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Entrapment—THE SUPREME COURT REAFFIRMS THE SUBJECTIVE TEST OF ENTRAPMENT AS A DEFENSE TO VIOLATION OF FEDERAL LAW—*United States v. Russell*, 411 U.S. 423 (1973).

The ever increasing rise in so-called victimless crimes has been accompanied by a corresponding increase in the use of undercover work by law enforcement officials.¹ The techniques which are sometimes employed by these officials, at best make for highly efficient police work, but at worst clearly give rise to the defense of entrapment. In spite of this increase of potential entrapment cases, no major case involving the defense of entrapment has been decided by the United States Supreme Court in the last fifteen years,² and because of the lack of a “cohesive theoretical basis”³ for the defense, the circuit courts have been inconsistent in its application.⁴

In *United States v. Russell*⁵ a realigned Supreme Court clarified the law by affirming the 1958 opinion of Mr. Chief Justice Warren in *Sherman v. United States*.⁶ The five-to-four decision, also affirmed the differing opinions within the Court on the theoretical basis for entrapment.⁷

The defendant in *Russell* was convicted of the manufacture, sale and delivery of methamphetamine (“speed”).⁸ The defendant had taken into his confidence an agent of the Federal Bureau of Narcotics and Dangerous Drugs who was posing as a member of a large organization interested in controlling the manufacture and distribution of methamphetamine. The

1. The undercover technique in law enforcement work began developing its fine points during the prohibition era of this country's history. Now with the heavy criminal activity in drug traffic and complexities of organized crime, undercover work has become an absolute necessity. However, one should note the concern with its use expressed by the Supreme Court in an early case. See *Sorrells v. United States*, 287 U.S. 435, 453 (1932).

2. The most recent Supreme Court decision is *Sherman v. United States*, 356 U.S. 369 (1958).

3. Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 71.

4. See, *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971); *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967); *Smith v. United States*, 331 F.2d 784 (D.C. Cir. 1964); *United States ex rel. Hall v. Illinois*, 329 F.2d 354 (7th Cir. 1964); *Washington v. United States*, 275 F.2d 687 (5th Cir. 1960); *Crisp v. United States*, 262 F.2d 68 (4th Cir. 1958).

5. 411 U.S. 423 (1973).

6. 356 U.S. 369 (1958).

7. See note 16 *infra*.

8. The defendant was convicted for violations of 21 U.S.C. §§ 331(q)(1), (2), 360a(a), (b) (Supp. V, 1964) (both of which were repealed in 1970). The drug methamphetamine is what is more commonly known as an “upper”, and more properly known as methamphetamine hydrochloride (desoxyephedrine hydrochloride). The drug stimulates the central nervous system and its effects depend upon the personality and mental state of the particular individual. Although the drug usually decreases the feeling of fatigue and increases confidence and alertness, a continued use may result in the exact opposite effect. Large doses tend to be followed by fatigue and mental depression. Most significantly the drug is habit forming.

agent offered to supply the defendant with all the phenyl-2-propanone needed in the manufacturing process⁹ in return for one-half of the total drug produced. After examining a sample of an earlier batch, the agent delivered the chemical and in return was given his share of the drug produced. The remainder of the batch was purchased by the agent for sixty dollars. When the agent again made the same offer, one of the defendant's confederates, at whose home the laboratory was located, declined to accept, saying that he had enough of the needed chemical. Three days later agents raided the confederate's home and made arrests.

The majority opinion, delivered by Mr. Justice Rehnquist,¹⁰ sustained the trial court's finding of Russell's guilt, and disagreed sharply with the Ninth Circuit's finding of entrapment,¹¹ stating that the circuit court had "expanded the traditional notion of entrapment".¹² The opinion clearly reflects the majority's belief in the "traditional notion", as it reaffirms the Court's majority opinion in *Sorrells v. United States*.¹³ In *Sorrells*, entrapment was first recognized as a defense, and the test of the defense, announced by that decision, was subsequently affirmed in *Sherman v. United States*.¹⁴

The decision in *Russell*, like both of its predecessors, emerged from a court "sharply divided"¹⁵ over the basic concept of entrapment. Two easily distinguished theories have divided the Court almost equally on all three

9. Although this chemical compound is itself legal to possess, it is essential to the manufacture of methamphetamine. The chemical is however difficult to obtain, as a manufacturer's license is needed to purchase it. See 411 U.S. at 447.

10. 411 U.S. at 424-36. Mr. Justice Rehnquist was joined in his opinion by Mr. Chief Justice Burger and Justices White, Blackmun and Powell.

11. *Russell v. United States*, 459 F.2d 671 (9th Cir. 1972). The Ninth Circuit found entrapment as a matter of law and reversed Russell's conviction because of the "intolerable degree of governmental participation." *Id.* at 673.

12. *United States v. Russell*, 411 U.S. 423, 427 (1973).

13. 287 U.S. 435 (1932). In *Sorrells* a prohibition agent posed as a tourist visiting scenic Asheville, North Carolina. After engaging the defendant in a conversation about their mutual war experiences, the agent asked if he could get some liquor. Initially, Sorrells stated he had none, but after the agent's third request, the defendant left and in a few minutes returned with a half-gallon of illegal liquor and sold it to the agent. The Court reversed and remanded the defendant's conviction, stating that if the criminal design originated with the agent the defense of entrapment was available to the defendant.

14. 356 U.S. 369 (1958). Sherman, a former narcotics addict, met a government informer at a doctor's office where both were being treated for addiction. After several accidental meetings, the informer asked the defendant to supply him with drugs. Initially, Sherman refused but following repeated requests the defendant agreed. The informer told police he had another seller, and on three occasions agents observed exchanges between the two men. The Court held this was entrapment as a matter of law and ordered the indictment dismissed.

15. *Lopez v. United States*, 373 U.S. 427 (1963). In the language of the Court: "The defense of entrapment, its meaning, purpose, and application, are problems that have sharply divided this Court on past occasions." *Id.* at 434.

occasions.¹⁶ The first view, referred to as the "origin of intent"¹⁷ or subjective test, is the view taken by the majority in *Russell*. By this test, only the predisposition of the particular defendant to commit the act charged must be examined.¹⁸ If such an examination reveals the defendant to have been "otherwise innocent"¹⁹ prior to the "creative activity"²⁰ of the government, the defense of entrapment is proven.²¹ The rationale underlying this approach is that Congress, in enacting criminal laws, "could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, but was induced to commit them by the government".²² The second view, that taken by the minority in *Russell*,²³ calls for an objective test and asserts that proof of police misconduct is dispositive on the issue of entrapment.²⁴ This view takes the position that

16. While the majority of five justices in all three cases has adopted what will be referred to as the subjective view, the contrary view has been advocated by the sizeable minority. In *Sorrells*, Mr. Justice McReynolds dissented favoring an affirmance of the conviction, 287 U.S. at 453; but in a concurring opinion written by Mr. Justice Roberts and joined by Justices Brandeis and Stone, what will be referred to as the objective view of entrapment was adopted. 287 U.S. at 453-59. In *Sherman* the objective view was taken in a concurring opinion written by Mr. Justice Frankfurter and joined by Justices Douglas, Harlan and Brennan. 356 U.S. at 378-85. *Russell* has two dissenting opinions, both adopting the objective view. The first by Mr. Justice Douglas with whom Mr. Justice Brennan joins, and the second a very thorough opinion by Mr. Justice Stewart with whom Justices Brennan and Marshall joined. 411 U.S. at 436-50.

17. See Comment, *Entrapment*, 73 HARV. L. REV. 1333, 1335 (1960).

18. *United States v. Russell*, 411 U.S. 423, 426 (1973); *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Sorrells v. United States*, 287 U.S. 435, 444-45 (1932).

19. *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

20. *Id.* In *Russell* this activity was referred to as "instigating a criminal act". 411 U.S. at 428. *Sherman* referred to such activity as "induce[ing] its commission". 356 U.S. at 372.

21. The apparent simplicity of the subjective test is clearly the ideal of justice. Only guilty persons should be punished; guilt, to be ascertained by a finding of intent plus the overt act. But should guilt for the crime charged be proven by a showing that the defendant has committed crimes other than the one charged? A showing of predisposition demands an evaluation of the particular defendant's past and evidence of prior crimes committed by him is proper rebuttal to a defense based on entrapment. This places the burden of proof of showing innocence on the defendant, rebuttable by the normally inadmissible evidence of prior guilt. The Court considers this fair play and deems it necessary to draw a line "between the trap for the unwary innocent and the trap for the unwary criminal." 356 U.S. 369, 372-73 (1958).

22. *United States v. Russell*, 411 U.S. 423, 435 (1973). Although this language is original in *Russell*, it is merely a restatement of the language used earlier. See *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Sorrells v. United States*, 287 U.S. 435, 448 (1932).

23. See note 16 *supra*.

24. The objective test holds as its goal not the acquittal of innocent men, but the suppression of police misconduct. Clearly the goal of police activities is the prevention of future crimes and entrapping past criminals may serve that end. But as with the illegal seizure or coerced confession cases, the conduct of the government can exceed permissible means to accomplish its desired ends. The logic which would allow one standard of police conduct to

society cannot tolerate certain conduct by police intended to trap a defendant in a criminal act regardless of his past record or present inclinations to criminality.²⁵ This view dismisses the congressional intent theory of the defense as "sheer fiction"²⁶ and disregards completely any consideration of criminal predisposition on the part of the defendant.²⁷

A division of opinion likewise exists as to whether the defense of entrapment is a question of law or fact. The majorities have held the subjective test of determining the defendant's predisposition, is a question of fact which can only be taken from the jury when the facts lead to the decision of entrapment as a matter of law.²⁸ The objective view would make the matter of police misconduct a question of law to be decided only by the court. This is clearly pointed out by the dissenting opinion in a companion case to *Sherman*.²⁹

Most significant in *Russell* is the Court's complete rejection of the objective test. The argument was made to the Court that the officer's involvement in the illegal activity of the defendant was so great that prosecution

be used against a two-time loser and another against one with a spotless record and pure of heart, strikes at the very core of both the letter and spirit of due process. It is this disparity the objective test seeks to eliminate by placing entrapment on an equal footing with other police conduct.

25. *United States v. Russell*, 411 U.S. 435, 437 (1973) (Douglas dissenting) quoting with approval Frankfurter's concurring opinion in *Sherman v. United States*, 356 U.S. 369, 382-83 (1958).

26. *Sherman v. United States*, 356 U.S. 369, 379 (1958) (Frankfurter concurring).

27. *United States v. Russell*, 411 U.S. 435, 446 (1973) (Stewart dissenting); *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter concurring); *Sorrells v. United States*, 287 U.S. 435, 459 (1932) (Roberts concurring). In *Sorrells*, Mr. Justice Roberts draws an analogy between the attempted prosecution of an entrapped defendant and the clean hands doctrine in equity. In what appears to be a dawning of the exclusionary rule theory, Roberts states:

Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong . . . [T]his is the real basis of the decisions approving the defense of entrapment, though in statement the rule is cloaked under a declaration that the government is estopped or the defendant has not been proved guilty. 287 U.S. at 455.

28. *Sherman v. United States*, 356 U.S. 369, 377 (1958). This position is affirmed by the decision in *Russell* which upheld the jury's verdict of guilty in which the question of entrapment was submitted to the jury.

29. *Masciale v. United States*, 356 U.S. 386, 389 *reh. den.*, 357 U.S. 933 (1958) (Frankfurter dissenting). This dissent adopted the opinion of Mr. Justice Roberts in *Sorrells*, 287 U.S. at 457 and Mr. Justice Frankfurter in *Sherman*, 356 U.S. at 385. It is worthy at this point to note the logic with which Frankfurter argued the importance of a judicial decision on entrapment. After pointing out that the defense should be used to block impermissible police misconduct he stated:

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. 356 U.S. at 385.

should be barred on constitutional grounds.³⁰ This presented the Court with an opportunity to adopt the objective view for either of two reasons. The Court could have found that the conduct of the police was so outrageous as to violate the "fundamental fairness" mandated by the due process clause.³¹ It chose, however, to hold the case "not of that breed",³² while leaving open the possibility that such a case could occur. In the alternative, the Court could have held that such police misconduct, viewed objectively, is a violation of the defendant's constitutional rights, and an exclusionary rule should apply.³³ But this was rejected on the basis that no independent constitutional right of the defendant had been violated by the police conduct.³⁴

The Court in refusing to find any constitutional basis for the defense of entrapment, chose instead to accept the prior decisions of the judicially created rule as the reason for continuing the subjective test. This reasoning would seem to be in conflict with the basis on which the Court first created entrapment.³⁵

It is now well settled law that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of a crime, will not defeat the prosecution.³⁶ It may, however, be that one virtue does emerge from the Court's position. The majority opinion points out in *Russell* that since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive

30. *United States v. Russell*, 411 U.S. 423, 435 (1973).

31. In *Rochine v. California*, 342 U.S. 165 (1952) the defendant was convicted when incriminating evidence was forcibly retrieved from his stomach. The Court held the evidence inadmissible on due process grounds stating that the methods of the police constituted conduct "that shocks the conscience." *Id.* at 172.

32. *United States v. Russell*, 411 U.S. 423, 432 (1973). The Court states:

The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment. (Citations omitted). *Id.*

33. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

34. *United States v. Russell*, 411 U.S. 423, 435 (1973).

35. In *Sorrells*, the Court relied heavily on *Butts v. United States*, 273 F. 35 (8th Cir. 1921). The opinion in *Butts* quoted with approval in *Sorrells*, said that to punish an entrapped defendant was ". . . unconscionable, contrary to public policy, and to the established law of the land . . ." *Id.* at 38.

36. *United States v. Russell*, 411 U.S. 423, 435 (1973); *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Sorrells v. United States*, 287 U.S. 435, 441 (1932).

37. *United States v. Russell*, 411 U.S. 423, 433 (1973). When this opinion was written the proposed Federal Criminal Code and various studies of it were well known. It is certainly within the possibilities, the majority of the Court had seen the proposals, adopting the objective view and saw no need for a departure from the established case law with the impending legislation in the near future.

definition of the defense it may find desirable.³⁷ Perhaps then, there is hope that Congress will enact the view, the Court has refused to adopt.³⁸

J.A.B. III

38. At the present time two bills are before the United States Senate. Both are comprehensive attempts to codify criminal law in a Federal Criminal Code. The first to be introduced was S. 1, the entrapment section of which provides as follows:

(a) BAR.—It is a bar to prosecution that the defendant was entrapped into engaging in prohibited conduct.

(b) OCCURRENCE.—Entrapment occurs when a law enforcement officer or person requested by a law enforcement officer to assist him induces or encourages a person to engage in prohibited conduct, *using such methods or inducement or encouragement as create a substantial risk that the conduct would be committed by persons other than those who are ready to commit it*. Conduct merely affording a person an opportunity to engage in prohibited conduct does not constitute entrapment. A risk is less substantial where a person has previously engaged in similarly prohibited conduct and such conduct is known to such officer as a person assisting him.

. . . (emphasis added) S. 1, 93 Cong., § 1-3B2 Entrapment (1973).

The alternate bill which incorporates other changes is S.1400. The provision on entrapment in this provides:

It is a defense to a prosecution under any federal statute *that the defendant was not predisposed to commit the offense* charged and did so solely as a result of active inducement by a law enforcement officer or a person acting as an agent of a law enforcement agency. The employment of stratagem or deception, or the provision of a facility or an opportunity for commission of an offense, or the failure to foreclose such an ordinary law-abiding person to commit an offense, does not in itself constitute unlawful entrapment. (emphasis added) S. 1400, 93 Cong., § 531 Unlawful Entrapment (1973).

Note how the emphasis on the dispositive factor is shifted in S. 1400 to predisposition from the character of the police misconduct. Therefore, if the Senate adopts S. 1400 and the House concurs, the subjective test of the majority in *Russell* will be codified. The only chance to save the objective theory of entrapment is S. 1 and even it does not completely adopt this better view.

See also 13 BNA 1973 CRIM. L. REP. 3265, 3269-70.