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Entrapment

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ENTRAPMENT

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Entrapment is a well-established defense to a criminal charge, but it is also a "relatively limited defense." United States v. Russell, 411 U.S. 423, 435 (1973). The common law did not recognize an entrapment defense, adopting the view that courts should "not look to see who held out the bait, but [rather] who took it." People v. Mills, 70 N.E.2d 786, 789 (N.Y. 1904). Nevertheless, the defense took root in several state courts in the late 19th Century. Subsequently, "[b]eginning with the decision in Sorrells v. United States in 1932, the development of the law of entrapment became largely an activity of the federal courts, with the states then adopting the doctrine thereby created." 1 LaFave & Scott, Substantive Criminal Law § 502.2(a), at 597 (1986).

A Biblical analogy is sometimes used to describe entrapment. "And the Lord God said unto woman, what is this thou hast done? And the woman said, The serpent beguiled me, and I did eat." Genesis 3:13. In Sherman v. United States, 356 U.S. 369, 376 (1958), the U.S. Supreme Court may have been alluding to this reference when it commented: "Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." See also Groot, The Serpent Beguiled Me and I (Without Scienter) Did Eat — Denial of Crime and the Entrapment Defense, 1973 U. Ill. L.F. 254.

TYPES OF CASES

The entrapment defense has been raised in some notorious trials, such as Abscam and the DeLorean case. See Gershman, Abscam, the Judiciary, and the Ethics of Entrapment, 91 Yale L.J. 1565 (1982) (Abscam involved an FBI sting operation in which a number of Congressmen were convicted); Reaves, Squashing Bugs, 70 A.B.A.J. 30 (Oct. 1984) ("John DeLorean was acquitted of drug trafficking despite apparently incriminating videotapes."); Chambers et al., In the Name of the Father, Time, Jan. 23, 1995, at 38 (discussing an alleged attempted assassination of Louis Farrakhan by Malcolm X's daughter and whether she was entrapped by an FBI informant). The defense is most often raised in drug-related offenses:

> The defense of entrapment has been asserted in the context of a wide variety of criminal activity, including prostitution, alcohol offenses, counterfeiting, price controlling, and, probably most spectacularly, bribery of public officials. However, the great majority of the cases in which an entrapment defense is interposed involve a charge of some drug offense. 1 LaFave & Scott, § 502.2, at 598 (1986).

POLICY CONSIDERATIONS

The use of decoys, deceptions, "sting" operations, informants, undercover agents, and other forms of police stratagems are often necessary and legally permissible. The U.S. Supreme Court has repeatedly recognized that "the infiltration of drug rings and a limited participation in their unlawful present practices" is one of the "only practicable means of detection." *Russell,* 411 U.S. at 432. See also *Sherman,* 356 U.S. at 372 ("Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer."); Sorrells v. United States, 287 U.S. 435, 441 (1932) ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises.").

"Of course evidence that Government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant such an [entrapment] instruction." Matthews v. United States, 485 U.S. 58, 66 (1988).

> [A]n agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs . . . . In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition. Jacobson v. United States, 503 U.S. 540, 549-50 (1992).

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In short, the police may employ a variety of stratagems that rely on deception to catch criminals, but they may not induce law-abiding citizens to commit crimes and then prosecute them. Entrapment, therefore, requires the drawing of a line "between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman,* 356 U.S. at 372. The Model Penal Code commentary puts it this way:

> Particularly in the enforcement of laws against vice, such as liquor and narcotic laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses; the participants in the crime are satisfying their desires. If the aim is, for example, to obtain evidence against a seller of narcotics, it will typically be necessary to use an agent of law enforcement to make the purchase and, of course, to conceal that association from the seller. Cooperation with the criminal and something less than absolute truth is required in many other kinds of cases where the police have an "inside man" in a group of would-be lawbreakers. The law must therefore attempt to distinguish between those deceits and persuasions that are permissible and those that are not. Model Penal Code and Commentaries: Official Draft and Revised Comments pt. 1, § 2.13, at 408 (1985).

SUBJECTIVE TEST

Sorrells v. United States, 287 U.S. 435, 454 (1932), is generally regarded as the genesis of the modern entrapment defense. The *Sorrells* Court stated that "[e]ntrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer." In another passage, the Court wrote that entrapment occurs

> when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute. Id. at 442.

The *Sorrells* approach has come to be known as the subjective approach or "origin of intent" test. The focus is on the subjective state of mind of the accused — the defendant's predisposition or propensity to commit the offense. See *Russell,* 411 U.S. at 433 ("[T]he principal element in the defense of entrapment [is] the defendant's predisposition to commit the crime."). In contrast, the minority rule, known as the objective approach, focuses on the conduct of the police, rather than the defendant's state of mind.

The subjective approach has been consistently affirmed by the U.S. Supreme Court and is the rule in the majority of states, including Ohio. 1 LaFave & Scott, § 5.2, at 599 ("This subjective approach to entrapment ... is adhered to by the federal courts as well as a majority of the state courts.").

UNDERLYING RATIONALE

The *Sorrells* Court grounded the entrapment defense on congressional intent: "We are unable to conclude that it was the intention of the Congress in enacting this statute [the National Prohibition Act] that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Sorrells,* 287 U.S. at 448. See also *Sherman,* 356 U.S. at 372 ("Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.").

In effect, the Court read an implied exception into the federal penal code. Accordingly, state courts are not bound by this aspect of federal substantive criminal law. As the Ohio Supreme Court noted: "Since defining the entrapment defense under either of the [two] standards does not implicate federal constitutional principles, we are not bound by *Sorrells* and its progeny and are free to adopt either standard." State v. Doran, 5 Ohio St.3d 187, 190-91, 449 N.E.2d 1295 (1983).

TWO-PRONGED TEST

The subjective approach "has two related elements: [1] government inducement of the crime, and [2] a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Matthews,* 485 U.S. at 63. If the accused was induced and was not predisposed, entrapment is established. There is a tendency, however, to collapse the two prongs into a single prong dealing only with predisposition. "[I]nducement is significant chiefly as evidence bearing on predisposition: the greater the inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime in question." United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc).

UNITED STATES SUPREME COURT CASES

Sherman v. United States

The Supreme Court reaffirmed the *Sorrells* subjective test in Sherman v. United States, 356 U.S. 369 (1958). A government informant met Sherman at a doctor's office where they both were participants in a narcotics treatment program. The informer made numerous requests, citing his personal suffering, before Sherman acquiesced and obtained drugs. Concurring, Justice Frankfurter wrote: "Particularly reprehensible in the present case was the use of repeated requests to overcome petitioner's hesitancy, coupled with appeals to sympathy based on mutual experiences with narcotics addiction." Id. at 384.

Moreover, Sherman did not profit from these sales, and no narcotics were found in his apartment when it was searched. According to the Court, these facts illustrate the "evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use." Id. at 369. The Court ruled that the police conduct constituted entrapment as a matter of law. Justice Frankfurter advocated the replacement of the subjective approach with an objective test.

United States v. Russell

In United States v. Russell, 411 U.S. 423 (1973), an undercover agent supplied propanone, a necessary ingredient in the illicit manufacture of methamphetamine ("speed"). Although possession of propanone was not illegal, it was very difficult to obtain. Rejecting Russell's entrapment argument, the Supreme Court reaffirmed the subjective approach:

> *Sorrells* is a precedent of long standing that has already been once reexamined in *Sherman* and implicit-

ly there reaffirmed. Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable. Id. at 433.

In dissent, Justice Stewart commented that the "objective approach to entrapment . . . is the only one truly consistent with the underlying rationale of the defense." Id. at 441.

Hampton v. United States

In Hampton v. United States, 425 U.S. 484 (1976), the government's involvement in the criminal enterprise was more pervasive than it had been in *Russell*. The police informant supplied Hampton with heroin, which was not only illegal but also constituted the corpus delicti of the sale for which Hampton was convicted. The plurality opinion once again reaffirmed the subjective test and then went on to reject a due process entrapment defense. Hampton conceded that he did not qualify for entrapment under the subjective approach and therefore focused instead on the due process argument. Justice Brennan, in dissent, argued for the objective approach and criticized the plurality for not extending the entrapment defense to the *Hampton* facts:

> Where the Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser, the Government's role has passed the point of toleration. . . . The Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary. Id. at 498.

Jacobson v. United States

In the Supreme Court's most recent decision, Jacobson v. United States, 503 U.S. 540 (1992), the defendant asserted the entrapment defense to a charge of receiving child pornography through the mail. The Court agreed with Jacobson, once again applying the subjective approach:

> In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. ... Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. Id. at 548-49.

In 1984 Jacobson had ordered two pornographic magazines from a California bookstore, at a time when receipt of these magazines was legal. Postal inspectors later found his name on the mailing list for this bookstore. For the next 2 and 1/2 years, two government agencies (the Postal Service and the Customs Service) made repeated efforts, through five fictitious organizations and a bogus pen pal, to ascertain Jacobson's willingness to break a new federal law by ordering sexually explicit photographs of children through the mail.

These agencies finally piqued Jacobson's interest, and he ordered a magazine. When he received the magazine, he was arrested and his house searched. The search disclosed only the two original magazines and the material sent by the federal agencies. The Supreme Court ruled as a matter of law that Jacobson had been entrapped.

Whether *Jacobson* expands the entrapment defense is controversial. The dissent argued that the majority opinion changed the defense by requiring the prosecution to prove not only that an accused was predisposed to commit the crime before the opportunity to commit the crime arose, but also *before* the Government came on the scene: "[T]his holding changes entrapment doctrine. Generally, the inquiry is whether a suspect is predisposed before the government induces the commission of the crime, not before the Government makes initial contact with him." Id. at 556-57 (O'Connor, J., dissenting). The dissent believed that the majority position "redefines 'predisposition,' and introduces a new requirement that Government sting operations have a reasonable suspicion of illegal activity before contacting a suspect." Id. at 556. The majority disagreed, asserting that its interpretation was not new:

> The dissent is mistaken in claiming that this is an innovation in entrapment law and in suggesting that the Government's conduct prior to the moment of solicitation is irrelevant. . . . Indeed, the proposition that the accused must be predisposed prior to contact with law enforcement officers is so firmly established that the Government conceded the point at oral argument . . . . Id. at 549 n. 2.

After *Jacobson*, the Seventh Circuit, en banc, declared that "[c]ases both in this and in other circuits, . . . recognize that *Jacobson* has changed the landscape of the entrapment defense." United States v. Hollingsworth, 27 F.3d 1196, 1198 (7th Cir. 1994). The court went on to state:

> Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. . . . . The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation. Id. at 1200.

PRIVATE INDUCEMENTS

The defense of entrapment does not extend to inducements made by a private individual not working as or in conjunction with a government agent. See State v. Hsie, 36 Ohio App.3d 99, 103, 303 N.E.2d 89 (1973) ("At most, defendant claims he was motivated by the urgings of a mutual friend but not by any inducement of the state's agent."); United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) ("There is no defense of private entrapment."); United States v. Mers, 701 F.2d 1321 (11th Cir. 1983); Henderson v. United States, 237 F.2d 169, 175 (5th Cir. 1956) ("Well settled ... it is that the doctrine of entrapment does not extend to acts of inducement on the part of a private citizen who is not an officer of the law.").

Generally, the defense is available only when the inducement originated with law enforcement officers. E.g., *Jacobson* (Postal Service and Customs Service agents); *Russell* (undercover agent for Bureau of Narcotics and Dangerous Drugs); *Sorrells* (prohibition agent). This category extends to paid informants. E.g., *Matthews* (FBI informant); *Hampton* (DEA informant). As the Supreme Court noted in *Sherman*, the "Government cannot make such use of an informer and then claim disassociation through ignorance." 356 U.S. at 369. The Court also observed: "Although he was not being paid, [the informer] was an active government informer who had but recently been the in-

stigator of at least two other prosecutions." Id. at 373-74. See also State v. Good, 110 Ohio App. 415, 439, 165 N.E.2d 28 (1960) (dissent) ("The State in this case cannot claim disassociation from the work of its informer and agent, it being quite clear that the informer ... was acting under the instructions of the Police Department although its members may not have known about every detail of his conduct toward the defendant.").

DERIVATIVE ENTRAPMENT

The Seventh Circuit has recognized "derivative entrapment," which arises when a private person is entrapped and then acts as an agent or conduit for police efforts to entrap others. The court wrote:

> [W]hile there is no defense of either private entrapment or vicarious entrapment, there is a defense of derivative entrapment: when a private individual, himself entrapped, acts as agent or conduit for governmental efforts at entrapment, the government as principal is bound. This principle follows as we said from the unquestioned principle that the entrapment defense will lie whether the government uses its own employee as the stinger or an informant. U.S. v. Hollingsworth, 27 F.3d 1196, 1204 (7th Cir. 1994).

SERIOUS CRIME EXCEPTION

The entrapment defense may be unavailable in certain types of prosecutions. In *Sorrells* the Supreme Court remarked: "We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions." 287 U.S. at 451. The Model Penal Code, although adopting the objective approach, also recognized an exception; the defense is "unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment." Model Penal Code 2.13(3) (1962).

This exception is based on the notion that it "is unlikely that a law abiding person could be persuaded by any tactics to engage in [violent] behavior, and a person who can be persuaded to cause such injury presents a danger that the public cannot safely disregard." Model Penal Code and Commentaries: Official Draft and Revised Comments pt. 1, § 2.13, at 420 (1985) (also noting the adoption of this exception in several state criminal codes).

OBJECTIVE TEST

The objective approach, advocated by Justice Roberts in a separate opinion in *Sorrells,* and by Justice Frankfurter in a concurring opinion in *Sherman,* is sometimes called the "police conduct" test. This approach can be traced to Justice Brandeis' celebrated dissent in Casey v. United States, 276 U.S. 413, 425 (1928), in which he wrote: "This prosecution should be stopped, not because some right of [the accused's] has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts." The majority of commentators favor the objective approach and the Model Penal Code adopted it. Nevertheless, it remains a minority position.

Police conduct

In contrast to the subjective approach, which focuses on the accused's predisposition, the objective approach focuses on the government's conduct in inducing the defendant's participation in the crime. "This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime." *Sherman,* at 384 (Frankfurter, J. concurring). Under this view, the issue is whether the police's conduct would induce a reasonable (hypothetical) person to break the law. Thus, the Model Penal Code frames the issue as whether law enforcement officials employed "methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Model Penal Code 2.13(1)(b) (1962).

Rationale

Under the objective approach, the underlying basis for the entrapment defense is not the "innocence" of the accused but rather the prohibition of "unlawful governmental activity in instigating crime." *Russell,* 411 U.S. at 442 (Stewart, J., dissenting). See also *Sherman,* 356 U.S. at 380 (Frankfurter, J., concurring) ("Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.").

Furthermore, this rationale requires the court, and not the jury, to decide the issue: "[S]uch a judgment, aimed at blocking off areas of impermissible police conduct, is appropriate for the court and not the jury." *Sherman,* 356 U.S. at 385 (Frankfurter, J., concurring). In *Sorrells,* Justice Roberts put it this way: "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law." *Sorrells,* 287 U.S. at 457.

According to its proponents, the objective approach is superior to the subjective approach for several reasons. First, the legislative intent rationale, the basis for the subjective approach, is a "sheer fiction." *Sherman,* 356 U.S. at 379. "[T]he courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced." Id. at 380.

Second, the subjective test permits the introduction of prejudicial evidence of bad character, which may force the accused to abandon the defense. "The danger of prejudice . . . is evident. The defendant must either forego the claim of entrapment or run the risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged." *Sherman,* 356 U.S. at 383. Or, if the defense is pursued, an otherwise innocent person may be convicted. "The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored." Id. at 383.

Third, the subjective test provides no guidance for the police: "Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future." *Sherman,* 356 U.S. at 385. Because the objective approach is designed to control police conduct, rather than determine the innocence of a particular defendant, it shares some of the attributes of the exclusionary

rule in search and seizure and confession cases. 1 LaFave & Scott, § 5.2(c), at 602 ("So viewed, the entrapment defense appears to be a procedural device (somewhat like the Fourth Amendment and Miranda exclusionary rules) for deterring undesirable governmental intrusions into the lives of citizens.").

OHIO RULE

By the 1980s, several Ohio courts of appeal had adopted the subjective approach. E.g., State v. Metcalf, 60 Ohio App.2d 212, 396 N.E.2d 786 (1977); State v. Hsie, 36 Ohio App.2d 99, 303 N.E.2d 89 (1973); State v. McDonald, 32 Ohio App.2d 231, 289 N.E.2d 583 (1972).

State v. Doran

The Ohio Supreme Court did not address the issue comprehensively until State v. Doran, 5 Ohio St.3d 187, 190, 449 N.E.2d 1295 (1983), where the Court noted that it had "not yet defined which test is applicable in this state." Prior cases had focused on other entrapment issues. See State v. Minnker, 27 Ohio St.2d 155, 271 N.E.2d 821, 825 (1971) (no error in failing to instruct on entrapment) ("[I]t is *not* entrapment for the officer to place himself in a position to apprehend those participating in the criminal conduct, and he may use *inducement* and set traps to apprehend them.").

The Supreme Court explicitly embraced the subjective approach: "The defense of entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." *Doran,* at 190.

In addition, the Court cited a number of the traditional objections to the objective approach to support its decision. First, an "innocent" person could be convicted under the objective standard:

> [T]he objective test focuses upon the nature and degree of the inducement by the government agent and not upon the predisposition of the accused. Thus, even though the accused may not be individually predisposed to commit the crime, the inducement may not be the type to induce a reasonably law abiding citizen, and thus lead to the conviction of an otherwise innocent citizen. Id. at 191.

Second, the objective test could also lead to the acquittal of the guilty. By ignoring the predisposition of the individual accused, "a 'career' criminal, or one who leaves little or no doubt as to his predisposition to commit a crime, will avoid conviction if the police conduct satisfies the objective test." Id. at 191. See also *Russell,* 411 U.S. at 434 ("Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because the government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed.").

Third, the objective test could adversely effect the accuracy of the fact-finding process: "Since most of these inducements will be offered in secrecy, the trial will more than likely be reduced to a swearing contest between an accused claiming that improper inducements were used and a police officer denying the accused's exhortations." *Doran,* at 191. In contrast, under the subjective test, "the fact-finding process is enhanced because evidence of predisposition may come from objective sources." Id. at 192.

The Court reaffirmed *Doran* in State v. Italiano, 18 Ohio St.3d 38, 42, 479 N.E.2d 857 (1985) ("It is not entrapment . . . when it is shown that the accused was predisposed to commit the offense, and the state merely provided the accused with the opportunity to commit the offense.").

Some appellate cases appear to collapse the two-pronged test into the predisposition issue. State v. Seebeck-Horstman, 67 Ohio App.3d 443, 446, 587 N.E.2d 359 (1990) ("The ultimate issue is whether a preponderance of evidence establishes that the accused lacked the predisposition to commit the offense with which he is charged."); State v. Savage, 1 Ohio App.3d 13, 14, 437 N.E.2d 1202 (1980) ("Absence of 'predisposition' on the part of the accused is *the principal element* of the entrapment defense.").

Defendants have prevailed in only a few of the reported cases. E.g., State v. Metcalf, 60 Ohio App.2d 212, 219, 396 N.E.2d 786 (1977) (court described the police's conduct as "entrapment by duress or to coin a phrase, aggravated entrapment"); State v. Sarto, 36 Misc. 184, 304 N.E.2d 919, 920 (CP 1973) ("[T]here is not the slightest suggestion that this defendant had ever participated in dealing in marijuana, except for his own use, either before or after this alleged offense.").

JURY INSTRUCTIONS

In contrast to the objective view, entrapment under the subjective approach raises a jury issue. See *Matthews,* 485 U.S. at 63 ("The question of entrapment is generally one for the jury, rather than for the court."); Masciale v. United States, 356 U.S. 386, 829 (1958) ("While petitioner presented enough evidence for the jury to consider, they were entitled to disbelieve him in regard to [the informant] and so find for the Government on the issue of guilt.").

Only in clear cases will the issue be decided by the court. *Sherman* was one such case: "The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use." 356 U.S. at 376. *Jacobson* was another.

In *Doran* the Ohio Supreme Court held the jury instruction defective because it failed to correctly allocate the burden of persuasion. *Doran,* 5 Ohio St.3d at 191 ("A jury instruction which fails to allocate any burden of proof on the affirmative defense of entrapment is inherently misleading and confusing and is prejudicial error."). See also Ohio Jury Instruction § 411.25.

An instruction is not required, however, if insufficient evidence of entrapment is in the record. See State v. Dotson, 35 Ohio App.3d 135, 139, 520 N.E.2d 240 (1987) (jury instruction not required where neither prosecution or defense evidence raised entrapment; "There is nothing to indicate that the agent did more than supply a possible market, and that market was immediately developed by the defendant into an actual sale."); State v. Birns, 10 Ohio App.2d 103, 226 N.E.2d 149 (1967) (instruction not required because there was "no evidence to suggest even entrapment"), cert denied, 389 U.S. 1038 (1968).

BURDEN OF PROOF

In other jurisdictions that adopt the subjective view, the accused has the burden of establishing the fact of government inducement. 1 LaFave & Scott, § 5.2(f)(e) (1986). Once this threshold is satisfied, the burden shifts to the gov-

ernment to prove predisposition beyond a reasonable doubt. In *Jacobson* the U.S. Supreme Court commented: "Where the Government has induced an individual to break the law and the defense of entrapment is at issue, . . . the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson*, 503 U.S. at 548-49.

Ohio rule

In Ohio, however, the burden of persuasion (by a preponderance of the evidence) for all affirmative defenses is allocated to the defendant by RC 2901.05(C)(2). The statute defines an affirmative defense as one "involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." In *Doran*, the Ohio Supreme Court ruled that entrapment was an affirmative defense within the meaning of this statute. First, the Court noted that entrapment is a "classic confession and avoidance" and thus an excuse or justification defense. 5 Ohio St.3d at 193.

Second, proof of entrapment is peculiarly within the accused's knowledge: "The key consideration with the subjective test is whether the accused was predisposed to commit the offense. While proof of predisposition may come from objective sources, only the accused possesses the actual knowledge concerning his predisposition to commit the offense." Id.

Finally, it is not unfair to allocate the burden of persuasion to the accused.

> The accused, as a participant in the commission of the crime, will be aware of the circumstances surrounding the crime, and is at no disadvantage in relaying to the fact-finder his version of the crime as well as the reason he was not predisposed to commit the crime. Moreover, the accused will certainly be aware of his previous involvement in crimes of a similar nature which may tend to refute the accused's claim that he was not predisposed to commit the offense. Id.

See also State v. Cheraso, 43 Ohio App.3d 221, 222, 540 N.E.2d 326 (1988) ("Entrapment is an affirmative defense and appellant has the burden of establishing this defense by a preponderance of evidence.").

EVIDENCE ISSUES

Character evidence

As a general rule, character (propensity) evidence is inadmissible under Evid. R. 404(A). An entrapment defense, however, necessarily raises issues concerning the defendant's character and commission of "other acts." See 1 Giannelli & Snyder, Ohio Evidence § 404.1 (3d ed 1996). As the U.S. Supreme Court stated in *Sorrells*, "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." *Sorrells*, 287 U.S. at 451-52.

Nevertheless, this evidence rule has been characterized as the "greatest fault" of the subjective approach and an "indiscriminate attitude toward predisposition evidence is by no means a necessary feature of the subjective test." Park, The Entrapment Controversy, 60 Minn. L. Rev. 163, 272 (1976). A similar caution about the admission of character evidence is found in *Doran*, where the Court expressed concern about the "scope of admissible evidence on the issue of an accused's predisposition." The Court wrote:

> While evidence relevant to predisposition should be freely admitted, judges should be hesitant to allow evidence of the accused's bad reputation, without more, on the issue of predisposition. Rather, while by no means an exhaustive list, the following matters would certainly be relevant on the issue of predisposition: (1) the accused's previous involvement in criminal activity of the nature charged, (2) the accused's ready acquiescence to the inducements offered by the police; (3) the accused's expert knowledge in the area of the criminal activity charged; (4) the accused's ready access to contraband; and (5) the accused's willingness to involve himself in the criminal activity. Id. at 191-92.

Other relevant factors include an accused's own admissions of past deeds or future plans and the results of a search that shows the defendant is involved in a "course of ongoing criminal activity." 1 LaFave & Scott, § 5.2(f)(1), at 607.

Numerous Ohio cases address this evidence issue. E.g., State v. Smith, 92 Ohio App.3d 172, 176-78, 634 N.E.2d 659 (1993) (applying the *Doran* factors); State v. Cheraso, 43 Ohio App.3d 221, 222, 540 N.E.2d 326 (1988) ("Once [entrapment] is established, the state can rebut the entrapment defense by showing that the defendant was predisposed to commit the crime."); Columbus v. Corne, 7 Ohio App.3d 344, 345-46, 455 N.E.2d 696 (1982) ("But, after the prosecution has rested its case and the defense of entrapment is raised and pursued by the accused, then, the prosecution may introduce rebuttal evidence in an effort to show the accused's predisposition to commit the crime."); State v. Savage, 1 Ohio App.3d 13, 14, 437 N.E.2d 1202 (1980) (In an entrapment case, "the defendant waives his right to prohibit the state from showing his 'predisposition' and makes predisposition relevant for the state to show on *rebuttal*.").

Expert Testimony

Several federal courts have ruled that the defendant may introduce expert testimony concerning his susceptibility to inducement. See U.S. v. McLernon, 746 F.2d 1098, 115 (6th Cir. 1984) ("expert testimony concerning a defendant's predisposition may be invaluable in an entrapment case."); U.S. v. Hill, 655 F.2d 512 (3d Cir. 1981); U.S. v. Benveniste, 564 F.2d 335 (9th Cir. 1977); Graham, Handbook of Federal Evidence § 702.4, at 631 n.8 (3d ed. 1991). A few Ohio cases have addressed this issue:

> [The] defendant shall be permitted to introduce expert psychiatric testimony as to any susceptibility to influence or suggestion as relevant to the predisposition issue . . . . The expert shall not however testify as to the actions of government agents or their effect upon the defendant's susceptibility nor as to the ultimate issue of the existence of entrapment which is within the province of the jury. State v. Woods, 20 Misc.2d 1, 3, 484 N.E.2d 773 (CP 1984).

See also State v. Dapice, 57 Ohio App.3d 99, 105, 566 N.E.2d 1261 (1989) ("There is some authority that expert testimony on the issue of predisposition may be admitted. However, admission of such testimony is a matter left to the discretion of the trial court.").

INCONSISTENT DEFENSES

"The traditional view has been that the defense of entrapment is not available to one who denies commission of the

criminal act with which he is charged, for the reason that the denial is inconsistent with the assertion of such a defense." 1 LaFave & Scott, § 5.2(f)(3), at 609.

However, in Matthews v. United States, 485 U.S. 58 (1988), the U.S. Supreme Court ruled that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." Matthews, an employee of the Small Business Administration, was charged with accepting a bribe. The trial court refused to instruct on entrapment, as requested by Matthews, because Matthews would not admit committing all the elements of the crime, in particular the mens rea element. (Matthews claimed the money was a personal loan unrelated to S.B.A. business).

The Supreme Court held that denying the charge and asserting the affirmative defense of entrapment is permissible. The prosecution argued that entrapment presupposed the commission of the crime and a jury could not logically conclude that Matthews had both failed to commit the crime and been entrapped. The Court, however, saw nothing unusual about pleading inconsistent defenses. In an earlier case, Stevenson v. United States, 162 U.S. 313 (1896), the Court had held that a murder defendant was entitled to both a manslaughter and self-defense instruction: "The affirmative defense of self-defense is, of course, inconsistent with the claim that the defendant killed in the heat of passion." *Matthews,* 485 U.S. at 64.

In *Doran* the Ohio Supreme Court appears to have taken a different approach, noting that "[w]hen an accused raises the defense of entrapment, the commission of the offense is admitted" and "entrapment is the classic confession and avoidance." *Doran,* 5 Ohio St.3d at 193. Numerous Ohio cases follow this view. E.g., State v. Dapice, 57 Ohio App.3d 99, 105, 566 N.E.2d 1261 (1989) ("In the use of entrapment as an affirmative defense, the defendant admits that he committed the offense, but challenges the origin of the intent."); State v. Johnson, 4 Ohio App.3d 308, 310, 448 N.E.2d 520 (1982) ("Entrapment is a 'confession and avoidance' defense in which the defendant admits committing the acts charged"); State v. Savage, 1 Ohio App.3d 13, 14, 437 N.E.2d 1202 (1980) ("Where a defendant, after the state has rested its case in chief, affirmatively pursues the defense of entrapment he concedes that he committed the crime and puts in issue whether he had a predisposition to commit the crime."); State v. Hsie, 36 Ohio App.2d 99, 303 N.E.2d 89 (1973) ("The defense of entrapment is in the nature of a confession and avoidance and it assumes that he act charged as a public offense was committed."); State v. Good, 110 Ohio App.2d 415, 430, 165 N.E.2d 28, 28 (1960) (Entrapment not available "when he denies that he committed such acts. Such claims ... are inconsistent with the claim that he neither had for sale nor sold narcotics and where his theory of the case is that he is innocent.").

Doran, however, was decided before *Matthews,* and it is unclear whether the *Doran* dictum will be upheld when the Ohio Supreme Court directly considers the issue. Nevertheless, the *Doran* approach raises "serious constitutional questions concerning whether a defendant may be required, in effect, to surrender his presumption of innocence and his privilege against self-incrimination in order to plead entrapment." 1 LaFave & Scott, § 5.2(f)(3), at 609 (1986).

Furthermore, permitting "inconsistent" defenses does not put the prosecution at a disadvantage. In a concurring opinion in *Matthews,* Justice Scalia wrote that "the defense of entrapment will rarely be genuinely inconsistent with the defense on the merits, and when genuine inconsistency exists its effect in destroying the defendant's credibility will suffice to protect the interests of justice." 485 U.S. at 67.

GUILTY PLEAS

A guilty plea waives the right to appeal the issue of entrapment. E.g., United States v. Nunez, 958 F.2d 196, 200 (7th Cir. 1992); United States v. Sarmiento, 786 F.2d 665, 668 (5th Cir. 1986).

INFORMANT'S IDENTITY

The identity of an informant is subject to a limited privilege. If the defendant makes a showing that the identity of the informant is necessary to the defense, the privilege may be breached. E.g., State v. Butler, 9 Ohio St.3d 156, 459 N.E.2d 536 (1984) (showing not made); State v. Williams, 4 Ohio St.3d 74, 446 N.E.2d 779 (1983). See also 1 Giannelli & Snyder, Ohio Evidence § 5.1 (3d ed 1996).

DUE PROCESS

In addition to the entrapment defense, which is a substantive criminal law issue, the due process clause has been cited as the source of a constitutional "entrapment" defense involving "outrageous police conduct." In United States v. Russell, 411 U.S. 423, 430 (1973), the defendant asked the Court to recast the entrapment defense, arguing that the defense should rest on due process grounds: "[Russell's] principal contention is that the defense should rest on constitutional grounds. He argues that the level of Shapiro's involvement . . . was so high that a criminal prosecution for the drug's manufacture violated the fundamental principles of due process." Russell argued that this defense should apply when "the criminal conduct would not have been possible had not an undercover agent 'supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels.'" Id. at 431. The undercover agent supplied propanone, a necessary ingredient in the illicit manufacture of methamphetamine ("speed"). The chemical, however, is harmless and its possession was not illegal. In addition, the drug was available from other sources.

The Court rejected Russell's argument but left open the possibility of a due process defense in a later case: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, . . . the instant case is distinctly not of that breed." Id. at 431-32 (citing Rochin v. California, 342 U.S. 165 (1952), holding that stomach pumping a suspect to obtain drugs "shocks the conscience" and thus violates due process).

Nevertheless, Justice Rehnquist, the author of the above passage, divorced himself from his dictum in Hampton v. United States, 425 U.S. 484, 490 (1976), arguing in his plurality opinion that a defendant has only the substantive criminal law entrapment defense: "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."

In a concurring opinion, Justice Powell, along with Justice Blackmun, wrote that he was "unwilling to join the

plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition." Id. at 495. Justice Brennan, joined by Stewart and Marshall, dissented but agreed with the Powell opinion on the due process issue. Id. at 497 ("I agree with Mr. Justice Powell that *Russell* does not foreclose imposition of a bar to conviction — based upon our supervisory power or due process principles — where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be 'predisposed.'").

The federal appellate courts are divided on whether a due process defense even exists. In United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), the Third Circuit became one of the few courts to bar prosecution on due process grounds. In that case the informant suggested the establishment of a drug manufacturing operation, located a site for the operation, supplied the equipment and materials, and ran the lab. In contrast, the Sixth Circuit ruled in United States v. Tucker, 28 F.3d 1420, 1428 (6th Cir. 1994), that there was no due process defense. "[W]e hold that a defendant whose defense sounds in inducement is, by congressional intent and Supreme Court precedent, limited to the defense of entrapment and its key element of predisposition. Defendants may not circumvent this restriction by couching their defense in terms of 'due process' or 'supervisory powers.'"

In *Doran* the Ohio Supreme Court commented on this issue: "An accused may put the conduct of the police or their agent into issue by arguing that such conduct was so outrageous as to violate due process. . . . In our view, a 'due process' defense is analytically distinct from the defense of entrapment." 5 Ohio St.3d at 192 n. 4 (citing Rochin v. California, 342 U.S. 165 (1952)). Some appellate cases, however, have "refused to recognize the due process defense of outrageous government conduct separate from the entrapment defense." State v. Jurek, 52 Ohio App.3d 30, 33, 556 N.E.2d 1191 (1989), motion granted, 46 Ohio St.3d 704, 545 N.E.2d 1282 (1989), dismissed, 47 Ohio St.3d 711, 548 N.E.2d 241 (1989). See also State v. Latina, 13 Ohio App.3d 182, 185, 468 N.E.2d 1139 (1984) ("The Ohio courts have not recognized a due process defense of outrageous government conduct separate from the entrapment defense.").

Another court has disagreed. State v. Miller, 1193 WL 294806 (App) ("[W]e hold again as we have held before, that a due process defense outside the defense of entrapment may be made in Ohio."). In State v. Metcalf, 60 Ohio App.2d 212, 219, 396 N.E.2d 786 (1977), the court described the police conduct as "entrapment by duress or to coin a phrase, aggravated entrapment." The court entered a judgment of acquittal, commenting that under these circumstances the subjective test is "unwarranted." Id. at 219. This case comes very close to a due process analysis. The court added: "Whenever the government undertakes to entrap by duress such conduct must fail as a matter of sound public policy. Duress by law enforcement personnel is as hostile to the preservation of liberty as is the use by the government of force to extract a confession of crime from an innocent person." Id.

If the police induce violence or threats of violence against innocent parties, use contingent fee arrangements with informants, initiate sexual relations to induce the crime, or offer exorbitant financial rewards, a due process defense may be successful. 1 LaFave & Scott, § 5.2(g); Whitebread & Slobogin, Criminal Procedure ch. 19 (3d ed. 1993).

REFERENCES

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