conspiracy charge, the government can narrow its notice of alibi defense to a limited interval of the offense, even though the government will provide evidence of other criminal acts occurring at different dates and times.[9] This is permissible if the defendant is aware that the Government is invoking the rule in this manner and the defendant can request a bill of particulars pursuant to Federal Rule of Criminal Procedure 7(f) to identify the scope of the crime.[10]

Rule 12.1 also requires that the government disclose the name of each witness the government intends to rely on to establish that the defendant was present at the scene of the alleged offense, and each government rebuttal witness to the defendant's alibi defense.[11] The government is not obligated to disclose rebuttal witnesses unless it specifically requests notice of an alibi defense under Rule 12.1(a).[12] However, the defense is still bound by the documentary and other reciprocal discovery rules under Rule 16 regardless of whether or not the government makes a request under Rule 12.1(a).[13] If the government or defense fail to disclose a witness, the district court should consider (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case.[14]

b. Speedy Trial

The government's filing of notice of written demand of alibi tolls accrual of speedy trial time

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7. FED. R. CRIM. P. 12.1(a).

8. *Vela*, 673 F.2d at 89.

9. *Id.*; *see also United States v. King*, 703 F.2d 119, 124 (5th Cir. 1983) (defendants were not prejudiced by the government's failure to provide a specific date, even though alibi had been raised as a defense).

10. *Vela*, 673 F.2d at 89.

11. FED. R. CRIM. P. 12.1; *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977) (Rule 12 also entitles defendant to rebuttal witnesses, which is not authorized by Rule 16).

12. *United States v. Ortega-Chavez*, 682 F.2d 1086 (5th Cir. 1982); *see also Benton*, 637 F.2d at 1058–59 (gratuitous and unsolicited disclosure of alibi witnesses does not trigger an obligation of the government to disclose its rebuttal alibi witnesses).

13. *King*, 703 F.2d at 126.

14. *Myers*, 550 F.2d at 1041–42 (affirming exclusion of testimony from rebuttal alibi witnesses the government failed to disclose).

until the defense files a written response to the notice.[15]

4. Trial Considerations

a. Evidence

"When a defendant goes further than a denial and gives an implausible or controverted alibi or explanation, his testimony may be considered evidence of consciousness or guilt."[16]

b. Jury Instructions

Defense counsel should request an instruction that the jury should entertain reasonable doubt as to whether defendant was present at the time and place of the alleged offense.[17] However, in cases where the district court denied an alibi jury instruction, the appellate court has ruled that the remaining jury instructions to weigh the evidence, assess the credibility of witnesses, and find each element of the offense beyond a reasonable doubt were sufficient to support the alibi defense.[18]

Like any witness, an alibi or rebuttal alibi witnesses should not be excluded to avoid needless consumption of time to control the court's docket, even though the government's alibi witnesses were believed to be unreliable.[19] Additionally, if an alibi witness is going to invoke her Fifth Amendment right for one aspect of her testimony, her testimony can be excluded.[20]

Commentary on a defendant's failure to come forward with an alibi immediately following his

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15. *United States v. Santoya*, 890 F.2d 726 (5th Cir. 1989).

16. *United States v. Flores*, 286 F. App'x 206 (5th Cir. 2008) (citing *United States v. Sutherland*, 428 F.22 1153, 1157 (5th Cir. 1970)); *see also Fitzpatrick v. United States*, 178 U.S. 304 (1900) (a defendant who testifies in trial is subject to cross examination as to every fact bearing on his alibi).

17. *Houston*, 434 F.2d at 614 (this jury instruction did not shift to defendant burden of proving alibi by preponderance of evidence and did not violate right to due process); s*ee also Brown*, 49 F.3d at 137; *Poole v. Georgia*, 551 F.2d 683, 685–86 (5th Cir. 1977) (per curiam) (upholding alibi instruction where it did not shift government's burden of proving guilt beyond a reasonable doubt).

18. *See, e.g., United States v. Laury*, 49 F.3d 145 (5th Cir. 1995) (jury instruction requiring jury to weigh evidence and judge credibility of witnesses was sufficient to place alibi defense before jury, considering defendant's closing arguments that emphasized alibi evidence).

19. *See United States v. Colomb*, 419 F.3d 292 (5th Cir. 2005) (finding reversible error for denying the government's rebuttal alibi witnesses who offered to testify from prison in the case in order to receive a reduced sentence).

20. *United States v. Zeno*, 54 F. App'x 414, 2002 WL 31718507, at *5 (5th Cir. 2002); *cf. United States v. L'Hoste*, 640 F.2d 693, 695 (5th Cir. 1981) (a district court cannot grant immunity for an alibi witness).

arrest is not permissible.[21] However, an attempt to impeach a defendant by bringing out inconsistencies between statements is permissible.[22]

B. INSANITY

Insanity is ". . . a defense on the merits which relates to the accused's criminal intent, and if the accused prevails on this issue, he must be acquitted."[23] The defense requires proof "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 [either] the nature and quality or the wrongfulness of his acts."[24] Mental disease or defect does not otherwise constitute a defense.[25]

1. Elements

The elements of an insanity defense are 1) that the accused was suffering from a severe mental illness at the time of their criminal conduct and 2) that this illness rendered them unable to appreciate their wrongdoing at that time.[26]

2. Burden

The defendant has the burden of proving the defense of insanity by clear and convincing evidence.[27]

3. Pretrial Considerations

a. Notice

21. *United States v. Hale*, 422 U.S. 171, 181 (1975); *United States v. Mata-Yanez*, 9 F.3d 1546, 1993 WL 503312, at *4–5 (5th Cir. 1993) (unpublished); *cf. Laury*, 985 F.2d at 1302 (cross-examination and comments concerning defendant's failure to immediately come forward with alibi defense violated defendant's due process rights, but did not constitute plain error). *But see United States v. Allston*, 613 F.2d 609, 611 (5th Cir. 1980) (defendant who presented an alibi witness a year after his arrest had opened the door to cross-examination on defendant's post-arrest silence because he gave the impression that he cooperated with the police).

22. *Id.*; s*ee Goldsby v. United States*, 160 U.S. 70, 73–74 (1895).

23. *United States v. Huff*, 409 F.2d 1225, 1228 (5th Cir. 1969).

24. 18 U.S.C. § 17.

25. *Id.*

26. 18 U.S.C. § 17; *United States v. Dixon*, 185 F.3d 393, 398–99 (5th Cir. 1999); Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.34 (2001).

27. 18 U.S.C. § 17; *Dixon*, 185 F.3d at 403.

Federal Rule of Criminal Procedure 12.2 requires that the defendant provide notice of his intent to present an insanity defense to the government.[28] This notice may be withdrawn and the withdrawn notice cannot be used against the defendant. Notice as to expert witnesses must be given, though the rule does not require specificity with regard to the details of the expert's anticipated testimony.[29] However, Rule 16(b)(1)(c)(ii) requires the defendant, at the government's request, provide a summary of any expert testimony if notice has been given under Rule 12.2. The summary must "describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Failure to comply with the notice requirements can result in the exclusion of any expert testimony concerning the client's sanity at the time of the commission of the offense.[30] After providing timely notice of the accused's intent to present an insanity defense, subsequent representations by defense counsel can have the effect of nullifying notice.[31] The Rule also includes specific notice requirements for capital cases.

b. Obtaining a Psychiatric Examination

Pursuant to 18 U.S.C. § 3006A, the accused can obtain the services of a psychiatric expert if their sanity at the time of the offense is truly at issue.[32] The defense must make a showing that "sanity [is] likely to be a significant factor at trial, such that the denial of a mental examination [would amount] to a denial of due process under *Ake v. Oklahoma*, 470 U.S. 68 (1985), or an abuse of discretion under 18 U.S.C. 3006A."[33] When the defense moves under § 3006A(e) for psychiatric expert assistance, the district court is required to conduct an ex parte inquiry to determine whether the requested relief is appropriate.[34] However, the district court's failure to conduct the inquiry required by § 3006A(e) does not automatically warrant reversal.[35] Failure to object to a district court's ruling triggers a plain error standard of review on appeal.[36]

c. Trial Bifurcation

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28. FED. R. CRIM. P. 12.2.

29. *Id.*

30. *United States v. Castro*, 15 F.3d 417, 421 (5th Cir. 1994).

31. *United States v. Williams*, 998 F.2d 258, 264 (5th Cir. 1993).

32. 18 U.S.C. § 3006A.

33. *Castro*, 15 F.3d at 421.

34. *United States v. Pofahl*, 990 F.2d 1456, 1471 (5th Cir. 1993); *see also United States v. Patterson*, 724 F.2d 1128, 1129–30 (5th Cir. 1984); *United States v. Theriault*, 440 F.2d 713, 715 (5th Cir. 1971).

35. *Pofahl*, 990 F.2d at 1471.

36. *Id.* at 1472.

The Fifth Circuit has held that there is no statutory or constitutional basis to grant a bifurcated trial to address separately the issues of 1) insanity at the time of the commission of the offense and 2) guilt or innocence.[37] By contrast, the D.C. Circuit recognizes a right to a bifurcated trial.[38]

d. Evaluation

If a defendant is competent for purposes of trial, out on bond, and intends to present an insanity defense, the court may order that the accused be evaluated on an inpatient or outpatient basis.[39] The government may present evidence that commitment is necessary in order to assess the defendant's sanity at the time of the offense, pursuant to 18 U.S.C. § 4247(b).[40] The court may consider 1) the purpose of examination, 2) the availability and competency of experts in the vicinity of the court, and 3) the fact that insanity is a determination for the jury while competency is for the court.[41] The court should not consider 1) the court's opinion regarding the quality of an outpatient examination compared with an inpatient examination and 2) the cost differential between the two options.[42]

The accused can be barred from raising the defense of insanity if she refuses to submit to an examination by a court-designated psychiatrist.[43]

4. Trial Considerations

a. Evidentiary Concerns

Rule 704(b) of the Federal Rules of Evidence prevents an expert from "stat[ing] 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."[44] "[A]n expert is . . . free to testify as to whether the defendant was suffering from a severe mental illness at the time of the criminal conduct; he is prohibited, however, from testifying that his severe mental illness does or does not prevent the defendant

37. *United States v. Huff*, 409 F.2d 1225, 1228 (5th Cir. 1969); *United States v. Milne*, 498 F.2d 329, 330 (5th Cir. 1974).

38. *United States v. Grimes*, 421 F.2d 1119 (D.C. Cir. 1969); *Washington v. United States*, 419 F.2d 636 (D.C. Cir. 1969); *Parman v. United States*, 399 F.2d 559 (D.C. Cir. 1968).

39. *United States v. Newchurch*, 807 F.2d 404, 410–11 (5th Cir. 1986).

40. *Id.* at 411–12.

41. *Id.*

42. *Id.*

43. *United States v. Leonard*, 609 F.2d 1163, 1165 (5th Cir. 1980).

44. FED. R. EVID. 704(b); *see United States v. Abou-Kassem*, 78 F.3d 161, 166 (5th Cir. 1996).

from appreciating the wrongfulness of his actions."[45] A hypothetical submitted to an expert that mirrors the facts of the case in which he is testifying about can violate Rule 704(b).[46] However, an acceptable hypothetical includes addressing: 1) a similar mental illness and similar facts, or 2) whether someone suffering from this condition could appreciate the wrongfulness of their actions.[47]

District courts should be "liberal in their evidentiary rulings affecting proof of sanity," including evidence of prior criminal acts.[48] Courts have allowed the government to introduce evidence of prior criminal conduct and statements of the accused in order to counter an insanity defense.[49]

If the accused presents an insanity defense and puts his intent at issue, the government can present evidence of prior similar illegal acts to prove intent.[50] However, an accused's participation in such illegal acts does not necessarily demonstrate an ability to appreciate the nature and quality or the wrongfulness of the conduct.[51]

Competency findings are inadmissible at trial for the purpose of proving sanity at the time of the commission of the offense.[52] However, courts have allowed experts to testify that they examined the accused for competency, as long as they do not address the results of such examination.[53]

Statements made by the accused during a competency evaluation may not be used against him at

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45. *United States v. Dixon*, 185 F.3d 393, 398–400 (5th Cir. 1999) (finding error in expert's testimony but holding that the error was cured by the court's instruction to the jury).

46. *United States v. Levine*, 80 F.3d 129, 134–35 (5th Cir. 1996); *cf. United States v. Roberts*, 470 F.2d 1190, 1192 (5th Cir. 1972) (holding psychiatrist's testimony regarding defendant's commission of offense, which rebutted insanity defense, was not prejudicial because court instructed jury to disregard statement as it relates to guilt or innocence, and provided jury instruction to that effect).

47. *See Dixon*, 185 F.3d at 399–400; *Levine*, 80 F.3d at 134–35.

48. *United States v. Emery*, 682 F.2d 493, 498 (5th Cir. 1982); *United States v. McRary*, 616 F.2d 181, 184–85 (5th Cir. 1980).

49. *See United States v. Ballard*, 18 F.3d 935, 1994 WL 83395, at *1 (5th Cir. 1994) (unpublished) (admitting government's videotape and testimony of defendant's shoplifting incident); *United States v. Godkins*, 527 F.2d 1321, 1324 (5th Cir. 1976) (testimony of defendant's rationale for using mails in the commission of the offense was admitted).

50. *See, e.g., United States v. Loza-Iniguez*, 172 F.3d 869, 1999 WL 129922, at *1 (5th Cir. 1999) (unpublished) (after defendant presented insanity defense and put intent at issue, government was able to present evidence of defendant's prior reentries and deportations to prove intent—that defendant's presence in United States was intentional).

51. *United States v. Barton*, 992 F.2d 66, 69–70 (5th Cir. 1993).

52. 18 U.S.C. § 4241(f).

53. *United States v. Fortune*, 513 F.2d 883, 887–89 (5th Cir. 1976); *United Stats v. Hereden*, 464 F.2d 611, 612 (5th Cir. 1972); *United States v. Harper*, 450 F.2d 1032, 1035–37 (5th Cir. 1971).

trial, except on the issue of sanity.[54]

b. Jury Instructions

The court must give an insanity instruction if a reasonable juror could find that insanity has been shown with convincing clarity.[55] In making that determination, the trial court must assess "whether a reasonable juror could conclude that 1) there is a high probability that the defendant 2) was unable to appreciate the nature and quality or the wrongfulness of his acts 3) at the time he committed the acts constituting the offense 4) as a result of a mental disease or defect 5) which is severe.[56] The court must construe the evidence in a light most favorable to the accused,[57] but it "can withhold a jury instruction if the relationship between a defendant's mental illness history and his criminal conduct has not been explained or examined in any meaningful way."[58] Although it can be requested, a jury instruction on the consequence of a not guilty by reason of insanity verdict is not required.[59]

5. Miscellaneous Issues

If the government is unable to rebut the defense's expert testimony concerning insanity, the conviction may be vulnerable to a sufficiency challenge on appeal.[60]

"[W]hen a criminal defendant establishes . . . that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society."[61]

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54. FED. R. CRIM. P. 12.2(c); *Leonard*, 609 F.2d at 1167.

55. *United States v. Dixon*, 185 F.3d 393, 403–04 (5th Cir. 1999); *see also United States v. Long*, 562 F.3d 325, 331 (5th Cir. 2009) ("The defendant need not eliminate ambiguity from his proof or . . . instill certainty in the minds of the jurors but rather [is] only require[d] to produce evidence that would permit the jury to find a high probability that . . . [he] was insane.").

56. *United States v. Long*, 562 F.3d 325, 332 (5th Cir. 2009).

57. *United States v. Eff*, 524 F.3d 712, 717 (5th Cir. 2008).

58. *Dixon*, 185 F.3d at 407 (failure to explain discrepancies through an expert witness or through cross-examination of government's witness prevented insanity defense jury instruction).

59. *Shannon v. United States*, 512 U.S. 573, 578–86 (1994).

60. *See, e.g., United States v. Andrew*, 666 F.2d 915, 921 (5th Cir. 1982) (government presented only inconclusive psychiatric testimony to rebut defendant's own expert testimony of insanity); *United States v. Parks*, 460 F.2d 736 (5th Cir. 1972) (government psychiatrist's testimony based on incorrect factual assumptions was insufficient to support jury verdict in face of testimony by two defense psychiatrists and five lay witnesses which established strong case suggesting legal insanity).

61. *Jones v. United States*, 463 U.S. 354, 370 (1983); *see* 18 U.S.C. § 4243.

After an appellate court has held that there was insufficient evidence to determine the defendant's "capacity to be responsible for criminal acts," the Double Jeopardy Clause precludes retrying the defendant.[62]

C. PUBLIC AUTHORITY

To complete a public authority defense, a defendant must show that "he was [actually or believed to be] engaged by a government official to participate in covert activity."[63] If the government official the defendant relied upon does not actually possess the authority to permit the conduct, the defense of public authority is questionable.[64]

The following circumstances have been found to be insufficient to prove that the government official had authority to engage the defendant in criminal activity:[65] a defendant's cooperation with the government,[66] a confidential informant agreement,[67] or a defendant's desire to complete his own criminal investigation.[68]

1. Elements

To establish the public authority defense, the defendant must show that 1) the defendant is affirmatively told that his conduct would be lawful; 2) he is told this by an official of the United States government; 3) the defendant actually relies on what the official tells him in taking the action; and, 4) the

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62. *Burks v. United States*, 437 U.S. 1, 10–11, 17–18 (1978).

63. FED. R. CRIM. P. 12.3; *United States v. Fox*, 248 F.3d 394, 408 (5th Cir. 2001), *United States v. Spires*; 79 F.3d 464, 466 n.2 (5th Cir.1996).

64. *United States v. Mayfield*, 31 F. App'x 160, 2001 WL 1751481, at *1 (5th Cir. 2001) (rejecting such claim of apparent public authority, even if defendant reasonably believed the government official has authority), *but see United States v. Sariles*, EP-09-CR-03261-PRM (W.D.Tex. 2009) (denying public authority defense because the law enforcement officer did not have actual authority to authorize a violation of federal law) (appeal pending).

65. *Id.* at *1 (holding evidence insufficient to prove that police officer who allegedly empowered defendant to possess firearm had authority to do so).

66. *Spires*, 79 F.3d at 466 n.2 (cooperating with criminal task force did not provide defendant with safeguard from a firearm possession when prohibition to carry gun was condition of his cooperation and government agent warned him to stop carrying gun).

67. *United States v. Ashlock*, 105 F. App'x 581 (5th Cir. 2004) (existence of confidential informant agreement was not evidence that defendant had authority to engage in criminal acts when agreement delineated specific prohibitions to commit certain criminal acts).

68. *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001) (affirming defendant's conviction for receipt of child pornography despite defendant's intention to "deliver up these defilers of children"), *disapproved of on other grounds by Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

defendant's reliance on what he was told by the official is reasonable in light of the circumstances.[69]

2. Burden

The burden is on the defendant to establish the defense by a preponderance of the evidence.[70]

3. Pretrial Considerations

If the defendant fails to provide the government with notice of a public authority defense, as required by Federal Rule of Criminal Procedure 12.3, the defendant foregoes the opportunity to present this defense.[71] The defendant must file this notice under seal with the clerk's office if the notice identifies a federal intelligence agency as the source of public authority.[72]

The government must submit a response to defendant's notice of a public authority defense within 14 days after receiving the defendant's notice, but no later than 21 days before trial.[73]

4. Trial Considerations

Testimony of the accused relating to a public authority defense, if unsupported by documentation or other evidence, may be found insufficient to justify a public authority defense jury instruction.[74]

D. ENTRAPMENT BY ESTOPPEL

This defense is applicable when a government official or agent actively assures the defendant that certain conduct is legal and the defendant reasonably relies on that advice and continues or initiates conduct. Unlike a traditional entrapment defense, the focus of inquiry is on conduct of government

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69. *United States v. Jumah*, 493 F.3d 868, 872 n.1 (7th Cir. 2007) (citing Seventh Circuit Pattern Criminal Jury Instr. 6.07 (1999)); *United States v. Wright*, 2008 WL 2346162, at *4 (M.D. La. 2008) (defendant must "demonstrate that he engaged in the activity pursuant to authority granted to him by a government official qualified to do so, and that he acted according to the established practice, rules and regulations of the law enforcement agency"); *see also United States v. Strahan*, 565 F.3d 1047, 1051 (7th Cir. 2009); *United States v. Pitt*, 193 F.3d 751, 757–58 (3d Cir. 1999).

70. *Wright*, 2008 WL 2346162, at *3–4; *see, e.g., United States v. Pereira*, 129 F.3d 609, 1997 WL 681129, at *5 (5th Cir. 1997) (unpublished) (holding evidence insufficient to support jury's verdict despite evidence of public authority defense).

71. *United States v. Smith*, 481 F.3d 259, 262 (5th Cir. 2007).

72. FED. R. CRIM. P. 12.3(a)(1).

73. FED. R. CRIM. P. 12.3(a)(3).

74. *United States v. Villareal*, 79 F. App'x 730, 731–32 (5th Cir. 2003); *United States v. Mayfield*, 31 F. App'x 160, at *1 (5th Cir. 2001).

rather than intent of defendant.[75]

1. Elements

A defendant may raise entrapment by estoppel only when 1) a government official or agent 2) actively assures the defendant that certain conduct is legal and 3) the defendant reasonably relies on that advice.[76]

2. Burden

Courts disagree as to which party bears the ultimate burden on entrapment by estoppel. In the Eighth and Ninth Circuits, the burden of proving all elements of entrapment by estoppel is on the defendant.[77] Elsewhere, once the defendant presents evidence to invoke the defense, the government has the burden of disproving entrapment by estoppel.[78]

3. Pretrial Considerations

Federal Rule of Criminal Procedure 12.3 requires pretrial notice to the government that the defendant intends to assert a defense of an entrapment by estoppel.[79]

4. Trial Considerations

For reliance on the advice of a government agent to be reasonable, the accused must establish that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.[80]

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75. *United States v. Uresti-Careaga*, 281 F. App'x 404, 405 (5th Cir. 2008); *United States v. Ortegon-Uvalde*, 179 F.3d 956, 959 (5th Cir. 1999); *United States v. Spires*, 79 F.3d 464, 466 (5th Cir. 1996).

76. *United States v. Trevino-Martinez*, 86 F.3d 65, 69 (5th Cir. 1996).

77. *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004); *United States v. Austin*; 915 F.2d 363, 365 (8th Cir. 1990).

78. *United States v. Randolph*, No. 06-001, 2006 WL 1120680, at *3 n.1 (E.D. Pa. Apr. 26, 2006); *United States v. Jumah*, No. 04-237, 2006 WL 1005159 (N.D. Ill. Apr. 12, 2006).

79. 1A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, CRIMINAL § 211 (3d ed. 2004) (citing *United States v. Neville*, 82 F.3d 750, 761 (7th Cir. 1996); *United States v. Jumah*, 493 F.3d 868, 874 n.4 (7th Cir. 2007); *United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990)).

80. *Trevino-Martinez*, 86 F.3d at 69 (reliance on consulates granting defendant visa to enter United States not sufficient for entrapment by estoppel defense because defendant failed to disclose his prior arrests and deportations); *United States v. Amelo-Rodriguez*, 324 F. App'x 390 (5th Cir. 2009) (defendant could not reasonably rely on federally-licensed firearms dealer when defendant's application falsely stated he was not alien in United States).

Entrapment by estoppel requires a showing of reliance on a federal government official empowered to render the claimed advice or on an authorized agent of the federal government who has been granted authority from the federal government to render such advice.[81] In addition, the defendant must corroborate an allegation that a government agent actively misled the defendant.[82]

E. OUTRAGEOUS GOVERNMENT CONDUCT

The outrageous government conduct defense is available when the government agent's conduct is so outrageous that due process principles—fundamental fairness or a universal sense of justice—prevent the government from invoking the judicial process to obtain a conviction.[83] This defense may bar prosecution and require dismissal of an indictment.[84]

1. Elements

A claim of outrageous government conduct focuses on the conduct of the government's agents rather than the predisposition or intent of the defendant to commit the crime.[85] The defense requires proof of 1) government overinvolvement in the charged crime, and 2) the defendant's passive role or connection to the government-orchestrated and implemented criminal activity.[86] However, a defendant who actively participates in crime may not avail himself of an outrageous government conduct defense.[87]

When the outrageous government conduct is based on the defendant's sexual relationship with the government agent, the defendant must prove 1) that government consciously set out to use sex as

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81. *United States v. Spires*, 79 F.3d 464, 466–67 (5th Cir. 1999) (agent of crime task force, federally funded but run by the state was not a federal government official); *United States v. Emerson*, 86 F. App'x 696, 698–99 (5th Cir. 2004) (defendant could not rely on legality of possession of firearm from empowered federal official because he had constructive notice of existence of federal firearms laws pertaining to domestic relations cases).

82. *United States v. Cornejo-Flores*, 254 F.3d 1082, 2001 WL 564140, at *2 (5th Cir. 2001) (unpublished) (failure to give defendant I-294 form did not constitute governmental act of actively misleading defendant); *United States v. Figueroa-Serrano*, 198 F.3d 240, 1999 WL 824488, at *1 (5th Cir. 1999) (unpublished) (defendant failed to show that government official actively assured him that he could legally return to United States).

83. *United States v. Russell*, 411 U.S. 423, 432 (1973).

84. *United States v. Nations*, 764 F.2d 1073, 1076–77 (5th Cir. 1985) (citing *United States v. Yater*, 756 F.2d 1058, 1064–66 (5th Cir. 1985)).

85. *Russell*, 411 U.S. at 429; *United States v. Graves*, 556 F.2d 1319, 1321 (5th Cir. 1977) (distinguishing outrageous criminal conduct defense from entrapment).

86. *United States v. Evans*, 941 F.2d 267, 271 (5th Cir. 1991); *United States v. Arteaga*, 807 F.2d 424, 427 (5th Cir. 1986) ("outrageous government conduct defense requires not only government overinvolvement in the charged crime but a passive role by the defendant"); *Nations*, 764 F.2d at 1076–77.

87. *Evans*, 941 F.2d at 271; *Arteaga*, 807 F.2d at 427.

weapon in its investigatory arsenal, or acquiesced in such conduct for its own purposes once it knew or should have known that such relationship existed; 2) that government agent initiated sexual relationship, or allowed it to continue to exist, to achieve governmental ends; and 3) that sexual relationship took place during or close to period covered by indictment and was entwined with events charged therein.[88]

2. Burden

The defendant bears "an extremely high burden of proof" to establish outrageous government conduct.[89]

3. Pretrial considerations

Since the claim of outrageous government conduct limits the government's invocation of the judicial process to obtain a conviction, the defendant must raise the issue in a pretrial motion under Federal Rule of Criminal Procedure 12(b) to prevent waiver of the defense.[90]

4. Trial considerations

A claim of outrageous conduct is a question of law to be determined by the court, not a question of fact for the jury.[91]

F. VINDICTIVE PROSECUTION

The due process clause protects criminal defendants from a prosecutor that demonstrates a retaliatory motive to deter a defendant from exercising a constitutional or other legal right.[92] A presumption of vindictiveness arises when the course of events provide no objective indication that would allay a reasonable apprehension by the defendant that the prosecutor's decision was vindictive.[93]

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88. *United States v. Nolan-Cooper*, 155 F.3d 221, 232 (3d Cir. 1998).

89. *United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003); *United States v. Asibor*, 109 F.3d 1023, 1039 (5th Cir. 1997).

90. *United States v. Nguyen*, 250 F.3d 643, 645–46 (8th Cir. 2001); *United States v. Pitt*, 19 F.3d 751, 760 (3d Cir. 1999); *United States v. Henderson-Durand*, 985 F.2d 970, 973 (8th Cir. 1993).

91. *United State v. Hudson*, 982 F.2d 160, 163 (5th Cir. 1993); *Graves*, 556 F.2d at 1321.

92. *Blackledge v. Perry*, 417 U.S. 21, 25 (1974); *see also North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) ("due process also requires a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge").

93. *United States v. Wells*, 262 F.3d 455, 466–67 (5th Cir. 2001); *United States v. Johnson*, 91 F.3d 695, 698 (5th Cir. 1996); *United States v. Krezdorn*, 718 F.2d 1360, 1365 (5th Cir. 1983) (the district court must examine the entire proceedings to determine if the prosecution was motivated by some purpose other than a vindictive desire); *Ehl v. Estelle*, 656 F.2d 166, 169

This presumption does not arise for pretrial prosecutorial decisions, absent actual evidence of vindictiveness.[94]

1. Elements

To show vindictive prosecution, there must be 1) an exercise of a protected right, 2) a prosecutorial stake in the exercise of that right, 3) unreasonableness of the prosecutor's conduct, and 4) the intent to punish the defendant for exercising the protected right.[95]

2. Burden

If there is a presumption of vindictiveness, the government must prove by a preponderance of the evidence that events occurring since the original charging decision altered that initial exercise of the prosecutor's discretion.[96] On the other hand, if there is no presumption of vindictiveness, the burden is on the defendant, by a preponderance of the evidence, to prove the affirmative defense of vindictive prosecution.[97]

3. Pretrial Considerations

When vindictiveness occurs pretrial, it must be raised in a pretrial motion.[98]

4. Trial Considerations

a. Evidence

A substantial and realistic likelihood of a prosecutorial vindictiveness motive has been demonstrated by a defendant's exercise of his procedural or substantive rights, such as succeeding on

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(5th Cir. 1983) (presumption applied when prosecutor changed his formal plea bargaining position after defendant was convicted and exercised his constitutional right to challenge conviction).

94. *United States v. Goodwin*, 457 U.S. 368 (1982); *United States v. Johnson*, 91 F.3d 695, 698 (5th Cir. 1996) (broad discretion is afforded prosecution to make pretrial decisions, such that absent a presumption of vindictiveness, defendant must prove that prosecutor's conduct was actually vindictive); *cf. United States v. Brown*, 298 F.3d 392, 405–06 (5th Cir. 2002) (post-trial decision is more likely to be improperly motivated than pretrial decision).

95. *United States v. Suarez*, 263 F.3d 468, 479 (6th Cir. 2001).

96. *Krezdorn*, 718 F.2d at 1365.

97. *Id.*

98. FED. R. CRIM. P. 12(b)(3)(A).

appeal.[99] However, the elements of this defense are not satisfied by the prosecution's decision to reindict the defendant after a mistrial or a hung jury, absent evidence of actual retaliation.[100]

Vindictiveness may be demonstrated by a prosecutor "upping the ante" by bringing additional charges or more severe charges.[101] In addition, the court may consider the timing of a prosecutor's decisions.[102] The subjective intent of the prosecutor is irrelevant to this inquiry.[103]

The prosecution can present objective factors to counter the presumption or evidence of vindictiveness, such as new evidence, mistake, oversight, a different approach to prosecutorial duty, or public demand for prosecution of the additional crimes allegedly committed.[104]

G. SELECTIVE PROSECUTION

Selective prosecution occurs when the government's decision to prosecute is based on an unjustifiable standard such as race, religion, or some other arbitrary classification.[105] While selective enforcement of the law is not a constitutional violation,[106] selective prosecution is an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution, rather than a defense on the merits to the criminal charge itself.[107]

1. Elements

The claimant must first demonstrate that the federal prosecutorial policy or decision had a discriminatory effect and, secondarily, that it was motivated by a discriminatory purpose.[108]

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99. *United States v. Ward*, 757 F.2d 616 (5th Cir. 1985).

100. *United States v. Ruppel*, 666 F.2d 261 (5th Cir. 1982).

101. *Blackledge v. Perry*, 417 U.S. 21, 27–28 (1974); *Neal v. Cain*, 141 F.3d 207 (5th Cir. 1998).

102. *United States v. Brown*, 298 F.3d 392, 405–06 (5th Cir. 2002); *United States v. Krezdorn*, 693 F.2d 1360, 1365 (5th Cir. 1983).

103. *Krezdorn*, 693 F.2d at 1371; *Jackson v. Walker*, 585 F.2d 139, 149 (5th Cir. 1978)

104. *Krezdorn*, 693 F.2d at 1364; *see United States v. Saltzman*, 537 F.3d 353, 360 (5th Cir. 2008) (the prosecution has the opportunity to proffer legitimate and objective reasons for its conduct).

105. *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

106. *United States v. Tibbetts*, 646 F.2d 193, 195 (5th Cir. 1981).

107. *Armstrong*, 517 U.S. at 463.

108. *Id.* at 465; *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978).

2. Burden

The defendant carries a heavy burden to prove the existence of an invidious purpose because there is a presumption that a criminal prosecution is undertaken in good faith.[109] "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'"[110]

3. Pretrial Considerations

a. Pretrial Notice

This defense must be raised before trial to prevent waiver of this issue.[111] In addition, discovery is not available under Federal Rule of Criminal Procedure 16. To obtain discovery, the defendant must present "some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent."[112]

b. Evidence

The defendant must show that he has been singled out for prosecution, while others similarly situated who have committed the same acts have not been prosecuted.[113]

The government's selective prosecution of the defendant is constitutionally invidious if the government's acts were in bad faith, impermissibly motivated by racial or religious discrimination, or to prevent the defendant's exercise of his constitutional rights.[114] The government may exercise some

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109. *United States v. Sparks*, 2 F.3d 574, 580 (5th Cir. 1993); *United States v. Hoover*, 727 F.2d 387 (5th Cir. 1984); *Tibbetts*, 646 F.2d at 195–96 (failure to prove prosecutorial policy had discriminatory effect prevents review of prosecutorial intent); *see United States v. Ramirez*, 765 F.2d 438, 440 (5th Cir. 1985) (government's decision to prosecute cannot be challenged unless there is invidious element).

110. *Armstrong*, 517 U.S. at 465.

111. *United States v. Gary*, 74 F.3d 304, 313 (1st Cir. 1996).

112. *Armstrong*, 517 U.S. at 468.

113. *United States v. Jennings*, 724 F.2d 436, 445 (5th Cir. 1984); *United States v. Greene*, 697 F.2d 1229, 1234 (5th Cir. 1983).

114. *Jennings*, 724 F.2d at 445; *Sparks*, 2 F.3d at 580 (defendant must show that government selected case for prosecution "because of," rather than "in spite of," its adverse effect upon identifiable group); *United States v. Weber*, 162 F.3d 308, 334 (5th Cir. 1998) (invidious intent is proven if prosecutorial decision is premised on race, religion or desire to prevent defendant's exercise of constitutional rights); *United States v. Kahl*, 583 F.2d 1351, 1353 (5th Cir. 1978).

selectivity in selecting cases for close investigation and for prosecution.[115]

The remedy for a selective prosecution claim is dismissal.[116]

4. Trial Considerations

A selective prosecution claim does not offer a mitigation argument under the Federal Death Penalty Act because the challenge is to the prosecution rather than a defense to the crime.[117]

H. VENUE

The Constitution provides that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[118] This constitutional guarantee is codified in Federal Rule of Criminal Procedure 18.[119]

1. Elements

Venue is an element of the offense.[120] Some criminal statutes include a provision designating the proper venue, such as murder or manslaughter,[121] money laundering offenses,[122] or failure to pay child support.[123] Under 8 U.S.C. § 1329, there are special venue provisions for crimes set out in 8 U.S.C. §§ 1325 and 1326. Proper venue for eluding examination or inspection under 8 U.S.C. § 1325 is in the

115. *Ramirez*, 765 F.2d 438, 440; *see, e.g., Greene*, 697 F.2d at 1234 (prosecuting most vocal defendant who encouraged concerted action to violate law did not establish invidious intent); *Johnson*, 577 F.2d at 1309 (vigorously prosecuting tax protestors only demonstrates legitimate interest in punishing flagrant violators and deterring violations by others).

116. *United States v. Snype*, 441 F.3d 119, 141 (2d Cir. 2006).

117. *In re United States*, 397 F.3d 274, 284 (5th Cir. 2005).

118. U.S. CONST. art. III, § 2, cl. 3.

119. FED. R. CRIM. P. 18.

120. *United States v. Carreon-Palacio*, 267 F.3d 381, 390–91 (5th Cir. 2001) (citing *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir.1984)).

121. 18 U.S.C. § 3236.

122. 18 U.S.C. § 1956(i).

123. 18 U.S.C. § 228(e).

district where the crime was committed.[124]

There are additional venue provisions in 18 U.S.C. §§ 3231, *et. seq.*, including offenses that begin in one district and are completed in another district and offenses not committed in any district.[125] When the statute is silent, the "locus delicti of crime must be determined . . . from the nature of the crime alleged and location of act or acts constituting it."[126]

2. Burden

The prosecution bears the burden of proving by a preponderance of the evidence that the trial is in the same district as the crime's commission.[127]

3. Pretrial Considerations

Any challenge to venue must be made before trial or the defendant waives the right to object to venue.[128] If the indictment does not provide sufficient notice to the defendant of a venue deficiency, the objection is still timely if made at the close of the government's evidence.[129]

II. AFFIRMATIVE DEFENSES

A. DURESS

"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."[130] "[T]he 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

124. 2 Op. Off. Legal Counsel 110 (1978); *See United States v. Hernandez*, 189 F.3d 785, 792 (9th Cir. 1999).

125. 18 U.S.C. §§ 3237–3238.

126. *United States v. Cabrales*, 524 U.S. 1, 6–7 (1998).

127. *United States v. Carreon-Palacio*, 267 F.3d 381, 390–91 (5th Cir. 2001).

128. *Id.* at 391 n.26; *United States v. Solesbee*, 94 F. App'x 207 (5th Cir. 2004).

129. *Carreon-Palacio,* 267 F.3d at 393.

130. *United States v. Bailey*, 444 U.S. 394, 409-410 (1980).

conclusion of guilt even though the necessary mens rea was present."[131] Unlike a defense of necessity, duress involves coercion by a person to commit a criminal act, rather than physical forces justifying the act.[132] For example, "where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, as opposed to destroying the dike in necessity to protect more valuable land.[133]

1. Elements

To succeed on a duress defense, the defendant must show 1) that the defendant or a member of his family was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious body injury; 2) that he did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct; 3) that he had no reasonable legal alternative to violating the law (that is, he had no chance to refuse to do the criminal act and to avoid the threatened harm); and 4) that there was a direct causal relationship between the criminal action taken and the avoidance of the threatened harm.[134]

A duress defense "does not arise from 'choice' of several sources of action; it is instead based on real emergency and may be asserted only by defendant who was confronted with crisis as personal danger, crisis that did not permit selection from among several solutions, some of which would not have involved criminal acts."[135] As such, "[t]o establish the absence of a legal alternative a defendant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative."[136] Moreover, "the defense only arises if there is a real emergency leaving no time to pursue any legal alternative[,]" requiring "proof of absolute and uncontrollable necessity . . . ."[137]

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131. *United States v. Dixon*, 548 U.S. 1, 7 (2006) (internal quotations omitted).

132. *Bailey*, 444 U.S. at 409–10 ("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.").

133. *Id.*

134. *United States v. Dixon*, 413 F.3d 520, 523 (5th Cir. 2005), *aff'd*, 548 U.S. 1 (2006); *United States v. Willis*, 38 F.3d 170, 175 (5th Cir.1994); *United States v. Lui*, 960 F.2d 449, 454 (5th Cir. 1992); *United States v. Harper*, 802 F.2d 115, 118 (5th Cir. 1986).

135. *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982).

136. *United States v. Posado-Rios*, 158 F.3d 832, 874 (5th Cir. 1998) (internal quotation marks omitted).

137. *Id.*; *see Gant*, 691 F.2d at 1163 (continued possession of gun will undermine duress defense); *United States v. Chapman*, 455 F.2d 746, 749–50 (5th Cir. 1972) (failure to return to federal custody can establish intent for escape from federal custody charge).

2. Burden

The defendant bears the burden of proving duress by a preponderance of the evidence.[138]

3. Pretrial Considerations

No notice is required for the duress defense. However, if the defendant intends to present mental health evidence to support a duress defense, notice must be given under Federal Rule of Criminal Procedure 12.2.

4. Trial Considerations

a. Evidence

Evidence to support a duress defense must show that a person of ordinary firmness would succumb to the level of coercion present in a given set of circumstances.[139] In addition, evidence supporting the defendant's state of mind or to bolster the defendant's credibility can be admissible despite hearsay and relevancy objections.[140] Where duress is raised, even if a defendant does not testify, evidence of a prior conviction can be admitted to prove the defendant's criminal intent.[141]

b. Jury Instructions

"In determining whether a defendant has made a threshold showing of the elements of the [duress] defense, a court must objectively evaluate the facts presented by the defendant."[142] To allow a duress jury instruction, there must be evidence that, given the events supporting a duress defense, there

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138. *United States v. Dixon*, 548 U.S. 1, 8 (2006). *But see United States v. Santos*, 932 F.2d 244, 249 (3d Cir. 1991) (if the offense is a specific intent crime, then the government must prove each element beyond a reasonable doubt including disproving duress).

139. *Bailey*, 444 U.S. at 415 ("Vague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense."); *Dixon*, 413 F.3d at 523; *Willis*, 38 F.3d at 175 (denying evidence of battered woman syndrome because it is inherently subjective to abused defendant rather than reasonable person).

140. *United States v. Herrera*, 600 F.2d 502, 504–05 (5th Cir. 1979) (withholding evidence of coercion denied defendant fair trial even though court provided coercion jury instruction to jury).

141. *United States v. Zanabria*, 74 F.3d 590, 592 (5th Cir. 1996).

142. *United States v. Posado-Rios*, 158 F.3d 832, 873 (5th Cir. 1998); *see also Dixon*, 413 F.3d at 523; *Willis*, 38 F.3d at 175 (duress defense requires that reasonable person believe there is threat).

was no reasonable alternative other than committing the criminal act.[143] The duress defense does not preclude a jury instruction on a lesser included offense.[144]

If the district court denies a duress jury instruction, the defendant is not barred from arguing that the government has failed to prove her intent beyond a reasonable doubt.[145] Similarly, the government may argue in closing—without violating a defendant's right to not testify—that the defense has failed to deliver on its promise to provide a duress defense.[146]

5. Sentencing

At sentencing the defendant can argue for a downward departure under U.S. Sentencing Commisison policy statement §5K2.12, or a variance under 18 U.S.C. § 3553(a), based on an imperfect duress defense.[147] At sentencing, the district court may consider subjective factors demonstrating duress, but not to determine criminal liability.[148]

B. NECESSITY

Necessity is "[a] justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions."[149] With the defense of necessity, the traditional view has been that the pressure must come from a physical force of nature, rather than from other human beings.[150]

While the Fifth Circuit has not addressed this issue, the Supreme Court has stated that "it is an

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143. *Bailey*, 444 U.S. at 410–11*; see United States v. Panter*, 688 F.2d 268 (5th Cir.1982) (recognizing duress defense when bartender, who is felon, reached for gun to protect himself from drunk convicted murderer). *But see United States v. Tannehill*, 49 F.3d 1049, 1057 (5th Cir.1995); *United States v. Lambert*, 984 F.2d 658, 661-62 (5th Cir.1993); *United States v. Harvey*, 897 F.2d 1300, 1304-05 (5th Cir.1990); *United States v. Harper*, 802 F.2d 115, 118 (5th Cir. 1986); *United States v. Mejia*, 720 F.2d 1378, 1382 (5th Cir. 1983); *United States v. Colacurcio*, 659 F.2d 684, 690 (5th Cir. 1981).

144. *United States v. Deisch*, 20 F.3d 139, 152 (5th Cir. 1994), *overruled on other grounds by Apprendi v. New Jersey*, 530 U.S. 466 (2000).

145. *Posada-Rios*, 158 F.3d at 875.

146. *Zanabria*, 74 F.3d at 592–93.

147. *United States v. Harris*, 104 F.3d 1465, 1477 (5th Cir. 1997); *see also United States v. Vela*, 927 F.2d 197, 200 (5th Cir. 1991).

148. *Willis*, 38 F.3d at 176; *United States v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992) (at sentencing, district court could consider subjective factors, such as evidence on special vulnerability of those suffering from battered woman's syndrome).

149. BLACK'S LAW DICTIONARY 1053 (7th ed. 1999).

150. 2 WAYNE R. LAFAVE, *Substantive Criminal Law* §10.1 (2d ed. 2003).

open question whether federal courts ever have authority to recognize a necessity defense not provided by statute."[151]

1. Elements

To succeed on a necessity defense, the defendant must show that 1) he or a member of his family was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious body injury; 2) he did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct; 3) he had no reasonable legal alternative to violating the law (that is, he had no chance to refuse to do the criminal act and to avoid the threatened harm); and 4) there was a direct causal relationship between the criminal action taken and the avoidance of the threatened harm.[152]

"[I]f there was a reasonable, legal alternative to violating the law, . . . the defense will fail."[153] To assert the necessity defense, the defendant must show a "direct causal relationship could be reasonably anticipated between the proscribed action and the avoidance of the threatened harm."[154] The assessment of available legal alternatives must be reasonable.[155] The threat of death or serious bodily injury must be present to support a necessity defense.[156]

2. Burden

The defendant bears the burden of proving a necessity defense by a preponderance of the evidence.[157]

3. Trial Considerations

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151. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001).

152. *United States v. Gant*, 691 F.2d 1159, 1162–63 (5th Cir. 1982). *But see Bailey*, 444 U.S. at 409–10 (suggesting that protection of property could support defense: if "A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity").

153. *Bailey*, 444 U.S. at 410; *see, e.g., United States v. Morgan*, 311 F.3d 611, 616 (5th Cir. 2002) (defendant had reasonable legal alternative to leave dead birds of other hunters behind under Migratory Bird Treaty Act).

154. *Gant*, 691 F.2d at 1164.

155. *United States v. Posada-Rios*, 158 F.3d 832, 874–75 (5th Cir. 1998).

156. *United States v. Sidhu*, 130 F.3d 644, 649 (5th Cir. 1997) (defendant's necessity for employment did not support necessity defense; instead, it merely established physician's superior role).

157. *Gant*, 691 F.2d at 1165.

The defendant's prior drug-related activities may be relevant to rebut his necessity defense.[158]

C. SELF-DEFENSE

Self-defense is available when a defendant acts criminally in order to protect himself from a real or threatened attack.[159]

1. Elements

Like the elements of duress, the elements of self-defense are: 1) the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; 2) he had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; 3) he had no reasonable, legal alternative to violating the law (a chance both to refuse to do the criminal act and also to avoid the threatened harm); and 4) a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.[160] An additional element—the failure to retreat—may be considered when assessing the defendant's legal alternatives, and may be a factor for the jury to consider.[161]

In an assault on a federal officer case, under18 U.S.C. § 111, the defense is available only if the defendant acted in response to excessive force.[162] The defendant must establish that he was reasonably mistaken or lacked knowledge concerning the officer's authority.[163]

2. Burden

The defendant has the burden of production, but not proof, when asserting a self-defense

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158. *United States v. Dotson*, 799 F.2d 189, 194 (5th Cir. 1986) (allowing government's insinuation that defendant's drug dealings placed him in dangerous situation was not abuse of discretion).

159. BLACK'S LAW DICTIONARY 1364 (7th ed. 1999).

160. *United States v. McGee*, 29 F.3d 625, 1994 WL 395111, at *6 (5th Cir. 1994) (unpublished); *United States v. Harper*, 802 F.2d 115, 117 (5th Cir. 1986)*; accord United States v. Bello*, 194 F.3d 18, 26–27 (1st Cir. 1999); *United States v. Haynes*, 143 F.3d 1089, 1090 (7th Cir. 1998); *United States v. Villegas*, 899 F.2d 1324, 1343–44 (2d Cir. 1990).

161. *Brown v. United States*, 256 U.S. 335, 343 (1921); *United States v. Blevins*, 555 F.2d 1236, 1239 (5th Cir. 1997).

162. *United States v. Earnest*, 116 F. App'x 538, 538–39 (5th Cir. 2004) (per curiam).

163. *United State v. Montoya*, 676 F.2d 428, 432 (10th Cir. 1982)*; cf. United States v. Ochoa*, 526 F.2d 1276, 1282 (5th Cir. 1976) (holding evidence sufficient to support defendant's knowledge that intruders were federal agents, undermining his claim of defense of property and defense of others).

claim.[164] When a self-defense claim is brought in response to a felon-in-possession charge,[165] the Third, Ninth, and Eleventh Circuits have held that the defendant carries the burdens of production and proof.[166]

3. Pretrial Considerations

The Fifth Circuit has allowed multiple and contradicting defenses, including self-defense and a claim that the murder was an accident.[167]

When a defendant's self-defense claim requires corroboration from his co-defendants, a motion to sever should be filed.[168]

4. Trial Considerations

a. Evidence

While evidence of a victim's character or other bad acts can be admitted under Federal Rules of Evidence 404(a) or 404(b), it may also be excluded as irrelevant, prejudicial, or cumulative to an element of self-defense.[169] In addition, extrinsic evidence regarding the defendant can be excluded if it undermines his self-defense claim.[170]

Evidence supporting a defendant's claim of self-defense can also support evidence of guilt, such

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164. *United States v. Branch*, 91 F.3d 699, 714 (5th Cir. 1996).

165. *United States v. Panter*, 688 F.2d 268, 271–72 (5th Cir. 1982) (self-defense claim was available to defendant facing felon-in-possession charge); *United States v. Sands*, 246 F. App'x 859, 860–61 (5th Cir. 2007) (per curiam).

166. *United States v. Beasley*, 346 F.3d 930, 934–35 (9th Cir. 2003); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000); *United States v. Deleveaux*, 205 F.3d 1292, 1299 (11th Cir. 2000).

167. *United States v. Browner*, 889 F.2d 549, 555 (5th Cir. 1989).

168. *United States v. Wilson*, 116 F.3d 1066, 1084 (5th Cir. 1972) (co-conspirators could testify that victims were reaching for gun before murder occurred).

169. *See United States v. Gulley*, 526 F.3d 809, 817 (5th Cir. 2008) (victim's alleged propensity for violence was not essential element of defendant's self-defense claim, which could be proven regardless of victim's violent disposition); *United States v. Caldwell*, 257 F. App'x 764, 768–69 (5th Cir. 2007) (per curiam) (victim's job evaluation was not probative of victim's violent character and was substantially outweighed by unfair prejudice). *But see United States v. McIntire*, 461 F.2d 1092, 1092–93 (5th Cir. 1972) (reversing conviction after district court refused to admit testimony from witnesses that defendant was beaten by victim when he was intoxicated).

170. *United States v. Levario Quiroz*, 854 F.2d 69, 73–74 (5th Cir. 1988) (admitting evidence that defendant had been indicted for another shooting where he claimed self-defense was plain error).

as the government's contention that the defendant had constructive possession of the firearm.[171]

b. Jury Instructions

A self-defense instruction should be phrased in such a way as to make clear that the government bears the ultimate burden of proof, especially when instructing the jury on a defendant's duty to retreat.[172] The absence of a self-defense jury instruction can be remedied by alternate instructions including a willfulness and excessive force instruction.[173]

c. *Brady* Considerations

The government must disclose evidence that supports the defendant's claim of self-defense, including the victim's criminal history.[174]

5. Sentencing

A self-defense claim will not prevent an enhancement for possession of a firearm under U.S.S.G. §2K2.1(c)(1).[175]

D. BATTERED SPOUSE'S SYNDROME

While the battered spouse syndrome is not well-received under federal law, this syndrome can be the basis of or support an underlying justification defense—i.e., duress or self-defense—if it satisfies the elements of these defenses.[176]

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171. *See United States v. Reed*, 277 F. App'x 357, 362 (5th Cir. 2008) (per curiam) (a defensive motive to protect self and others for possessing firearm after robbery provided evidence of constructive possession).

172. *Blevins*, 555 F.2d at 1239 ("We apprehend that the better practice when instructing on the theory of self-defense is to phrase the instructions positively rather than negatively as the trial court did in this case. The trial court, in effect, instructed that defendant was required to retreat unless he had reasonable grounds to believe and actually did believe that he was in imminent danger of death or serious bodily harm. We think that the better instruction would provide that defendant was not required to retreat if he had reasonable grounds to believe and actually did believe that he was in imminent danger of death or serious bodily harm.").

173. *United States v. Teel*, 299 F. App'x 387, 389 (5th Cir. 2008) (per curiam).

174. *United States v. Agurs*, 427 U.S. 97 (1976); *Martinez v. Wainwright*, 621 F.2d 184, 1888 (5th Cir. 1980); *cf. Braswell v. Wainwright*, 463 F.2d 1148, 1157 (5th Cir. 1972) (excluding witness on procedural grounds violated defendant's Sixth Amendment rights when witness was only witness to corroborate defendant's self-defense claim).

175. *United States v. Calton*, 117 F. App'x 982, 983–84 (5th Cir. 2004) (per curiam).

176. *United States v. Dixon*, 413 F.3d 520, 523 (5th Cir. 2005), *aff'd*, 548 U.S. 1 (2006); *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994).

1. Elements

See the elements of self-defense or duress defense.

2. Burden

See the elements of self-defense or duress defense.

3. Pretrial Considerations

Notice may be required if the individual will rely on expert testimony or a mental health defense.[177]

Even if it is likely that evidence of battered spouse syndrome will be excluded at trial, this evidence should be requested to assist at sentencing. As such, this type of evidence, including a psychological or psychiatric examination, may be useful at trial and sentencing.[178]

4. Trial Considerations

a. Evidence

To satisfy the elements of duress or self-defense, the evidence must establish that a person of ordinary firmness would succumb to the level of coercion or threat present.[179] However, battered spouse syndrome evidence "seeks to establish that, because of her psychological condition, the defendant is unusually susceptible to the coercion.[180]" This is a subjective response rather than an objectively reasonable one.

The element of imminent threat must also be satisfied. Because a person with a history of being battered would respond differently to a threat or coercion, such evidence would not satisfy a well-grounded "fear of death or serious bodily injury."[181]

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177. FED. R. CRIM. P. 12.2, 16.

178. *Willis*, 38 F.3d at 176; *United States v. Smith*, 987 F.2d 888, 891 (2d Cir. 1993) (holding it was error to deny funds for psychiatric evidence for subjective evidence of battered woman syndrome because it was relevant at sentencing); *United States v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992) (remanding case for resentencing in light of subjective factors related to battered woman's syndrome).

179. *Willis*, 38 F.3d at 176–77.

180. *Id.* at 175.

181. *Id.*

In order to admit evidence of the battered spouse syndrome, avoid references to special vulnerability or subjective responses, and instead argue that the evidence is admissible to support an element of a recognized defense or to show how a reasonable person would respond.[182]

5. Sentencing

Evidence of battered spouse syndrome can be submitted at sentencing because policy statement §5K2.12 allows for subjective evidence—"as the defendant believed them to be."[183]

E. DEFENSE OF OTHERS

Defense of others is an affirmative defense for murder, voluntary manslaughter, and assault.[184] A person may use a reasonable amount of force in defending against an attack without being guilty of assault.[185] The right to defend a victim from attack does not exceed the victim's ability to defend himself.[186]

1. Elements

To assert this defense, the defendant must prove that a reasonable person in the defendant's position 1) would have believed that intervention was necessary to protect a third person, and 2) the third person would have been justified in using similar force to protect himself.[187]

2. Burden

The burden of production and proof is on the defendant.[188]

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182. Richard Coughlin et al., *Specific Defenses (Non-Mental Health)*, *in* 1 DEFENDING A FEDERAL CRIMINAL CASE 8-431, 8-447 (2010).

183. *Willis*, 38 F.3d at 176; *Smith*, 987 F.2d at 891 (2d Cir. 1993) (holding it was error to deny funds for psychiatric evidence for subjective evidence of battered woman syndrome, because it was relevant at sentencing); *Johnson*, 956 F.2d at 898 (remanding case for resentencing in light of subjective factors related to battered woman's syndrome).

184. *United States v. Branch*, 91 F.3d 699, 714 (5th Cir. 1996) (murder and voluntary manslaughter); *United States v. Grimes*, 413 F.2d 1376, 1379 (7th Cir. 1969) (assault).

185. *Grimes*, 413 F.2d at 1379.

186. *Id.*

187. *Id.*; *United States v. Bakhtiari*, 913 F.3d 1053 (2d Cir. 1990).

188. *Grimes*, 413 F.3d at 1379.

3. Pretrial Considerations

Government's conduct that prevents access to a possible witness who can corroborate the defense-of-another theory may result in dismissal of the indictment.[189]

4. Trial Considerations

a. Jury Instructions

There must be sufficient evidence to support a defense-of-others jury instruction.[190]

b. Evidence

The defendant's claim of defending others can be undermined by events preceding the criminal act.[191] A defendant's rationale justifying a criminal act, while supporting an accused's theory of defense of others, can provide evidence of an element of the offense and negate the theory of defense in light of all the evidence.[192]

F. DEFENSE OF PROPERTY

"When an individual's lawful possession of property is threatened by the unlawful conduct of another, that individual may take reasonable steps, including the use of force, to prevent or terminate such interference with the property."[193]

1. Elements

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189. *United States v. Hernandez*, 347 F. Supp. 2d 375 (S.D. Tex. 2004) (defendant was deprived of Fifth Amendment right to due process and Sixth Amendment right to compulsory process when government deported witness to alleged assault of federal officer).

190. *See United States v. Ramos*, 537 F.3d 439, 465 (5th Cir. 2008) (jury instructions supported theory of defense that defendants were responding defensively to threatening behavior). *But see United States v. Davis*, 423 F.2d 974, 975 n.1 (5th Cir. 1970) (defendant not entitled to acquittal for assault of federal officer because he was acting to defend his father from death or injury).

191. *United States v. Harris*, 932 F.2d 1529, 1537 (5th Cir. 1991) (seeking out and provoking an argument with victim countermined defendant's defense of his brother theory); *United States v. Ochoa*, 526 F.2d 1278, 1282 (5th Cir. 1976) (defendant's claim that he was protecting his family and home from intruders was undermined by evidence that agents knocked at front and back door, stated their identity, wore uniforms, and defendant continued his siege after ambulance arrived).

192. *See United States v. Reed*, 277 F. App'x 357, 362 (5th Cir. 2008) (defensive motive to protect self and others for possessing firearm after robbery provided evidence of constructive possession).

193. Richard Coughlin et al., *Specific Defenses (Non-Mental Health)*, *in* 1 DEFENDING A FEDERAL CRIMINAL CASE 8-431, 8-432 (2010).

"To justify the use of force, the defender of property must reasonably believe: (1) his property is in immediate danger of unlawful entry, trespass, or carrying away; (2) the use of force is necessary to avoid this danger; and (3) there is no time to resort to the law for the protection of the property."[194] The threat of loss of an individual's property can justify a reasonable use of force, but it can never justify deadly force.[195]

For an assault against a federal officer pursuant to 18 U.S.C. § 111, this defense is available if the accused was unaware of the victim's federal employment status.[196]

2. Burden

The burden of proof belongs to the defendant.[197]

3. Trial Considerations

a. Jury Instructions

The events supporting a defense of property defense must be sufficient and plausible to merit a jury instruction.[198]

b. Evidence

A defendant's belief that intruders were entering his home could justify a criminal act, but this belief can be negated by circumstantial evidence that indicates defendant knew the persons attempting to

194. *Id.*

195. *See Wallace v. United States*, 162 U.S. 466, 473–74 (1896) ("[A] person cannot repel a mere trespass on his land by the taking of life, or proceed beyond what necessity requires. When he uses in the defense of such property a weapon which is not deadly, and death accidentally ensues, the killing will not exceed manslaughter; but when a deadly weapon is employed it may be murder or manslaughter."); *United States v. Gant*, 691 F.2d 1159, 1163 n.7 (5th Cir. 1982) ("the threat of loss of property without more never justifies the use of deadly force") (citing *McNabb v. United States*, 123 F.2d 848, 854 (5th Cir.1941)).

196. *Ochoa*, 526 F.2d at1282.

197. Richard Coughlin et al., *Specific Defenses (Non-Mental Health)*, *in* 1 DEFENDING A FEDERAL CRIMINAL CASE 8-431, 8-432 (2010).

198. *United States v. Barnett*, 492 F.2d 790, 791 (5th Cir. 1974) (refusing reasonableness of force instruction when defendant quickly assaulted federal officer and there was "engaged in the performance of (his) official duties' instruction").

enter the home were federal agents.[199]

G. ENTRAPMENT

Entrapment is an affirmative defense designed to ensure that persons not be held criminally liable for acts which they were induced to commit—without predisposition to engage in such activity— by law enforcement officials.[200] This is a court-created limitation on governmental activity, as opposed to a constitutional doctrine.[201] The purpose of this defense is to inhibit the use by the Government of pressure tactics which cause the commission of an offense by one who is not ordinarily predisposed to commit it.[202]

1. Elements

The defendant must make a prima facie showing of 1) governmental involvement or inducement more substantial than simply providing an opportunity or facilities to commit the offense of the crime, and 2) the defendant's lack of predisposition to commit the offense.[203]

a. Evidence of Inducement

Government inducement consists of creative activity on the part of law enforcement which spurs the commission of a crime by another individual.[204] The inducement does not need to overpower the will

199. *Ochoa*, 526 F.2d at 1282 (defendant's claim that he was protecting his family and home from intruders was undermined by evidence that agents knocked at the front and back door, stated their identity, wore uniforms, and defendant continued his siege after ambulance arrived).

200. *United States v. Reyes*, 239 F.3d 722, 739 (5th Cir. 2001); *United States v. Brace*, 145 F.3d 247, 257 (5th Cir. 1998) (entrapment is affirmative defense); *United States v. Thompson*, 130 F.3d 676, 689 (5th Cir. 1997); *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 197 (5th Cir. 1992); *United States v. Johnson*, 872 F.2d 612, 621 (5th Cir. 1989); *United States v. Arteaga*, 807 F.2d 424, 425 (5th Cir. 1986); *United States v. Lentz*, 624 F.2d 1280, 1286 (5th Cir. 1980); *United States v. Gonzalez*, 606 F.2d 70, 75 (5th Cir. 1979); *United States v. Bower*, 575 F.2d 499, 503–04 (5th Cir. 1978).

201. *United States v. Russell*, 411 U.S. 423, 430–35 (1972); *Ainsworth v. Reed*, 542 F.2d 243, 244 (5th Cir. 1976).

202. *United States v. Fink*, 502 F.2d 1, 4–5 (5th Cir. 1974), *rev'd on other grounds sub nom. Geders v. United States*, 425 U.S. 80 (1976).

203. *Mathews v. United States*, 485 U.S. 58, 62–63 (1988); *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir. 2009); *United States v. Jones*, 473 F.2d 293, 394 (5th Cir. 1973); *see United States v. Goodwin*, 625 F.2d 693, 697–98 (5th Cir. 1980) (defendant must show that government's conduct created substantial risk that offense would be committed by person not otherwise ready to commit offense); *United States v. Johnson*, 872 F.2d 612, 620–21 (5th Cir. 1989).

204. *United States v. Bradfield*, 113 F.3d 515, 521 (5th Cir. 1997); *United States v. Melchor Moreno*, 536 F.2d 1042, 1051 (5th Cir. 1976) (criminal design can still be attributed to government even if it implants idea and disappears); *United States v. Dodson*, 481 F.2d 656, 657 (5th Cir. 1973) (government afforded opportunity for illegal sale, but defendant drove to and initiated sale); *Gargano v. United States*, 24 F.2d 625, 625–26 (5th Cir. 1928) (test is whether offense originated in mind of accused or in mind of official).

of the accused, nor need it consist of threats, coercion or deceit.[205] While government infiltration of criminal activity is a permissible means of investigation,[206] when law officers envisage crime, plan it, and activate its commission by one not theretofore intending its perpetration, or where officers pursue tactics which offend common concepts of decency, then inducement can be established.[207] However, other actions or factors concerning the defendant—such as defendant's need for money or quibbling over price—can contradict a claim of inducement.[208]

To constitute entrapment, it must be shown that the government was involved, directly or indirectly, in the creation of the crime. If the government denies prior knowledge or direct involvement in a scheme to entrap, an entrapment defense is still available as long as "the government and entrapper have an established relationship such that government is estopped from denying responsibility."[209]

Moreover, entrapment does not occur if a private citizen, as opposed to a governmental agent, induces the defendant or initiates the criminal activity.[210] However, if the entrapment was perpetrated by

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205. *Bradfield*, 113 F.3d at 522; *Thompson*, 130 F.3d at 689.

206. *United States v. Tobias*, 662 F.2d 381, 386 (5th Cir. 1981) (government infiltration of criminal activity is recognized and permissible means of investigation); *Theagene*, 565 F.3d at 922 (government may conduct undercover operations or otherwise employ artifice and stratagem to catch criminals).

207. *United States v. Rubio*, 834 F.2d 442, 450 (5th Cir. 1987) (government's constant contact with defendant via mail established inducement element); *Tobias*, 662 F.2d at 386 (government may not instigate criminal activity, provide place, equipment, supplies and know-how, and run entire operation with only meager assistance from defendant without violating fundamental fairness); *United States v. Anderton*, 629 F.2d 1044 (5th Cir. 1980) (government's actions to pressure informant to contact accused constituted implanting illegal purpose, even if informant was ignorant government pawn); *Goodwin*, 625 F.2d at 697–98 (government employee and informer "begged" him to take part in criminal activity); *Badon v. United States*, 269 F.2d 75, 80 (5th Cir. 1959); *Hunter v. United States*, 62 F.2d 217, 219–20 (5th Cir. 1932) (informant's request to defendant to assist his sick mother by purchasing alcohol was sufficient evidence of inducement to present to jury).

208. *United States v. Reyes*, 645 F.2d 285, 287–88 (5th Cir. 1981) (no inducement when government informant made contact at defendant's request and government agent was the third buyer); *United States v. Bower*, 575 F.2d 499, 504 (5th Cir. 1978) (defendant's coordination of sale contradicted inducement element); *United States v. Anders*, 485 F.2d 562, 563 (5th Cir. 1973) (defendant's hesitation as to heroin price did not support inducement claim when he was known as heroin dealer and informant connected him with agent); *Eisenhardt v. United States*, 406 F.2d 449, 451 (5th Cir. 1969) (evidence that defendant was badly in need of money and in national organization capable of supplying large quantities of narcotics contradicted inducement element).

209. *Anderton*, 629 F.2d at 1047 (citing *United States v. Perl*, 584 F.2d 1316, 1322 n.5 (4th Cir. 1978)).

210. *United States v. Ogle*, 328 F.3d 182, 187 (5th Cir. 2003); *United United States v. Barnett*, 197 F.3d 138, 143 (5th Cir. 1999) (private citizen who worked out at the same gym as agent, who offered to "take care of him" for assistance, was not sufficient); *United States v. Sarmiento*, 786 F.2d 665, 667 (5th Cir. 1986) (without agreement with government, middleman's inducing comments to defendant does not permit entrapment defense); *Goodwin*, 625 F.2d at 697 ("Entrapment occurs only when the criminal conduct was the product of the creative activity of law enforcement officials."); *United States v. Garcia*, 546 F.2d 613, 615 (5th Cir. 1977) (citing *Pearson v. United States*, 378 F.2d 555 (5th Cir. 1977)); *States v. Maddox*, 492 F.2d 104, 106 (5th Cir. 1974) (private investigators that completed investigation did not constitute government agents); *Henderson v. United States*, 237 F.2d 169, 175 (5th Cir. 1956) (state officer's inducement satisfies government inducement element allowing entrapment defense for federal offense).

a government surrogate, a derivative entrapment defense is still available.[211]

Expert psychiatric testimony is admissible to demonstrate that a "mental disease, defect or subnormal intelligence makes defendant peculiarly susceptible to inducement."[212] The expert, after demonstrating a proper factual basis specific to the defendant, may testify that the defendant's mental disease, defect, or intelligence made him more susceptible to the government's inducement and incapable of forming the specific mens rea for the offense.[213]

b. Evidence of Predisposition

Predisposition turns on "whether the defendant intended, was predisposed, or was willing to commit the offense before first being approached by government agents."[214] The following factors are assessed to determine if the defendant is predisposed to the criminal activity: 1) the defendant's ready and willing participation in government-solicited criminal activity; 2) the defendant's eagerness (as opposed to significant hesitation or unwillingness); 3) the defendant's desire for profit; 4) the defendant's demonstrated knowledge or experience with the criminal activity under investigation; 5) the defendant's character, including past criminal history; 6) whether the government first suggested criminal activity; and 7) the nature of the inducement offered by the government.[215]

The predisposition of the defendant is assessed before any contact with the government official;[216] nonetheless, actions before and after commission of the crime may be considered for predisposition.[217] However, significant and persistent government encouragement, if precipitating

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211. *United States v. Waddell*, 507 F.2d 1226, 1227 (5th Cir. 1975) (citing *Sherman v. United States*, 356 U.S. 369 (1958), and *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974)) ("[A] paid Government informer, could entrap [defendant], even though no Government officer knew of [informer]'s actions, because the Government is deemed to have constructive knowledge of such chicanery.").

212. *United States v. Newman*, 849 F.2d 156, 165 (5th Cir. 1988).

213. *Id.*

214. *United States v. Theagene*, 565 F.3d 911, 921 (5th Cir. 2009); *see United States v. Fink*, 502 F.2d 1, 5 (5th Cir. 1974), *rev'd on other grounds sub nom. Geders v. United States*, 425 U.S. 80 (1976); *United States v. Bradsby*, 628 F.2d 901, 903 (5th Cir. 1980) (defendant's intent or predisposition to commit crime is a factual inquiry for jury resolution).

215. *Theagene*, 565 F.30 at 921; *United States v. Reyes*, 239 F.3d 722, 739 (5th Cir. 2001); *see United States v. Wolffs*, 594 F.2d 77, 79–90 (5th Cir. 1979).

216. *United States v. Mora*, 994 F.2d 1129 (5th Cir. 1993); *United States v. Cantu*, 876 F.2d 1134, 1137 (5th Cir. 1989).

217. *United States v. Kang*, 934 F.2d 621, 624–27 (5th Cir. 1991) (holding government's argument that evidence of defendant's regulatory violation supported argument that defendant was predisposed to offer bribe was reversible error); *United States v. Rubio*, 834 F.2d 442, 451 (5th Cir. 1987) (prior possession of child pornography can establish predisposition to mailing child pornography offense); *United States v. Aguirre Aguirre*, 716 F.2d 293, 301 (5th Cir. 1983) (defendant's actions before and after crime indicated strong predisposition, it was not error to deny informant's testimony).

defendant's eager acceptance of opportunity to commit an illegal act, counters an argument that defendant was predisposed.[218]

The client does not need to testify to prove the entrapment defense, particularly lack of predisposition.[219] On the other hand, hearsay evidence may not be admitted to support the defendant's lack of predisposition.[220]

2. Burden

The defendant bears the burden of production to raise the entrapment defense.[221] The defendant must make a prima facie case—through production of evidence—that the government's conduct created a substantial risk of entrapment.[222] If this burden is met, the defendant is entitled to a jury instruction and the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the criminal act.[223]

3. Pretrial Considerations

If the defendant will rely on mental health evidence to support her entrapment defense, she must give notice under Federal Rule of Criminal Procedure 12.2(b) and (c).[224] In addition, Rule 16 requires notice of the defendant's intent to use expert testimony.[225]

4. Trial Considerations

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218. *United States v. Sandoval*, 20 F.3d 134, 138 (5th Cir. 1994) (government agent "doggedly steered" defendant toward a bribe despite his reluctance during initial stages).

219. *United States v. Bradfield*, 113 F.3d 515, 523 n.26 (5th Cir. 1997) (testimony from employer that accused was hard-working husband and father provided evidence that he was not predisposed to commit crime).

220. *Id.* at 523 (citing *United States v. Webster*, 649 F.2d 346, 347 (5th Cir. 1981)).

221. *United States v. Smith*, 481 F.3d 259, 262–63 (5th Cir. 2007); *United States v. Hill*, 626 F.2d 1301 (5th Cir. 1980); *United States v. Gonzalez* 606 F.2d 70, 75 (5th Cir. 1979).

222. *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir. 2009).

223. *Id.*

224. FED. R. CRIM. P. 12.2.; *see United States v. Sandoval-Mendoza*, 475 F.3d 645 (9th Cir. 2007); *United States v. Newman*, 849 F.2d 156 (1st Cir. 1988).

225. FED. R. CRIM. P. 16.

If the defendant creates a prima facie case of entrapment, he is entitled to a jury instruction.[226] When a reasonable jury cannot find that the government discharged its burden of proving that defendant was predisposed to commit charged crime, then entrapment can be declared as a matter of law.[227]

Previously, a defendant could not rely on the defense of entrapment and simultaneously deny commission of the criminal acts, because entrapment is premised on commission of the offense.[228] However, the Supreme Court and the Fifth Circuit subsequently rejected this position and allowed for an entrapment defense if there is sufficient evidence to support a jury instruction, regardless of the defendant's admission of committing the offense.[229]

After the defendant raises entrapment, the government may introduce hearsay testimony concerning defendant's past reputation as it relates to both the defendant's predisposition to commit a crime and the reasonableness of conduct by government agents.[230]

H. WITHDRAWAL

The defendant can contest the intent element required for a conspiracy if there is evidence that he withdrew from the conspiracy.[231]

1. Elements

226. *Theagene*, 565 F.30 at 921. *But see United States v. Hanna*, 639 F.2d 192, 194 (5th Cir. 2009) (after offense was committed, assurances made over telephone by police was insufficient to constitute entrapment); *United States v. Martinez*, 894 F.2d 1445, 1450 (5th Cir. 1990) (government tactics—such as persuasion, pleas based on need, sympathy or friendship—was not element of entrapment required to be included in jury instruction); *Dodson*, 481 F.2d at 657–58 (because of accused's lack of contact with government agents, defendant lacked standing to raise entrapment defense when he assisted his partner in completing sale).

227. *United States v. Nation*, 764 F.2d 1073, 1078 (5th Cir. 1985).

228. *United States v. Brooks*, 611 F.2d 614, 618 (5th Cir. 1980) (no error in jury instruction where defendant denied selling guns to prohibited person); *United States v. Williamson*, 482 F.2d 508, 515 (5th Cir. 1973) (defendant who proclaimed innocence not entitled to an entrapment instruction); *Rodriguez v. United States*, 227 F.2d 912, 914 (5th Cir. 1955) (defense was not available when defendant denied transporting heroin). *But see United States v. Groessel*, 440 F.2d 602, 605 (5th Cir. 1971) (not guilty plea does not undermine the defense of entrapment).

229. *United States v. Mathews*, 485 U.S. 58 (1988) (entrapment defense is available even if defendant denies one or more elements of offense); *United States v. Greenfield*, 554 F.2d 179, 181–82 (5th Cir. 1977) (recognizing that defendant cannot deny commission of offense and present the entrapment defense; however, evidence presented by government can still establish entrapment); *United States v. Harrell*, 436 F.2d 606, 611–12 (5th Cir. 1970) (allowing entrapment jury instruction in conspiracy case even though defendant denied committing offense).

230. *United States v. Robinson*, 446 F.2d 562, 563–64 (5th Cir. 1971).

231. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 463–44 (1978).

This defense requires that the defendant show that he affirmatively took actions inconsistent with the object of the enterprise and communicated his intent to withdraw in a manner reasonably calculated to reach his cohorts.[232]

The defendant's actions or statements supporting a withdrawal defense must be of the defendant's volition.[233]

2. Burden

The burden of proving the affirmative act of withdrawal is on the defense.[234]

3. Jury Instructions

A jury instruction, stating that the jury must determine whether the defendant's statements to a government agent constituted disavowal of a conspiracy, has been upheld on plain error review.[235]

I. ABANDONMENT

"The abandonment, renunciation, or withdrawal of a criminal attempt occurs when the individual voluntarily forsakes his or her criminal plan prior to committing an overt act in furtherance of that plan."[236] The Fifth Circuit, along with the Ninth Circuit, has rejected this defense because if the defendant withdraws before forming the necessary intent or taking a substantial step toward commission of offense, then the crime of attempt cannot be proved.[237] The First, Second, Third, and Eleventh Circuits acknowledges this affirmative defense.[238]

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232. *Id.*; *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir. 1993); *United States v. Jimenez*, 622 F.2d 753, 755 (5th Cir. 1980).

233. *Stouffer*, 986 F.2d at 822 (defendant's forcible removal from bank presidency did not support withdrawal defense for mail and wire fraud).

234. *Jimenez*, 622 F.2d at 757.

235. *Jimenez*, 622 F.2d at 757–58.

236. 21 AM. JUR. 2D *Criminal Law* § 157 (2010).

237. *United States v. Shelton*, 30 F.3d 702, 706 (5th Cir. 1994) (rejecting defense); *see also United States v. Bussey*, 507 F.2d 1096, 1098 (9th Cir. 1974) (same),

238. *See United States v. Buttrick*, 432 F.3d 373, 377 (1st Cir. 2005) (acknowledges this affirmative defense of abandonment but reserves the question of the availability of the abandonment defense); *United States v. Crowley*, 318 F.3d 401, 411–11 (2d Cir. 2003) (same); *United States v. Davis*, 41 F. App'x 566, 573 (3d Cir. 2002) (this defense is available if the abandonment was voluntary); *United States v. McDowell*, 705 F.2d 426, 428 (11th Cir. 1983) (acknowledges the affirmative defense of abandonment).

J. VOLUNTARY INTOXICATION

The defense of voluntary intoxication can only be asserted when specific intent is an element of the crime charged.[239] Evidence of disease, intoxication, or trauma is proper for consideration by the jury to determine whether a sufficient degree of intoxication existed to negate such intent.[240] The use of this defense was held to not be a fundamental principle of justice such that a statutory prohibition to utilize this defense did not violate due process.[241]

1. Elements

The offense must be a specific intent crime and there must be a sufficient degree of intoxication to undermine the intent.[242]

2. Burden

The burden of proving specific intent beyond a reasonable doubt is on the government; however, the defendant bears the burden of production.[243]

3. Pretrial Considerations

Federal Rule of Criminal Procedure 12.2(b) and (c) requires the defendant to give notice of the intent to introduce "evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case."[244] In addition, Federal Rule of Criminal Procedure 16 requires notice of the defendant's intent to use expert testimony.[245]

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239. *United States v. Sam*, 467 F.3d 857, 862 (5th Cir.2006) (citing *United States v. Romano*, 482 F.2d 1183 (5th Cir.1973)); *United States v. Molina-Uribe*, 853 F.2d 1193, 1205–06 (5th Cir.1988), *overruled on other grounds by United States v. Bachynsky*, 934 F.2d 1349 (5th Cir.1991); *United States v. Caples*, 391 F.2d 1018, 1022–23 (5th Cir.1968)).

240. *Id.*

241. *Montana v. Egelhoff*, 518 U.S. 37 (1996).

242. *United States v. Martinez-Martinez*, 369 F.3d 1076, 1083–84 (9th Cir. 2004); *United States v. Crowley*, 236 F.3d 104, 110–11 (2d Cir. 2000); *Molina-Uribe*, 853 F.2d at 1205–06; *see, e.g., United States v. Adams*, 275 F. App'x 298, 300 (5th Cir. 2008) (defendant was unable to withdraw his guilty plea based on voluntary intoxication assertion because the offense of robbery was a general intent crime).

243. *Heidman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958) (voluntary intoxication); *see Caples*, 391 F.2d at 1022–23 (voluntary intoxication); *cf. Government of the Virgin Islands v. Smith*, 278 F.2d 169, 173 (3d Cir. 1960) (automatism defense).

244. FED. R. CRIM. P. 12.2.

245. FED. R. CRIM. P. 16.

4. Trial Considerations

If there is a foundation in the evidence, the defendant is entitled to a jury instruction.[246]

K. STATUTORY DEFENSES

Some statutes set out express affirmative defenses. In others, an exception to criminal liability may be construed as an affirmative defense, rather than an essential element of the crime.[247] In these circumstances, the defense has the burden of proving the exception, rather than the government having the burden of disproving the existence of the exception.[248]

1. Elements

Determining whether an exception is an affirmative defense or an element of the offense often depends on the structure of the statute. Generally, if a statute is "set forth in continuous fashion," such as a list of subsections, each subsection is an element of the crime.[249] An exception to a criminal statute exists if it is incorporated within one "subsection . . . and [is] not contained in separate, distinct clauses or provisos."[250] Examples include:

- 18 U.S.C. § 922(o): Subsection (1) prohibits unlawful possession of a machine gun, but contains exceptions in subsection (2) for lawful possession prior to the statute's effective date, which have been construed as an affirmative defense.[251]

- 18 U.S.C. § 2332a(a): "Lawful authority" is an affirmative defense to the use of, the attempt to use, or a threat to use a weapon of mass destruction.[252]

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246. *Molina-Uribe*, 853 F.2d at 1205–06.

247. *United States v. Wise*, 221 F.3d 140, 148–50 (5th Cir. 2000) (analyzing "without lawful authority" under 18 U.S.C. § 2332a); *United States v. Santos-Riviera*, 183 F.3d 367, 370-71 (5th Cir. 1999) (determining the essential elements of the Hostage Taking Act pursuant to 18 U.S.C. § 1203).

248. *Wise*, 221 F.3d at 148. *See, e.g.,United States v. Adams*, 174 F.3d 571 (5th Cir.1999) (subsections (1)-(2) of 50 C.F.R. § 20.21(i) are elements of the offense because they were set forth in a continuous fashion).

249. *Santos-Riviera*, 183 F.3d at 371–72 (citing *United States v. Adams*, 174 F.3d 571 (5th Cir.1999)).

250. *Id*.

251. *United States v. Gonzalez*, 121 F.3d 928, 936–37 (5th Cir. 1997).

252. *United States v. Wise*, 221 F.3d 140, 148–49 (5th Cir. 2000).

2. Burden

The burden is on the government if it is an element of the offense.[253] The burden of proof is on the defense if it is an exception.[254]

3. Examples

a. Solicitation to commit a crime of violence

18 U.S.C. § 373:

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

Related Fifth Circuit Case Law:

United States v. Razo-Leora, 961 F.2d 1140, 1147–48 n.6 (5th Cir. 1992) ("[T]he Government must prove that the defendant intended for another person to engage in conduct which violates Title 18, and that the defendant induced or tried to persuade that other person to commit the crime.")

b. Felon in possession of a firearm

18 U.S.C. § 922(g)(1):

(g) It shall be unlawful for any person– (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

18 U.S.C. 921(a)(20):

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253. *See United States v. Harstock*, 347 F.3d 1 (1st Cir. 2003).

254. *See United States v. Jackson*, 57 F.3d 1012, 1016 (11th Cir. 1995).

(20) The term “crime punishable by imprisonment for a term exceeding one year” does not include--

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Related Fifth Circuit Case Law:

United States v. Coleman, 609 F.3d 699, 704–705 (5th Cir. 2010) (“[I]f the targeted offense requires the Government to prove an effect upon competition as an element of the offense, then the conspiracy conviction falls within the business practices exception[,]” pursuant to 18 U.S.C. 921(a)(20)(A)).

c. Prohibition on purchase, ownership, or possession of body armor by violent felons

18 U.S.C. § 931:

(b) Affirmative defense.--

(1) In general.--It shall be an affirmative defense under this section that--

(A) the defendant obtained prior written certification from his or her employer that the defendant's purchase, use, or possession of body armor was necessary for the safe performance of lawful business activity; and

(B) the use and possession by the defendant were limited to the course of such performance.
(2) Employer.--In this subsection, the term “employer” means any other individual employed by the defendant's business that supervises defendant's activity. If that defendant has no supervisor, prior written certification is acceptable from any other employee of the business.

d. Fraud and related activity in connection with access devices

18 U.S.C. § 1029:
(g) (2) In a prosecution for a violation of subsection (a)(9), (other than a violation consisting of producing or trafficking) it is an affirmative defense (which the defendant must establish by a preponderance of the evidence) that the conduct charged was engaged in for research or development in connection with a lawful purpose.

e. International parental kidnaping

18 U.S.C. § 1204:

(c) It shall be an affirmative defense under this section that--

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence; or

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

Related Cases:

(a) *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d at 43, 46 (1st Cir. 2004) (defendant is restricted to affirmative defenses listed in 18 U.S.C. § 1204(c)); *United States v. Amer*, 110 F.3d 873 (2d Cir. 1997) (same, rather than utilizing the Hague Convention as defense).
(b) *United States v. Fazal*, 203 F. Supp. 2d 33 (D. Mass. 2002) (dismissing indictment on assertion of affirmative defense was not warranted because defendant traveled to India with children before custody decree conforming with Uniform Child Custody Jurisdiction Act was finalized).
(c) *United States v. Rizvanovic*, 572 F.3d 1152 (10th Cir. 2009) (rebuttal evidence that defendant was fleeing domestic violence can include evidence that defendant had abused his children).

f. Obscene visual representations of the sexual abuse of children

18 U.S.C. § 1466A:
(e) Affirmative defense.--It shall be an affirmative defense to a charge of violating subsection (b) that the

defendant--

(1) possessed less than 3 such visual depictions; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any such visual depiction--

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

g. Tampering with a witness, victim, or an informant

18 U.S.C. § 1512:
(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

Related Case: *United States v. Aguiar*, 975 F.2d 45, 48 (2d Cir. 1992) (defendant has burden to prove lawful conduct by preponderance of evidence).

h. Failure to register as a sex offender

18 U.S.C. § 2250:
(b) Affirmative defense.--In a prosecution for a violation under subsection (a), it is an affirmative defense that--

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

i. Certain activities relating to material involving the sexual exploitation of minors

18 U.S.C. § 2252:
(c) Affirmative defense.--It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant--

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof--

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

Related Cases:

United States v. Buchanan, 485 F.3d 274 (5th Cir. 2007); *United States v. Reedy*, 304 F.3d 358 (5th Cir. 2002) ("A 'matter' is larger and inclusive of a 'visual depiction,' but they do not explain the size or inclusiveness of a 'visual depiction.'").

j. Certain activities relating to material constituting or containing child pornography

18 U.S.C. § 2252A:
(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized

testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense.--It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

Related Cases:

(a) *United States v. Runyan*, 290 F.3d 223 (5th Cir. 2002) (affirmative defense for fewer than three images of child pornography does not alter requirement of interstate commerce nexus).

(b) *United States v. Pearl*, 89 F. Supp. 2d 1237 (D. Utah 2000) (defendant required to prove statutory defense by preponderance of evidence).

k. Sexual abuse of a minor or ward

18 U.S.C. § 2243:

(c) Defenses.--(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

Related Cases:

(a) *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991) (denying sexual conduct with minor did not preclude admitting inconsistent evidence that defendant believed victim was at least sixteen years old).

(b) *United States v. Jennings*, 438 F. Supp. 2d 637 (E.D. Va. 2006) (defendant required to establish

lack of knowledge of victim's age or of age difference as affirmative defense, and government not required to prove defendant's state of mind).

l. Abusive sexual contact

18 U.S.C. § 2244.
See United States v. Jennings, 438 F. Supp. 2d 637 (E.D. Va. 2006) (defenses listed in 18 U.S.C. 2243 applicable in prosecution for abusive sexual contact, a lesser included offense of sexual abuse).

m. Trafficking in counterfeit goods or services

18 U.S.C. § 2320:
(c) All defenses, affirmative defenses, and limitations on remedies that would be applicable in an action under the Lanham Act shall be applicable in a prosecution under this section. In a prosecution under this section, the defendant shall have the burden of proof, by a preponderance of the evidence, of any such affirmative defense.

Related Cases:
(a) *United States v. Sung*, 51 F.3d 92, 93–95 (7th Cir. 1995) (defendant's lack of knowledge that trademarks were registered is not statutory affirmative defense).
(b) *United States v. McEvoy*, 820 F.2d 1170, 1173 (11th Cir. 1987) (burden of proof on defendant for affirmative defenses).
(c) *United States v. Foote*, 238 F. Supp. 2d 1271 (D. Kan. 2002) (holding applicable statute of limitations is five years under Lanham Act).

n. Penalty for failure to appear

18 U.S.C. § 3146:
(c) Affirmative defense.--It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Related Cases:
(a) *United States v. Eley*, 480 F.2d 617 (5th Cir. 1973) (refusing to permit defendant to establish fear as motive for bail jumping).
(b) *United States v. Avery*, 447 F.2d 978, 979 (4th Cir. 1971) (holding that defendant's round trip ticket to visit Jamaica, indicating intent to return, did not negate or undermine willful violation of bond terms).

o. Restriction of access by minors to materials commercially distributed by means of world wide web that are harmful to minors

47 U.S.C. § 231:
(c) Affirmative defense

(1) Defense

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors--

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

(2) Protection for use of defenses

No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

III. SPECIFIC INTENT DEFENSES

A. AUTOMATISM

Automatism occurs when an "action or conduct occurs without will, purpose, or reasoned intention, such as sleepwalking; behavior carried out in a state of unconsciousness or mental dissociation without full awareness."[255] This defense can be raised to undermine the mens rea element of the offense,[256] or to support an insanity defense.[257]

1. Elements

The defendant must present sufficient evidence creating reasonable doubt that the defendant was unconscious or mentally disassociated during the offense.[258]

See the Insanity section *supra* for the elements of an insanity defense, if the defendant is demonstrating insanity at the time of the offense due to his automatism.

2. Burden

The burden of proving the mens rea element beyond a reasonable doubt is on the government; however, the defendant bears the burden of production.[259]

See the Insanity section *supra* for the elements of an insanity defense.

3. Pretrial Considerations

Federal Rule of Criminal Procedure 12.2(b) and (c) requires the defendant to give notice of her intent to introduce "evidence relating to a mental disease or defect or any other mental condition of the

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255. BLACK'S LAW DICTIONARY 129 (7th ed. 1999); *see also Haynes v. United States*, 451 F. Supp. 2d 713 (D. Md. 2006) (automatism means "performance of acts by an individual without his awareness or conscious volition").

256. *Government of the Virgin Islands v. Smith*, 278 F.2d 169, 173 (3d Cir. 1960) (defendant's unconsciousness as a result of an epileptic seizure undermined negligence required for involuntary manslaughter).

257. *United States v. McCracken*, 488 F.2d 406, 409–10 (5th Cir. 1974) (evidence of defendant's psychomotor epilepsy was used to support defendant's insanity defense).

258. *See Smith*, 278 F.2d at 174; *see also, McCracken*, 488 F.2d at 409–10 (5th Cir. 1974) (automatism supporting insanity defense).

259. *Smith*, 278 F.2d at 173.

defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case."[260] In addition, Federal Rule of Criminal Procedure 16 requires notice of the defendant's intent to use expert testimony.[261]

See the Insanity section *supra* for the elements of an insanity defense.

B. NEGATING MENS REA

Mental health evidence can be submitted to support a contention that a defendant's mental disease or defect rendered him incapable of forming the requisite intent of the offense, as opposed to proving that the defendant was insane at the time of the offense.[262]

1. Elements

The Sixth and Ninth Circuits limit this defense to criminal offenses with a specific intent element.[263]

2. Burden

The burden of proving the intent element beyond a reasonable doubt is on the government; however, the defendant bears the burden of production.[264]

3. Pretrial Considerations

Under Federal Rule of Criminal Procedure 12.2(b) and (c), the defendant must give notice of her intent to introduce "evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case."[265] In

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260. FED. R. CRIM. P. 12.2.

261. FED. R. CRIM. P. 16.

262. *United States v. Roberts*, 887 F.2d 534, 536 (5th Cir. 1989) (psychologist's evidence concerning defendant's personality type would undermine required intent); *United States v. Romano*, 482 F.2d 1183, 1196 (5th Cir. 1973) (same, drug use); Brent E. Newton, *Mental Health Issues in Federal Criminal Practice*, *in* 1 DEFENDING A FEDERAL CRIMINAL CASE 7-405, 7-432 (2010).

263. *See United States v. Willis*, 187 F.3d 639, 1999 WL 597440 (6th Cir. 1999) (unpublished); *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988).

264. *See United States v. Caples*, 391 F.2d 1018, 1022–23 (5th Cir.1968) (voluntary intoxication); *Heidman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958) (voluntary intoxication).

265. FED. R. CRIM. P. 12.2.

addition, Federal Rule of Criminal Procedure 16 may require notice of the defendant's intent to use expert testimony.[266]

4. Trial Considerations

Expert testimony has been admitted to demonstrate the defendant's personality trait,[267] the rationale for defendant's false and grandiose claims,[268] the defendant's language difficulties,[269] and the defendant's intelligence and limited reading skills.[270]

In requesting a jury instruction on this defense, the specific intent jury instructions are held to sufficiently address a diminished capacity defense.[271]

C. GOOD FAITH

Good faith is an absence of intent to defraud or to seek unconscionable advantage.[272] The "good faith defense is the affirmative converse of the government's burden of proving [a defendant's] intent to commit a crime."[273]

1. Elements

The defendant is not required to prove his good faith; instead, he can create reasonable doubt that

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266. FED. R. CRIM. P. 16.

267. *See, e.g., United States v. Cohen*, 510 F.3d 1114, 1123–27 (9th Cir. 2007) (evidence of defendant's narcissistic personality); *United States v. Roberts*, 887 F.2d 534, 536 (5th Cir. 1989) (evidence of naive and autocratic personality types).

268. *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995) (mental disorder caused defendant to make false and grandiose claims).

269. *United States v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001) (school psychologists's testimony of defendant's language difficulties).

270. *United States v. Hayden*, 64 F.3d 126 (3d Cir. 1995) (expert testimony of defendant's low intelligence and poor reading skills was admissible to counter willfulness element).

271. *See United States v. Simmonds*, 931 F.2d 685, 688–89 (10th Cir. 1991) (a specific intent instruction fulfills any duty to include a diminished capacity jury instruction when there is sufficient evidence to support diminished capacity); *United States v. Cebian*, 774 F.2d 446, 448 (11th Cir. 1985) ("appellant's PTSD theory simply represents a new approach to an old element; at its root, her claim is still that she lacked the specific intent to commit the crime").

272. BLACK'S LAW DICTIONARY 791 (7th ed. 1999).

273. *United States v. Kimmel*, 777 F.2d 290, 293 (5th Cir. 1985) (good faith is defense to mail fraud); *United States v. Goss*, 650 F.2d 1336, 1344 (5th Cir.1981) (holding"good faith is a complete defense to the charge of intent to defraud under the mail fraud statute").

the he acted with the requisite intent to commit the crime.

2. Burden

The government must prove beyond a reasonable doubt that the defendant acted with the required mental state.[274]

3. Pretrial Considerations

When fraudulent intent or a genuine misunderstanding of tax law is at issue, a defense of good faith should be considered.[275]

4. Trial Considerations

If there is sufficient evidence to support a good faith jury instruction, the defense should argue for its inclusion to ensure "the jury's attention [is directed] to the defense of good faith with sufficient specificity to avoid reversible error."[276] Nonetheless, this instruction can be denied if the "jury is given a detailed instruction on specific intent and the defendant had the opportunity to argue good faith to the jury."[277]

D. ADVICE OF COUNSEL

When willfulness is an element of the offense, an individual's reliance on the advice of counsel can excuse a criminal act.[278]

1. Elements

The elements of this defense are that the individual, 1) acting in good faith, 2) sought the advice

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274. *United States v. McPhilomy*, 270 F.3d 1302, 1312 (10th Cir. 2001); *see United States v. Wilkinson*, 460 F.2d 725, 729 (5th Cir. 1972) (instruction that jury must find beyond reasonable doubt that defendant acted without good faith unnecessary).

275. *United States v. Lindsay*, 184 F.3d 1138, 1140–41 (10th Cir. 1999) (genuine misunderstanding of tax law would negate mens rea); *Goss*, 650 F.2d at 1344.

276. *Goss*, 650 F.2d 1345 (reversing conviction because district court failed to include good-faith jury instruction).

277. *United States v. Hunt*, 794 F.2d 1095, 1098 (5th Cir.1986); *see United States v. Rochester*, 898 F.2d 971, 978–79 (5th Cir. 1990); *see United States v. Chenault*, 844 F.2d 1124, 1130–31 (5th Cir. 1988); *United States v. Lavergne*, 805 F.2d 517, 523 (5th Cir.1986) ("a finding of specific intent to deceive categorically excludes a finding of good faith").

278. *United States v. Ragsdale*, 426 F.3d 765, 777–78 (5th Cir. 2005) (defense unavailable because offense did not require knowledge of legal status of materials as obscene); *United States v. Mathes*, 151 F.3d 251, 255 (5th Cir. 1998).

of counsel, 3) fully disclosed all the relevant facts, and 4) followed the advice in good faith.[279] The advice of counsel must create or perpetuate an honest misunderstanding of an individual's legal duties.[280]

2. Burden

After the defendant presents evidence supporting an advice-of-counsel defense, the government must disprove the defense of advice of counsel beyond a reasonable doubt, because this defense negates the mens rea required to commit the offense.[281]

3. Pretrial Considerations

Any knowledge that the course of action that was initiated after receiving the advice of counsel is suspect or questionable undermines the defense of advice of counsel.[282]

4. Trial Considerations

When good faith reliance on counsel's advice is not a defense to offense, the defense can request a jury instruction on whether defendant possessed the requisite specific intent.[283]

E. APPLYING *MENS REA* TO ALL ELEMENTS OF THE OFFENSE

Where an offense has an intent element, defense counsel may be able to argue that this mens rea is applicable to all of the elements of the offense listed. Recently, in *Flores-Figueroa v. United States*, the Supreme Court held that in order to convict the defendant of aggravated identity theft for "knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person," the government must prove that defendant knew that the "means of identification" he unlawfully

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279. *See United States v. Carr*, 740 F.2d 339, 347 (5th Cir. 1984) (citing *United States v. Thaggard*, 477 F.2d 626, 632 (5th Cir. 1973)); *United States v. Markham*, 537 F.2d 187 (5th Cir. 1976) (reliance on expert must be in good faith and after full disclosure of relevant facts to expert); *United States v. Shewfelt*, 455 F.2d 836, 839 (9th Cir. 1972) (defense unavailable when defendant did not seek advice of counsel, but counsel was participant in criminal venture); *see also Covey v. United States*, 377 F.3d 903 (8th Cir. 2001); *United States v. Butler*, 211 F.3d 826 (4th Cir. 2000).

280. *Mathes*, 151 F.3d at 255.

281. *United States v. Musgrave*, 483 F.2d 327, 335 (5th Cir. 1973).

282. *Mathes*, 151 F.3d at 255 (subsequent discovery that counsel's advice is doubtful undercuts advice-of-counsel defense); *Thaggard*, 477 F.2d at 632 (obtaining advice of counsel that acts did not violate federal law, despite knowing that criminal acts violated state law, did not preclude conviction).

283. *United States v. Pettigrew*, 77 F.3d 1500, 1520 (5th Cir. 1996); *Beckanstin v. United States*, 232 F.2d 1, 4 (5th Cir. 1956) (defendant's reliance on his attorney's advice for making perjurious statement and not retracting statement was important to negate willful intent).

transferred, possessed, or used did, in fact, belong to another person.[284] The Supreme Court held that ordinary English required that the word "knowingly" be applied to all the subsequently listed elements of the crime, recognizing that an adverb applies to the transitive verb and the verb's object.[285]

The following table provides a brief review of some statutes susceptible to a similar analysis as in *Flores-Figueroa*. The Fifth Circuit is reticent in applying the same statutory construction applied in *Flores-Figueroa* to similar statutes. Nonetheless, defense counsel should preserve this error for possible review by the United States Supreme Court.

284. *Flores-Figueroa v. United States*, 129 S.Ct. 1886 (2009).

285. *Id.*

Statutes addressing whether "knowingly" applies to an element of the statute			
Statute	**Mens Rea Required**	**Element**	**Citation**
7 U.S.C. § 2024	✔	"any manner authorized by law"	*Liparota v. United States*, 471 U.S. 419 (1985)
18 U.S.C. § 641	✗	know the property they steal is owned by the United States.	*United States v. Rehak*, 589 F.3d 965 (8th Cir. 2009).
18 U.S.C. § 841	✗	knowledge of the drug type and amount	*United States v. Betancourt*, 586 F.3d 303 (5th Cir. 2009).
18 U.S.C. § 922(g)(1)	✗	knowledge that a) firearm was in and affecting interstate commerce and 2) defendant had a prior felony conviction	*United States v. Rose*, 587 F.3d 695 (5th Cir. 2009).
18 U.S.C. § 924(a)(2)	✗	knowledge that firearm was in and affecting interstate commerce	*United States v. Rose*, 587 F.3d 695 (5th Cir. 2009); *United States v. Fulbright*, 348 F. App'x 949 (5th Cir. 2009).
18 U.S.C. § 1028(a)	✔	knowledge that the means of identification belonged to another person	*Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *see United States v. Maciel-Alcala*, 598 F.3d 1239 (9th Cir. 2010) (knowledge of another person includes living or deceased person).
18 U.S.C. § 1832(a)	✗	modifies both "convert" and "trade secret" and that the language "intending or knowing," which occurs later in that subsection, modifies the subsequent term "trade secret."	*United States v. Roberts*, No. 3:08-CR-175, 2009 WL 5449224, (E.D.Tenn. 2009)
18 U.S.C. § 2421	✔	knowledge that 1) defendant conspired to transport individuals with the intent that they engage in prostitution and 2) defendant knew they were transported in interstate commerce.	*United States v. Shim*, 584 F.3d 394 (2d Cir. 2009).
18 U.S.C. § 2423(a)	✗	knowledge of a victim's minor status	*United States v. Cox*, 577 F.3d 833 (7th Cir. 2009).

IV. SPECIAL FEDERAL DEFENSES

A. EXTRATERRITORIAL JURISDICTION

The defendant can contest the federal court's exercise of jurisdiction outside the territorial limits of the United States.[286] Under international law, a state does not have jurisdiction to enforce a rule of law prescribed by it, unless it had jurisdiction to prescribe the rule.[287] A nation may exercise criminal jurisdiction outside its territories under five general international principles: 1) territorial, where the offense is committed; 2) national, based on the nationality or national character of the offender; 3) protective, based on whether the national interests are affected; 4) universality, where the custody of the offender gives jurisdiction; 5) and passive personality, based on the nationality or national character of the victim.[288]

1. Elements

The court must ascertain 1) whether Congress intended the extraterritorial application of the statute that prescribes the conduct alleged, and 2) that the exercise of extraterritorial jurisdiction is consistent with one of the principles of international law.

To determine congressional intent, first assess whether the criminal statute specifies a jurisdictional element that must be satisfied.[289] When a statute is silent, there is a "legal presumption that Congress ordinarily intends its statutes to have a domestic, not extraterritorial application."[290] However, the Supreme Court ruled that Congress's intent to regulate abroad can be "inferred from the nature of the offense."[291] This approach has been adopted by the Fifth Circuit,[292] but the Supreme Court's rulings on extraterritorial jurisdiction do not acknowledge this exception.[293]

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286. *Rivard v. United States*, 375 F.2d 882, 885–88 (5th Cir. 1967).

287. *Id.*

288. *Id.*

289. *See United States v. Rodgers*, 150 U.S. 249 (1893); *United States v. Wiltberger*, 18 U.S. 76 (1820) (manslaughter did not occur on high seas as designated by statute); *Hennings v. United States*, 13 F.2d 74 (5th Cir. 1926); *United States v. Archer*, 12 F.2d 137 (S.D. Ala. 1926) (offense occurred outside jurisdiction specified by Volstead Act and Tariff Act of 1922).

290. *Small v. United States*, 544 U.S. 385, 388–99 (2005).

291. *United States v. Bowman*, 260 U.S. 94, 98 (1922).

292. *United States v. Villanueva*, 408 F.3d 193 (5th Cir. 2005); *United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980).

293. Davina Chen et al., *Motions Practice*, *in* 1 DEFENDING A FEDERAL CRIMINAL CASE 6-281, 6-292–93 (2010).

The principle of *territorial jurisdiction* affords United States courts jurisdiction over offenses that occur in the United States. Under the objective territorial jurisdiction principle, the United States has "jurisdiction to attach criminal consequences to extraterritorial acts that are intended to have effect in the United States, at least where overt acts within the United States can be proved."[294] The Fifth Circuit has upheld convictions where no overt act occurred within the United States in circumstances where intent can be proven and the process of carrying out a criminal act in the United States has been interrupted.[295] The Fifth Circuit has consistently upheld convictions where an intent to produce an effect in the United States has been proven.[296]

The *nationality* principle allows United States courts to exercise jurisdiction over offenses that occur on American vessels outside of American territorial waters, based on the nationality of the offender and on "the law of the flag."[297] If an offense takes place on a vessel of United States ownership and registry, the United States can exercise extraterritorial jurisdictional regardless of whether the vessel was in American territorial waters.[298]

The *protective* principle confers jurisdiction based on a nation's need to protect its security and the integrity of its governmental functions.[299]

The *universality* principle confers jurisdiction when the offense charged is so heinous and widely condemned that if the United States captures the suspect, it can prosecute and punish on behalf of the world community.[300]

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294. *United States v. Postal*, 589 F.2d 862, 865 (5th Cir. 1979); *see also Marin v. United States*, 352 F.2d 174 (5th Cir. 1965); *Ramey v. United States*, 230 F.2d 171 (5th Cir. 1956). *But see United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979) (agreeing to sell stolen car in Mexico beyond Congress's to proscribe).

295. *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980) (although no illegal act occurred in United States, location of seized vessel indicated intent to distribute marijuana within United States); *United States v. Caicedo-Asprilla*, 632 F.2d 1161 (5th Cir. 1980); *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974); *United States v. Postal*, 589 F.2d 862, 866 n.39 (5th Cir. 1979); *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967); *see also Jones v. United States*, 137 U.S. 202 (1890); *Smith v. United States*, 137 U.S. 224 (1890); *United States v. Roberts*, 1 F. Supp. 2d 601 (E.D. La. 1998).

296. *United States v. Loalza-Vasquez*, 735 F.2d 153 (5th Cir. 1984) (conspiracy intended to produce effects in United States); *United States v. Gray*, 659 F.2d 1296 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980); *United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980); *United States v. May May*, 470 F. Supp. 384 (S.D. Tex. 1979).

297. *United States v. Riker*, 670 F.2d 987 (11th Cir. 1982)*; see United States v. Flores*, 289 U.S. 137 (1933); *United States v. Furlong*, 18 U.S. 184 (1820).

298. *Nixon v. United States*, 352 F.2d 601 (5th Cir. 1965).

299. *See United States v. Bowman*, 260 U.S. 94 (1922) (upholding protective jurisdiction). *But see United States v. James-Robinson*, 515 F. Supp. 1340 (S.D. Fla. 1981) (granting motion to dismiss for lack of jurisdiction).

300. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

The *passive personality* principle provides "that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national."[301] This principle protects Americans abroad without intruding on the interests of another sovereign.[302]

2. Trial Considerations

Counsel should request a jury instruction if there is a factual dispute concerning whether federal jurisdiction existed for the offense charged.[303]

B. COMMERCE CLAUSE

Under the Commerce Clause and the Necessary and Proper Clause of the United States Constitution, Congress has the power to criminalize conduct, even when that conduct is primarily local in nature.[304] The three rationales used to justify federal jurisdiction over local conduct are: 1) regulation of the use of interstate commerce channels, 2) regulation of the instrumentalities of interstate commerce; and 3) regulation of activities that have a substantial effect on interstate commerce. The government has the burden to prove the applicable interstate commerce element beyond a reasonable doubt.[305]

1. Generally

a. Use of Interstate Commerce Channels

The authority to criminalize conduct which utilizes the channels of interstate commerce is derived from Congress's power to regulate interstate commerce. "The power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[306]

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301. *United States v. Roberts*, 1 F. Supp. 2d 601 (E.D. La. 1998).

302. *Id.* (upholding conviction of cruise ship employee convicted of sexual abuse of minor when majority of passengers were Americans and ship began and ended its voyage in United States).

303. *United States v. Beyer*, 31 F. 35 (C.C.S.D. Ga. 1887).

304. U.S. CONST. art. I, § 8, cl. 18; art. III, § 8.

305. *See United States v. Chambers*, 408 F.3d 237 (5th Cir. 2005).

306. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

b. Instrumentalities of Interstate Commerce

The Commerce Clause grants Congress the power to regulate all matters having a close and substantial relation to interstate traffic.[307] "Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce."[308]

c. Activities that have a substantial effect on interstate commerce.

Congress may regulate an activity if it has a substantial relation to interstate commerce.[309] The constitutional analysis requires an assessment of the following factors: 1) whether the statute regulates commercial activity, 2) whether the statute contains an express jurisdictional element, 3) whether the statute or its legislative history contains express congressional findings regarding the activity's effect on interstate commerce, and 4) whether the link between the activity and a substantial effect on interstate commerce is attenuated.[310]

2. Successful Interstate Commerce Challenges

The United States Supreme Court has struck down as unconstitutional federal laws that exceed Congress's power under the Commerce Clause. In *United States v. Lopez*, the Supreme Court held that a federal law—the Gun-Free School Zones Act of 1990—exceeded Congress's power under the Commerce Clause.[311] The Court held that the possession of a gun on school property did not substantially affect interstate commerce.[312] Similarly, a portion of the Violence Against Women Act was struck down despite legislative findings that gender-motivated violence substantially affects interstate commerce.[313] The Supreme Court held that Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[314]

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307. *Houston E. & W. T. Ry. Co. v. United States*, 234 U.S. 342, 353 (1914).

308. *Id.*

309. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

310. *United States v. Morrison*, 529 U.S. 598, 609–13 (2000).

311. *Lopez*, 514 U.S. at 559.

312. *Id.*

313. *Morrison*, 529 U.S. at 617.

314. *Id.*

In federal arson cases pursuant to 18 U.S.C. § 844(I), the government must prove the property is "currently used in commerce or in an activity affecting commerce."[315] The government cannot use aggregation to prove that a building affects interstate commerce.[316]

Under the Hobbs Act, the government must prove that the defendant committed, attempted, or conspired to commit, a robbery or act of extortion that caused an interference with interstate commerce.[317] A generalized connection between the alleged criminal activity and interstate commerce is sufficient to sustain a conviction for conspiracy.[318] However, substantive convictions under the Hobbs Act require that the alleged act actually have an effect on interstate commerce.[319] For example, the interstate commerce element was not satisfied for crimes committed on a highway when there was no evidence that the victims traveled interstate, other than the use of a highway for interstate travel.[320]

In addition, "criminal acts directed toward individuals may violate 18 U.S.C.S. § 1951(a) only if (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce, (2) the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce, or (3) the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce."[321] Based on the government's failure to satisfy any of these factors, the Fifth Circuit reversed a conviction when an employee of a national computer company was robbed at his home.[322] Even though the victim worked for a national company, the conviction was reversed because there was no direct affect on interstate commerce nor a direct effect on a business engaged in interstate commerce.[323]

3. Federally Insured Financial Institutions

For offenses that involve financial institutions, the government must prove that the financial

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315. *Jones v. United States*, 529 U.S. 848, 859 (2000).

316. *United States v. Johnson*, 246 F.3d 749, 752 n.5 (5th Cir. 2001) (per curiam) (aggregating unrelated instances of arson insufficient to prove church's effect on interstate commerce).

317. *United States v. Mann*, 493 F.3d 484, 494 (5th Cir. 2007).

318. *Id.* at 495.

319. *Id.*

320. *Mann*, 493 F.3d at 495 (showing victims traveling on a highway failed to satisfy interstate commerce element); *United States v. Box*, 50 F.3d 345, 352 (5th Cir. 1995) (no evidence victims were traveling interstate); .

321. *United States v. Collins*, 40F.3d 95, 100 (5th Cir. 1994).

322. *Id.*

323. *Id.* at 101.

institution is federally insured in order to invoke federal jurisdiction.[324] This is an essential element of bank-related offenses that must be supported by the evidence.[325] If the government fails to present evidence of this element, a conviction is subject to reversal.[326] This element is satisfied if "a jury can reasonably infer that an institution was federally insured on the date [of the offense] if it is presented with evidence showing that the institution was insured both prior to that date and recently thereafter."[327]

The testimony of a knowledgeable bank employee is sufficient for purposes of proving that a bank is federally insured.[328] Though a certificate of insurance would arguably be the best evidence of federal insurance, evidentiary objections based on the best evidence rule may not be sustained.[329] The timing of the proof that the bank was federally insured must be assessed if it proves the bank's status at the time of trial or several years prior, versus at the time of the offense.[330]

Lastly, at the close of the government's case, it is important to move for a judgment of acquittal; however, the issue is not waived if the defendant fails to preserve the issue.[331]

4. Possession of a Firearm or Ammunition

Contesting the interstate commerce element under 18 U.S.C. § 922 provides an additional defense for clients. A firearm or ammunition is in or affecting interstate commerce within the meaning of the statute if, at some time after it was manufactured and before the offense was committed, that firearm or ammunition was transported between states, or between a state and a foreign country.[332] To prove a nexus between a firearm and interstate commerce, evidence of where the firearm was manufactured,[333] an

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324. *United States v. Fitzpatrick*, 581 F.2d 1221, 1223 (5th Cir. 1978).

325. *Id.*

326. *United States v. Platenburg*, 657 F.2d 797, 799–800 (5th Cir. 1981).

327. *Fitzpatrick*, 581 F. 2d at 1223.

328. *United States v. Schultz*, 17 F.3d 723, 725 (5th Cir. 1994).

329. *See United States v. Murrah*, 478 F.2d 762, 763–64 (5th Cir. 1973).

330. *See United States v. Maner*, 611 F.2d 107, 110 (5th Cir. 1980). *But see Cook v. United States*, 320 F.2d 258, 259–60 (5th Cir. 1963).

331. *Schultz*, 17 F.3d at 725 (failure to move for judgment of acquittal on lack of evidence that back was federally insured does not prevent appeal).

332. *United States v. Joost*, 133 F.3d 125, 131 (1st Cir. 1998).

333. *United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005) (weapon manufactured in Belgium must have traveled in interstate commerce to get into defendant's hands in Texas); *United States v. Washington*, 340 F.3d 222, 232 (5th Cir. 2003); *United States v. Garrett*, 583 F.2d 1381, 1389 (5th Cir. 1978).

officer's testimony that a firearm was manufactured in another state,[334] testimony of the firearm's location,[335] and the defendant's stipulation that he traveled interstate[336] have been presented to satisfy this element. An officer's testimony based on trade publications, company catalogues, and markings on the firearm has been held to be admissible and sufficient to uphold a conviction over hearsay objections and insufficiency arguments.[337]

For charges of ammunition possession, the defense should determine whether the ammunition was manufactured in-state through a process called reloading.[338] Reloading involves reloading recycled shell casings that are usually manufactured out-of-state. This process can occur in-state, and an expert can assess whether it is possible to ascertain where the ammunition was manufactured. In *United States v. Chambers*, the Fifth Circuit held that the indictment had been amended when the Government alleged that the components of the ammunition traveled interstate when the ammunition was manufactured in-state.[339]

In addition, the government's attempt to certify an officer as an expert on interstate passage of a weapon can be challenged under *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).[340] Lastly, if the government attempts to admit an ATF report or trace form, or admit expert testimony based on such a report, defense counsel should object on hearsay and confrontation clause grounds.[341]

5. Examples of Commerce Clause Cases

1. 18 U.S.C. § 2312—Transportation of stolen vehicles. *See United States v. Beil*, 577 F.2d 1313, 1314 (5th Cir. 1978) (knowledge that the property was stolen is sufficient as

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334. *United States v. Broadnax*, 601 F.3d 336, 343–44 (5th Cir. 2010); *United States v. Cantu*, 340 F. App'x 186, 188 (5th Cir. 2009); *United States v. Rivkin*, 306 F. App'x 56, 58 (5th Cir. 2009); *United States v. Fields*, 72 F.3d 1200, 1212 (5th Cir. 1996); *United States v. Privett*, 68 F.3d 101, 104 (5th Cir. 1995); *United States v. Lehmann*, 613 F.2d 130, 132–33 (5th Cir. 1980).

335. *United States v. Stevens*, 538 F.2d 1203, 1205–06 (5th Cir. 1976).

336. *United States v. Shelton*, 325 F.3d 553, 564 (5th Cir. 2003).

337. *United States v. Wallace*, 889 F.2d 580, 583–84 (5th Cir. 1989); *United States v. Harper*, 802 F.2d 115, 120–21 (5th Cir.1986).

338. *See* John Paul Reichmuth & Jason I. Ser, *Federal Firearms Offenses*, *in* 1 DEFENDING A FEDERAL CRIMINAL CASE 24-1337, 24-1351 (2010).

339. *United States v. Chambers*, 408 F.3d 237 (5th Cir. 2005).

340. *United States v. Conn*, 297 F.3d 548 (7th Cir. 2002); *United States v. Corey*, 207 F.3d 84, 92 (1st Cir. 2000); *Wallace*, 889 F.2d at 584.

341. *See Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004); *United States v. Davis*, 571 F.2d 1354 (5th Cir. 1978); *see also Corey*, 207 F.3d at 92 (Toruella, J., dissenting).

opposed to knowledge that the property moved in interstate commerce); *United States v. Breedlove*, 576 F.2d 57, 60 (5th Cir. 1978) ("The Government did not have to prove that the defendants knew the cars moved in interstate commerce once it is shown that the defendants knew the cars were stolen").

2. 18 U.S.C. § 2313—Sale or receipt of stolen vehicles. *See United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979) (Congress did not intend to assert jurisdiction over a defendant who agreed to sell a stolen vehicle in Mexico); *United States v. Hall*, 455 F.2d 492, 493 (5th Cir. 1972) (testimony from accomplice and wife of accomplice was sufficient to satisfy that the stolen vehicle had moved in interstate commerce); *Powell v. United States*, 410 F.2d 710, (5th Cir. 1969) ("...the interstate movement of a car does not necessarily cease when the car stops and transportation of it into the other state ends. The sale thereafter may be an incident to the theft and transportation.... But its character of being a part of interstate commerce does not continue indefinitely after its transportation ends.")

3. 18 U.S.C. § 2314—Transportation of stolen goods or articles used in counterfeiting. *See Pereira v. United States,* 347 U.S. 1, 9-10 (1954) (delivering a fraudulently obtained check from an out-of-state bank to another state for collection satisfies the interstate commerce element); *United States v. Sheridan,* 329 U.S. 379, 384–385 (1946) (purpose of the statute was to penalize violators of state laws who utilize, or cause to be utilized, the channels of foreign or interstate commerce, rather than transporting the securities); *United States v. Davis*, 608 F.2d 555, 556 (5th Cir. 1979) (transporting stolen goods in foreign commerce does not require proof of interstate commerce); *United States v. Levy*, 579 F.2d 1332, 1337 (5th Cir. 1978) (utilizing interstate commerce to complete a successful getaway satisfied the commerce clause element); *United States v. Blanke*, 572 F.2d 543, 543–44 (5th Cir. 1978) (forged checks drawn from an out-of-state bank and sold to a third party was sufficient for element of interstate commerce because defendant could foresee they would be cashed and sent through interstate commerce); *United States v. Kelly*, 569 F.2d 928, 934 (5th Cir. 1978) (prosecution for causing person to travel to execute a scheme to defraud was upheld because person stopped in Miami en route from Memphis to the Bahamas); *United States v. Poole*, 557 F.2d 531, 534 (5th Cir. 1977) (the interstate commerce element is satisfied when that person knowingly cashes (or deposits) a fraudulent check in one state drawn on a bank in another state"); *Popeko v. United States*, 294 F.2d 168, 170 (5th Cir. 1961) (actual transportation was not required but causing it to be transported interstate was sufficient).

4. 18 U.S.C. § 2421—Transporting an individual for prostitution. *See Mortensen v. United States*, 322 U.S. 369 (1944) (the interstate transportation must be the object or the means of effecting or facilitating the proscribed criminal activities, as opposed to an innocent

vacation trip); *Wilson v. United States*, 232 U.S. 563, 566–67 (1914) (interstate commerce element satisfied even though defendants did not control the choice of conveyance and the agent transporting the women was furnished with money for such expenses); *United States v. Dimsdale*, 410 F.2d 358 (5th Cir. 1969) (interstate commerce element satisfied if defendant knowingly induced interstate transportation, that victim crossed state boundary and that defendant had intent that victim give herself up to practices of prostitution, debauchery or other immoral practice).

5. 18 U.S.C. § 2422(a)—Coercing or enticing an individual to engage in prostitution. *See United States v. Jenkins*, 442 F.2d 429,433–34 (5th Cir. 1971) (despite claims that the defendant did not know a common carrier would be used, it was sufficient that a common carrier would likely be used and was utilized); *Nunnally v. United States*, 291 F.2d 205 (5th Cir. 1961) (inducing someone to travel in interstate commerce is sufficient to establish the commerce clause element).

6. 18 U.S.C. § 2423(a)—Transporting a minor for purposes of prostitution. *See United States v. Hitt*, 473 F.3d 146, 152–53 (5th Cir. 2006) (expert testimony concerning the "grooming process" for isolating children was utilized to prove interstate travel was not for a spontaneous event, but to reduce resistance and isolate minors).

7. 18 U.S.C. § 2252A—Child pornography charges. *See United States v. Gallenardo*, 579 F.3d 1076, 1081 (9th Cir. 2009) (transport and use of a camera and camera disks across state lines was sufficient to establish interstate commerce); *United States v. Venson*, 82 F. App'x 330, 2003 WL 22348922, *2 (5th Cir. 2003) (downloading an image that the government proved was produced out of state satisfied the interstate commerce element).

8. 18 U.S.C. § 1201(a)(1)—Kidnaping. *See United States v. Shugart*, 227 F. App'x 334, *1 (5th Cir. 2007) (evidence that defendant drove captive teenagers from Mississippi to South Carolina was sufficient); *United States v. Welch*, 10 F.3d 573 (8th Cir. 1993) (upholding jury charge that stated that knowledge of crossing state lines is not an essential element of the kidnaping offense); *United States v. Broadwell*, 870 F.2d 594, 601–02 (11th Cir. 1989) (kidnaping offense was completed when victim crossed state lines regardless of what occurred later).

9. 18 U.S.C. § 2250—Sex Offender Registration. *See United States v. Whaley*, 577 F.3d 254, 261 (5th Cir. 2009) (defendants must travel in interstate commerce to be punished under federal law for failure to register).

10. 18 U.S.C. § 1341—Mail Fraud. *See United States v. Elliott*, 89 F.3d 1360, 1363–64 (8th Cir. 1996) (jurisdiction is based on use of the postal service; therefore, the fact that the

mail only traveled intrastate is irrelevant).

11. 18 U.S.C. § 1343—Wire Fraud. *See United States v. Mills*, 199 F.3d 184 (5th Cir. 1999) (wire communications between two federal reserve banks in two states and defendant's banks were sufficient to establish federal jurisdiction); *United States v. Cowart*, 595 F.2d 1023 (5th Cir. 1979) (approval of loan application via telephone or telecopier from Florida office to branch office in Georgia formed basis of interstate communication element); *United States v. Davila*, 592 F.2d 1261 (5th Cir. 1979) (when wires actually traveled interstate even though their origin and destination were in the same state interstate commerce element satisfied).

12. 18 U.S.C. § 844—Arson. *See Jones v. United States*, 529 U.S. 848 (2000) (residence not used for commercial purpose does not satisfy property used in or affecting interstate comerce); *Russell v. United States*, 471 U.S. 858 (1985) (apartment building was used in an activity affecting commerce because it was being rented); *United States v. Jimenez*, 256 F.3d 330 (5th Cir. 2001) (residence which included home office of family business satisfied interstate commerce element); *United States v. Johnson*, 246 F.3d 749 (5th Cir. 2001) (insufficient evidence in factual basis of plea that church building was used for a commercial purpose); *United States v. Nguyen*, 117 F.3d 796, (5th Cir. 1997) (explosion of van storing maintenance supplies for the apartment building, which was damaged, and housed two business offices satisfied interstate commerce element); *United States v. Corona*, 108 F.3d 565 (5th Cir. 1997) (defendant's intent to burn building which had dubious interstate commerce connection was undermined by the burning of commercial building next door).

13. 15 U.S.C. § 78j(b)—Securities Fraud. *See Alley v. Miramon*, 614 F.2d 1372 (5th Cir. 1980) (the "in connection with" requirement of securities antifraud rule is flexibly applied to require that there be a nexus between the defendant's fraud and the plaintiff's sale of securities).

14. 18 U.S.C. § 1028—Fraud in Connection with Identification Documents. *See United States v. Pearce*, 65 F.3d 22 (4th Cir. 1995) (possession of a single document-making implement in or affecting interstate commerce is sufficient).

15. 18 U.S.C. § 1029—Fraud in Connection with Access Device. *See United States v. Clayton*, 108 F.3d 1114 (9th Cir. 1997) (cellular telephones, cloning tools, and identification numbers are instrumentalities of interstate commerce and government must prove that aggregate possession of devices affected interstate commerce); *United States v. Scartz*, 838 F.2d 876 (6th Cir. 1988) (fraudulent credit card transactions affects interstate commerce because bank channels are used to obtain approval of charges).

16. 18 U.S.C. § 1030—Fraud in Connection with Computers. *See United States v. Mitra*, 405 F.3d 492 (7th Cir. 2005) (interference with computer-based radio system, which utilizes electromagnetic spectrum, satisfies the interstate commerce element).

17. 18 U.S.C. § 1951—Interference With Commerce By Threats or Violence. *See United States v. Villafranca*, 260 F.3d 374 (5th Cir. 2001) (interstate commerce element satisfied because extortion by prosecutor affected the movement of defendants and drugs across state and international lines); *United States v. Box*, 50 F.3d 345 (5th Cir. 1995) (arrests at a rest area park adjacent to United States highway satisfied interstate commerce element); *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994) (insufficient evidence of interstate commerce of theft of personally owned car and cellular phone); *United States v. Davis*, 30 F.3d 613 (5th Cir. 1994) (robberies of four gas stations dealing in out-of-state goods satisfied interstate commerce element); *United States v. Stephens* 964 F.2d 424 (5th Cir. 1992) (kickbacks received from towing company that towed cars of out-of-state drivers on United States highway satisfied interstate commerce element); *United States v. Wright*, 804 F.2d 843 (5th Cir. 1986) (refusing to prosecute drunk driving violations resulted in more accidents, which impeded the flow of interstate commerce).

18. 18 U.S.C. § 32—Destruction of Aircraft or Aircraft Facilities. *See United States v. Hume*, 453 F.2d 339 (5th Cir. 1971) (airplanes affected were used in interstate commerce).

19. 18 U.S.C. § 659—Interstate or Foreign Shipments. *See United States v. Murray*, 946 F.2d 154 (1st Cir. 1991) (computer parts were an interstate shipment because owner of goods prepared and delivered goods to commence their interstate travel); *Sharp v. United States*, 280 F. 86 (5th Cir. 1922) (interstate commerce element satisfied by shipment of alcohol which was loaded into car consigned to another state destined to carrier who would haul it to its destination).

20. 18 U.S.C. §§ 891, 894—Extortionate Credit Transactions. *See Perez v. United States*, 402 U.S. 146 (1971) (loan sharks who used extortionate means to collect payments are controlled by organized crime resulting in a substantially adverse effect on interstate commerce).

21. 18 U.S.C. § 922—Possession of Firearm by Certain Persons. *See United States v. Lopez*, 514 U.S. 549 (1995) (Gun-Free School Zones Act exceeded Congress' commerce clause authority); *United States v. Luna*, 165 F.3d 316 (5th Cir. 1999) (firearms that were manufactured out of state and traveled to Texas satisfied interstate commerce element);

United States v. Pierson, 139 F.3d 501 (5th Cir. 1998) (same); *United States v. Rawls*, 85 F.3d 240 (5th Cir 1996) (same); *United States v. Shelton*, 937 F.2d 140 (5th Cir. 1991) (alleging "in commerce, and affecting commerce" was sufficient to allege an offense); *United States v. Young*, 730 F.2d 221 (5th Cir. 1984) (failure to allege foreign commerce did not constitute constructive amendment of the indictment); *United States v. Nichols*, 466 F.2d 998 (5th Cir. 1972) (unnecessary to prove interstate commerce and defendant in charge of knowingly making a false statement or misrepresentation to gun dealer); *United States v. Laisure*, 460 F.2d 709 (5th Cir. 1972) (same).

C. DERIVATIVE CITIZENSHIP

For immigration offenses that include alienage as an element of the offense, the government must prove beyond a reasonable doubt that the accused is an alien.[342] An alien is "any person not a citizen or national of the United States."[343] With the exception of those who have naturalized, United States citizenship is a right conferred at birth.[344] This right of *jus sanguinis* "can be obtained derivatively through a parent or a grandparent."[345] Therefore, the Government must essentially prove beyond a reasonable doubt a negative proposition: that the client is not a citizen of the United States.[346] The rules for determining derivative citizenship are very complex.[347]

The burden of alienage, even after the accused presents evidence of a possible derivative citizenship claim, remains on the Government.[348] Derivative citizenship is not an affirmative defense. In the case *United States v. Guerrero-Pinela*, the Ninth Circuit held that "[b]ecause alienage is an element of the offense, the district court erred as a matter of law in holding that Guerrero-Pinela had to carry the burden of showing derivative citizenship as an affirmative defense.[349]

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342. *United States v. Varela-Garcia*, 87 F. App'x 795, 798 (3rd Cir. 2004); *United States v. Cervantes-Nava*, 281 F.3d 501, 504 (5th Cir. 2002) (holding "alien status counts as an element of the illegal re-entry charge that the United States must prove beyond a reasonable doubt); *United States v. Garcia-Mancha*, No. 2:96-CR-0021, 2001 WL 282769, at *8 (N.D. Tex. March 15, 2001);.

343. 8 U.S.C. § 1101 (a)(3); *see also United States v. Sanchez*, 258 F. Supp. 2d 650 (S.D. Tex. 2003).

344. 8 U.S.C. § 1401(g); *see Miller v. Albright*, 523 U.S. 420, 429–30 (1998).

345. *See United States v. Marguet-Pillado*, 560 F.3d 1078, 1081–82 (9th Cir. 2009).

346. *Cervantes-Nava*, 281 F.3d at 504.

347. *See* Robert McWhirter, *The Citizenship Flowchart* 24–25 (Am. Bar Ass'n ed. 2007).

348. *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

349. *United States v. Guerrero-Pinela*, 132 F.3d 41 (9th Cir. 1997) (vacating and remanding case after district court excluded evidence of mother's citizenship, and holding defendant carried burden of proving derivative citizenship as affirmative defense).

The Government often submits a certificate of non-existence of record to verify that the defendant has no status in the United States and is therefore an alien. However, this type of evidence is testimonial because such certificates are "not routinely produced in the course of government business but instead are exclusively generated for use at trial[,]" thus triggering the Confrontation Clause.[350] To prevent this type of testimony, the defense should file a motion in limine to exclude this testimony or object to this type of evidence during trial.

350. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009); *United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010).