

ENTRAPMENT
Penal Law § 40.05
(Effective September 1, 1967)
(Revised June, 2020)¹

If the affirmative defense of entrapment is applicable, omit the final two paragraphs of the instructions of the crime charged, and substitute the following:

If you find that the People have not proven beyond a reasonable doubt any one of those elements, you must find the defendant not guilty.

If you find that the People have proven beyond a reasonable doubt each of the elements, you must consider the affirmative defense of entrapment that the defendant has raised. Remember, if you have already found the defendant not guilty, you will not consider this affirmative defense.

Under our law, it is an affirmative defense that the defendant engaged in the prohibited conduct because:

(1) he/she was induced or encouraged to do so by a public servant, [or by a person acting in cooperation with a public servant,] who was seeking to obtain evidence against him/her for the purpose of criminal prosecution, and

(2) the methods used to obtain the evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it.

Inducement or encouragement to commit an offense means active inducement or encouragement of a person who is not predisposed to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.²

[Note: Add where appropriate:

In determining whether the defendant was not otherwise disposed to commit the offense, you may consider whether he/she

Select appropriate alternative(s):

has engaged in criminal conduct of the same nature

[and]

was convicted of a crime of the same nature.³

That evidence, however, does not require you to find that he/she was predisposed to commit the crime. It is simply one of the factors that you may take into account in making that determination.]⁴

[Note: Add where appropriate:

In determining whether the defendant was not otherwise disposed to commit the offense, you may consider that he/she has no criminal history. The fact that the defendant has no criminal history, however, does not require you to find that he/she was not predisposed to commit the crime. It is simply one of the factors that you may take into account in making that determination.⁵]

Under our law, the defendant has the burden of proving this affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and the

convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

If you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a reasonable doubt each of the elements of (*specify*), you must find the defendant guilty of (*specify*).

If you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of (*specify*).

¹ The 2020 revision was for the purpose of clarifying the requirement that a defendant's criminal conduct or criminal conviction should be of the same nature of the crime(s) he/she is being tried for. See footnote three.

2. Penal Law § 40.05

3. See *People v. Calvano*, 30 N.Y.2d 199, 205 (1972) (“if prior criminal acts of the same nature may properly be proved to rebut the defense that defendant was ‘coerced’ into the transgression, like proof may properly be received in refutation of a claim [of entrapment] that he was ‘induced or encouraged’ to transgress”); *People v. Santarelli*, 49 N.Y.2d 241, 248 (1980) (“in asserting this defense [of entrapment], the accused necessarily places his predisposition to commit the crime in issue (see Penal Law, s 40.05) and thereby ‘opens the door’ for the People to introduce evidence of similar uncharged acts”); *People v. Harrison*, 208 A.D.2d 648, 648 (2d Dept. 1994) (“When the People are forced to refute a claim of entrapment, evidence of similar uncharged crimes becomes relevant to prove that the defendant was, in fact, predisposed to commit the crime charged”).

4. *People v. Thomas*, 175 A.D.2d 717 (1st Dept 1991) (“The assertion that the defense was available only to persons who were ‘not criminals’ was error”); *People v Byrd*, 155 A.D.2d 350 (1st Dept 1989) (error to give a charge that leaves the jury “with the impression that the entrapment defense was only available to ‘non-criminals’.”)

⁵ See *People v Sundholm*, 58 AD2d 224, 228, 396 NYS2d 529, 532 (4th Dept 1977) (“The evidence that defendant refused to sell the drug despite repeated and persistent requests for nearly three months, that defendant had never before sold or dealt in drugs, and that he only made this sale to get rid both of Park and the drug which had been abandoned in his room, could lead a jury to conclude that he was “(a person not) otherwise disposed to commit” the crime charged and had been entrapped by the police” (emphasis added)).