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Entrapment Defense in Narcotics Cases: Guidelines for Law Enforcement

Bureau of Justice Assistance

MONOGRAPH

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INTRODUCTION

Since 1932, the United States Supreme Court has issued several major decisions addressing the entrapment defense. Although the Court has attempted to provide clarity in this area, the precise scope and effect of the entrapment defense remain uncertain. The uncertainty stems from a variety of factors. First, because of the inherently controversial aspects of the entrapment defense, the Supreme Court itself has often been deeply divided over the standards that should apply to such cases. Second, because the Supreme Court's entrapment standards are primarily based on statutory rather than constitutional principles, state courts and legislatures have remained free to establish their own rules in this area. Consequently, entrapment rules often vary between the federal and state systems as well as between the states. Finally, because entrapment standards are subject to both judicial interpretation and jury determinations, the outcome in any particular case is difficult to predict.

Despite these difficulties, some effort must be made to provide police officers with practical guidelines for dealing with the entrapment defense. Police officers are routinely called upon to make decisions affecting the availability of this defense. Yet, without appropriate guidelines, officers lack the means for resolving the complex legal issues posed by entrapment doctrine.

The purpose of this monograph is to provide guidelines designed to minimize the likelihood of a successful entrapment defense, particularly in narcotics cases. The paper consists of four chapters. Chapter 1 defines the entrapment concept and briefly reviews pertinent United States Supreme Court decisions. Chapter 2 sets forth the alternative standards governing the entrapment defense. Chapter 3 attempts to provide specific guidelines for dealing with each of the prevailing entrapment standards. Finally, Chapter 4 addresses supervisory considerations in successfully avoiding the entrapment defense.

CHAPTER 1

ENTRAPMENT DOCTRINE

The United States Supreme Court has defined entrapment as "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."[1] In essence, this definition emphasizes two factors: (1) the defendant's innocent state of mind prior to contact with police officers; and (2) the manner by which law enforcement officers may have induced the defendant's commission of a crime. The Supreme Court has elaborated on this definition in a series of decisions that established the foundation for the entrapment defense. For the most part, these decisions have focused on the defendant's state of mind rather than on the propriety of the government's conduct. Thus, the Court has found entrapment only when police agents have induced innocent persons to violate the law. The following case summary sets forth the origin of this doctrine.

REVIEW OF SUPREME COURT CASES

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

Sorrells was a prohibition era prosecution in which a government agent succeeded in buying liquor from the defendant only after three requests and currying his favor by emphasizing their common wartime experiences. The Supreme Court reversed Sorrells' conviction, noting that the "defendant had no previous disposition to commit [the crime] but was an industrious, law-abiding citizen, and that the agent lured defendant . . . to its commission by repeated and persistent solicitation . . . ."[2]

The *Sorrells* Court emphasized that "merely afford[ing] opportunities or facilities for the commission of the offense does not defeat the prosecution."[3] However, the Court concluded that Congress could not have intended to convict "[w]hen the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act . . . ."[4]

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1 *Sorrells* v. *United States*, 287 U.S. 435, 454 (1932) (Roberts, J., concurring).

2 *Ibid.* at 441.

3 *Ibid.* at 441.

4 *Ibid.* at 445 (quoting *Newman* v. *United States*, 299 F. 128, 131 (4th Cir. 1924)).

Sherman v. United States, 356 U.S. 369 (1958)

Sherman was a narcotics prosecution in which the Court found entrapment. The defendant met an informant in a doctor's office at which both were being treated for narcotics addiction. After establishing a friendship, the informant claimed that his medical treatment was inadequate and repeatedly asked defendant to find a source of narcotics. After many such requests, in which the informant complained of suffering from withdrawal, the defendant agreed to supply narcotics. The evidence also established that, in addition to inducing the crime, the informant caused the defendant to resume his drug addiction.

In reversing defendant's conviction, the Supreme Court stated that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[5] Chief Justice Warren's majority opinion suggested that this line could best be drawn by conducting a "searching inquiry into [the defendant's] conduct and *predisposition.*"[6] The Court found insufficient evidence of predisposition, stressing that the defendant was not in the narcotics trade and made no profit on any of his deals with the informant.

Chief Justice Warren also declined to consider the suggestion that, rather than focus on the *defendant's predisposition,* entrapment should be found whenever *police conduct* improperly carries the risk that ordinary, non-predisposed citizens would respond to the inducement by engaging in crime. Thus, in determining whether entrapment occurred, *Sherman* chose to emphasize the defendant's character (i.e., the predisposition factor) rather than the government's actions (i.e., the nature of the inducement).

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

In *Russell,* an undercover officer supplied the defendant with phenyl-2-propanone, a chemical ingredient necessary to the manufacture of methamphetamine. The Supreme Court rejected the defendant's argument that the government's conduct in providing a vital chemical component constitutes entrapment as a matter of law. Accordingly, because the evidence established that defendant had been predisposed to commit the offense, his conviction was sustained.

Despite the government's success, the *Russell* decision contained a cautionary note for the law enforcement community. The Court once again applied the predisposition test, rather than the defendant's proposal based on "the type and degree of governmental conduct." However, Justice Rehnquist's majority opinion acknowledged that "we may some day be presented with a situation

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5 356 U.S. at 372.

6 *Ibid.* at 373 (quoting *Sorrells* v. *United States*, 287 U.S. 435, 451 (1932) (emphasis added).

in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."[7] Though the Court viewed "the instant case [as] distinctly not of that breed,"[8] its decision was the first to suggest that entrapment doctrine may be subject to constitutional constraints.

Hampton v. United States, 425 U.S. 484 (1976)

Hampton involved an effort by a defendant to invoke the due process principles articulated above in *Russell.* The defendant maintained that the government had both supplied him with heroin and steered him to an undercover officer who then bought the heroin. The defendant claimed that, regardless of his own predisposition to engage in heroin deals, due process had been violated by virtue of the government's "outrageous" involvement in criminal activity. Though a majority of the Court once again recognized a potential due process component to the entrapment defense, the conviction was sustained because of the defendant's predisposition to traffic in narcotics.

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7 411 U.S. at 431-32.

8 *Ibid.* at 432.

CHAPTER 2

ALTERNATIVE STANDARDS FOR THE ENTRAPMENT DEFENSE

Although the Supreme Court has consistently endorsed an approach to entrapment that emphasizes the defendant's state of mind (the predisposition test), not all state jurisdictions have adopted this standard. Instead, many state courts or legislatures have chosen a test that principally considers the propriety of police conduct rather than the defendant's guilty state of mind. A few jurisdictions have adopted a standard that considers both the Supreme Court's predisposition test and the propriety of police conduct.

While these tests may lead to different results, it must be stressed that merely offering someone the opportunity to commit a crime ordinarily does not constitute entrapment. For the entrapment defense to be raised, there must be some police inducement of the defendant. Thus, the police must initially suggest, persuade, or encourage commission of the crime. For example, offering crack cocaine to potential buyers in high crime areas does not constitute entrapment because the sting operation merely affords citizens the opportunity to violate the law. Absent inducement of some kind, there can be no entrapment.

Assuming that an inducement is contemplated, police officers must be familiar with the operative entrapment standard within their jurisdiction. If doubt exists as to which standard applies, the prosecutor's office should be consulted. Set forth below is a summary of the three prevailing entrapment standards: (1) the subjective predisposition test; (2) the objective police conduct test; and (3) the combined predisposition/police conduct test.

Subjective Predisposition Test

The subjective predisposition test has been adopted by the United States Supreme Court. The rule is known as the "subjective" test because it focuses on the defendant's predisposition to commit the crime. Thus, if the police induce an otherwise predisposed defendant to violate the law, entrapment does not exist. The only exception to this rule would be the relatively rare situation in which outrageous police conduct violates due process. The due process problem is discussed separately below.

There are two aspects to the subjective test: (1) the initial inducement; and (2) proof of predisposition. In practical terms, these two factors operate as follows:

> Entrapment is an affirmative defense that places on the defendant the initial burden of presenting some evidence that the government induced him to commit the offense charged. Once a defendant has presented some evidence of inducement, the burden rests on the government to overcome an entrapment defense by proving the predisposition of the defendant.[1]

To establish inducement, the defendant must do more than prove the government offered him the opportunity to commit a crime. In fact, many courts have held that inducement requires "more than mere suggestion, solicitation, or initiation of contact and . . . embodies an element of persuasion or mild coercion . . . ."[2] For example, a defendant establishes inducement by offering evidence of "fraudulent representations, threats, coercive tactics, harassment, promises of reward, pleas based on need, sympathy, or friendship, or any other [comparable] government conduct . . . ."[3]

After inducement has been adequately established, the focus shifts to the defendant's character. At this point, the crucial inquiry becomes whether the defendant was predisposed to commit the crime charged. Predisposition "refers to whether the defendant had a readiness and willingness to commit the offenses charged, or whether the government 'implant[ed] in the mind of an innocent person' the disposition to commit the offense."[4] According to a leading treatise on criminal law, "[a] defendant is considered predisposed if he is 'ready and willing to commit the crimes . . . charged . . . whenever opportunity was afforded.'"[5] If a defendant was predisposed, the entrapment defense ordinarily must be rejected despite the initial police inducement.

In determining predisposition, two considerations should be kept in mind. First, the concern is with whether the defendant was predisposed to commit the *crime charged,* rather than with his predisposition to violate the law generally. For example, evidence that the defendant

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1 *United States* v. *Adinseye*, 802 F.2d 740, 743 (4th Cir. 1986), cert. denied, 482 U.S. 916 (citation omitted); accord *United States* v. *Rodriguez*, 858 F.2d 809, 813 (1st Cir. 1988).

2 *United States* v. *Hill*, 626 F.2d 1301, 1304 (5th Cir. 1980) (citations omitted); see also *United States* v. *Leroux*, 738 F.2d 943, 948 (8th Cir. 1984).

3 *United States* v. *Burkley*, 591 F.2d 903, 914 (D.C. Cir. 1978), cert. denied, 440 U.S. 966; accord *United States* v. *Marino*, 868 F.2d 549, 552 (3rd Cir. 1989), cert. denied, 109 S.Ct. 3243.

4 *United States* v. *Fields*, 689 F.2d 122, 124 (7th Cir. 1982), cert. denied, 459 U.S. 1089 (citing *Sorrells* v. *United States*, 287 U.S. 435, 442); Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53, 69 (1986).

5 W. LAFAVE, CRIMINAL LAW 423 (1986)[hereinafter CRIMINAL LAW].

engaged in two prior assaults would have no bearing on his predisposition to commit narcotics violations.

Second, timing is crucial to each predisposition determination. The relevant inquiry must be on the defendant's state of mind *before the police contacted him.*[6] Thus, a defendant who becomes disposed to commit a crime immediately before its commission may still claim the entrapment defense if he was not so disposed before government agents contacted him. This rule prevents the police from "working on" an innocent person until the desired disposition is obtained just before occurrence of the criminal act.

The subjective test governs the entrapment defense in the federal courts and a majority of the states.[7] More specific guidelines for applying the subjective standard are discussed in Chapter 3.

Objective Police Conduct Test

In contrast to the subjective test, the objective standard focuses exclusively on whether police conduct created an undue risk of inducing innocent persons to commit criminal acts. Under this approach, entrapment exists if the police "employ methods of persuasion or inducement that create a substantial risk that . . . an offense will be committed by persons other than those who are ready to commit it."[8] The standard is characterized as an objective test because it is concerned with whether an average law-abiding person would likely have responded to the proposed inducement by agreeing to violate the law.[9]

Jurisdictions adopting this rule place greater emphasis on deterring police misconduct than on convicting any particular individual. Thus, the predisposition of any specific defendant to engage in crime is irrelevant under this standard. Instead, entrapment exists if police conduct creates a substantial risk of inducing offenses by persons not otherwise ready and willing to engage in criminality. In effect, this means that a culpable defendant may be acquitted in the

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6 *United States* v. *Williams*, 705 F.2d 603, 618 (2d Cir. 1983), cert. denied, 464 U.S. 1007; *United States* v. *Jannotti*, 501 F.Supp. 1182, 1191 (E.D.Pa. 1980), rev'd on other grounds, 673 F.2d 578 (3rd Cir. 1982), cert. denied, 457 U.S. 1106.

7 For a partial listing of the states which have adopted this rule, see CRIMINAL LAW, *supra*, note 13, at 422 n. 26; P. MARCUS, THE ENTRAPMENT DEFENSE 54, n. 10 (1989) [hereinafter THE ENTRAPMENT DEFENSE]. See generally Marcus, *The Entrapment Defense and the Procedural Issues: Burden of Proof, Questions of Law and Fact, Inconsistent Defenses*, 22 Crim. L. Bull. 197, 211-18 (1986) [hereinafter *The Entrapment Defense and the Procedural Issues*]. See also MODEL PENAL CODE 2.13(2)(A.L.I. 1985).

8 MODEL PENAL CODE § 2.13(1)(b)(A.L.I. 1985).

9 MODEL PENAL CODE § 2.13(1)(b)(A.L.I. 1985); NATIONAL COMMISSION STUDY DRAFT OF A NEW FEDERAL CODE 702 (1970); see also THE ENTRAPMENT DEFENSE, *supra*, note 15, at 86 nn. 11-12.

interest of protecting society at large against police inducements that may be too attractive for any citizen to resist.

The objective test of entrapment has been adopted in a minority of the states.[10] More specific guidelines for applying the objective standard are discussed in Chapter 3.

Combined Predisposition/Police Conduct Test

A few jurisdictions, rather than choosing between the subjective and objective approaches, have combined the two tests. Unfortunately, courts have not interpreted the combined standard uniformly. New Jersey, for example, requires defendants to establish (1) that the police conduct created a substantial risk that the crime would be committed by someone who was not otherwise predisposed to do so; and (2) that such misconduct actually caused the defendant himself to commit the crime (*e.g.*, that the defendant was not otherwise predisposed to engage in such criminality).[11] By comparison, Florida and West Virginia require the prosecution initially to establish that the police employed reasonable procedures (i.e., that did not potentially induce crimes by innocent persons), and still permit acquittal if the defendant himself was not predisposed to engage in the crime charged.[12]

Specific guidelines for operating under both the subjective and objective tests are set forth in the next chapter.

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10 For a partial listing of the states which have adopted this rule, see CRIMINAL LAW, *supra*, note 13, at 424 nn. 33-34; THE ENTRAPMENT DEFENSE, *supra*, note 15, at 86 n. 12; *The Entrapment Defense and the Procedural Issues*, *supra*, note 15, at 225-29; MODEL PENAL CODE § 2.13(2) (A.L.I. 1985).

11 *State* v. *Rockholt*, 476 A.2d 1236, 1239, 52 A.L.R.4th 757 (N.J. 1984).

12 *Cruz* v. *State*, 465 So.2d 516, 521 (Fla. 1985), cert. denied, 105 S.Ct. 3527; see also *State* v. *Hinkle*, 286 S.E.2d 699, 701 (W.Va. 1982).

CHAPTER 3

ENTRAPMENT GUIDELINES UNDER PREVAILING STANDARDS

Unfortunately, most courts have not provided law enforcement with comprehensive guidelines for avoiding improper entrapment situations. Nevertheless, it is possible to develop such guidelines by reviewing leading cases decided under the subjective and objective tests of entrapment, as well as those decisions in which courts have found due process violations. Based upon such a review, the guidelines in this chapter have been developed.

Before examining these guidelines, two points must be kept in mind. First, before considering any entrapment situation, law enforcement officials *must* know the entrapment test that governs their particular jurisdiction. In most cases, whether the jurisdiction has adopted the subjective test, the objective test, or a combination of the two can be determined by consulting with experienced narcotics investigators. If any doubt exists, the prosecutor's office or police legal advisor should be contacted for clarification. In any event, *no investigation involving a potential entrapment situation should proceed without knowing the test that will govern the outcome of the case.*

Second, once the correct entrapment standard has been determined, it is important to remember that its *application* will depend on the facts and circumstances of each case. While factors relevant to each standard are set forth below, these factors must be considered in their entirety. Although a single factor may occasionally determine the outcome of a case, more often the result will depend upon a combination of these factors. In each case, the likelihood of avoiding the entrapment defense can be maximized by considering all of these factors before offering the target any inducement.

With these cautionary comments in mind, appropriate guidelines for operating under the subjective and objective entrapment tests may be considered. To avoid constitutional attacks as well, the guidelines will be supplemented with suggested due process standards.

SUBJECTIVE PREDISPOSITION TEST: EVIDENTIARY FACTORS

Under the subjective predisposition test, the main question is whether the defendant was predisposed to commit the crime charged before the occurrence of any police inducement. In evaluating predisposition, courts have considered the following guidelines.

Expressions of Willingness to Commit the Crime Charged

According to many courts, the most significant evidence of predisposition is the defendant's own statements acknowledging a willingness to commit the crime charged. A defendant who has made such statements to an undercover officer will have great difficulty arguing entrapment. As the likelihood of refuting the entrapment defense increases with each additional statement expressing readiness to deal in drugs, obtaining several such statements should be a law enforcement priority.

Absence of Reluctance to Commit the Crime Charged

Occasionally, a defendant will not express his willingness to violate the law, but predisposition may be inferred from the manner in which he responded to the chance to commit a crime. For example, the fact that an alleged dope dealer "readily responded to the inducement offered"[13] suggests a predisposition to violate the narcotics laws. In contrast, a defendant who repeatedly expresses reluctance to engage in the crime charged has a better chance of acquittal under the entrapment defense.

Of course, it is not uncommon for sophisticated criminals to express some initial reluctance before agreeing to commit a crime. This tactic is viewed by violators as necessary to preserving a possible entrapment argument. Accordingly, evidence of slight or cautious reluctance does not demonstrate the absence of predisposition.[14]

Degrees of Inducement

The degree to which the police had to induce the defendant's violation is an important factor in evaluating whether the defendant was predisposed to commit the crime charged. The greater the inducement required, the less likely that predisposition existed.

Obviously, the inducement factor is closely related to the "reluctance" considerations discussed above. This factor, however, focuses on the law enforcement activity rather than on the defendant's conduct. If the defendant engaged in the crime charged only after having been heavily pressured by police agents, it is unlikely that he was predisposed to commit the crime charged prior to contact with law enforcement officers. Likewise, if the police had to offer the defendant a disproportionate economic benefit in order for the crime to occur, predisposition is probably absent.

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13 THE ENTRAPMENT DEFENSE, *supra*, note 15, at 142.

14 THE ENTRAPMENT DEFENSE, *supra*, note 15, at 148.

Though courts employing the predisposition standard do not hold that an excessive inducement automatically constitutes entrapment, the nature of the inducement is an important consideration in every case.[15] Properly understood, this aspect of the predisposition test ensures that the investigative target is offered an inducement that comports with reality. Given an extreme inducement (such as an excessive amount of money for a narcotics transaction), many ordinary citizens might agree to commit a crime. Since the police should be concerned only with criminals willing to respond to inducements common to their trade, the inducement should reflect the real world.

Defendant's Character – Other Similar Crimes

Although character evidence is ordinarily inadmissible in a criminal case, such proof is proper to rebut the entrapment defense.[16] Accordingly, in considering whether the entrapment defense is likely to succeed, law enforcement officials should carefully evaluate the background of any individuals targeted for investigation. For example, in a narcotics context, the fact that a target has prior narcotics convictions is strong evidence that the individual is predisposed to traffic in controlled substances. Note, however, that courts carefully scrutinize the nature of the prior convictions to ensure that they are substantially similar to the crime charged. Thus, the prosecution may not argue that someone is generally predisposed to violate the law. Rather, the predisposition must concern the specific crime charged.

Predisposition to commit the crime charged may also be established by evidence that the defendant engaged in prior similar acts that did not result in conviction. The theory is that the defendant was already engaged in the same "course of conduct" before receiving any police inducement.[17] For example, if a defendant engaged in two prior narcotics sales before committing the charged crime, predisposition to traffic in drugs may be proven by evidence of the two prior sales. Although the court will scrutinize such proof to ensure that it is not too remote to the charged offense,[18] at the very least this evidence will usually be allowed if the prior acts occurred during the overall investigation resulting in the defendant's arrest.

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15 See *United States* v. *Dion*, 762 F.2d 674, 689 (8th Cir. 1985), rev'd on other grounds, 476 U.S. 734 (1986) (excessive offers over a two-and-a-half year period enticed impoverished Indians to shoot protected birds); *United States* v. *Kaminski*, 703 F.2d 1004, 1008-1009 (7th Cir. 1983) (the defendant was not entrapped because he agreed to commit the crime before knowing the amount of any inducement).

16 See, e.g., *United States* v. *Burkley*, 591 F.2d 903, 921 (D.C. Cir. 1978), cert. denied, 440 U.S. 966; *United States* v. *Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985).

17 THE ENTRAPMENT DEFENSE, *supra*, note 15, at 142.

18 In addition, the judge has discretion to exclude all such evidence on grounds of undue prejudice.

Finally, evidence that a defendant engaged in other similar violations—or expressed a willingness to do so—*after* committing the crime charged is also probative of predisposition. For example, after a drug sale, a statement expressing desire to engage in future sales demonstrates the declarant's predisposition with respect to the immediate sale as well as future transactions. "The courts have consistently allowed such evidence of 'post-crime actions.'"[19]

Prior Course of Conduct

The fact that a defendant has engaged in a prior "course of conduct similar to the crime" charged is evidence of predisposition.[20] As indicated above, courts may limit the government's opportunity to introduce evidence of prior acts not resulting in conviction. However, course of conduct may also be proven by a defendant's statements acknowledging prior criminal activity. Alternatively, predisposition may be inferred from the fact that a defendant has the contacts and organizational structure in place to commit the crime charged. Thus, a narcotics defendant's entrapment defense may be countered by evidence that he was easily able to obtain illicit drugs[21] and that his actions were facilitated by an organized group with whom he worked easily and had close contact.

Criminal Activity For Profit

A defendant's willingness to engage in criminal activity for profit is probative of predisposition. Although most crimes are economically motivated, the entrapment defense is often raised by defendants who argue that they agreed to commit a crime to help a friend or relative. For example, this claim is frequently made by defendants charged with trafficking in narcotics. Under such circumstances, the fact that the defendant derived an economic benefit from the transaction undermines his claim of altruistic motive and suggests predisposition to commit the crime charged.

OBJECTIVE POLICE CONDUCT TEST: GUIDELINES

Under the objective police conduct test, the central concern is whether the police conduct created an undue risk of inducing innocent persons to commit criminal acts. If so, entrapment has occurred as a matter of law. Cases finding entrapment under this standard fit into the categories

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19 THE ENTRAPMENT DEFENSE, *supra*, note 15, at 161.

20 THE ENTRAPMENT DEFENSE, *supra*, note 15, at 142.

21 THE ENTRAPMENT DEFENSE, *supra*, note 15, at 149.

set forth below. In each instance, entrapment occurs either because the police exploited a social relationship with the defendant or somehow effected an improper inducement.

Note that the mere fact that a case fits within one of the categories below does not necessarily mean that entrapment has occurred. Courts differ in their applications of the objective test, and each situation varies according to its unique facts. Nevertheless, the categories below are typical of situations in which entrapment has been found under the objective test.

Plays on Sympathy

Numerous courts have held that police efforts to induce criminal acts by playing on a defendant's sympathy constitute entrapment.[22] This result is warranted, under the objective test, because sympathy plays create an unreasonable risk that any law abiding citizen would respond to the inducement simply to "help out." The following examples illustrate this improper technique: (1) a fictitious story that another drug dealer has threatened the informant's life unless lost drugs can be replaced; (2) pleas to help a desperate addict suffering from withdrawal; (3) tearful requests to provide drugs for a patient requiring pain killers; and (4) an informant's desperate need for money to avoid foreclosure. Oftentimes, plays on sympathy occur within the context of a close relationship between the informant/undercover officer and the defendant.

Exploitation of Social Relationship

The most common situation posing entrapment problems occurs when the police attempt to induce a crime by playing heavily on a close friendship.[23] Given repeated requests to commit a crime for the sake of helping a friend in need, many ordinary citizens might reluctantly violate the law. A court is especially likely to be sympathetic when the defendant received no profit from the crime.[24]

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22 See, e.g., *People* v. *Harding*, 413 N.W.2d 777, 784 (Mich.App. 1987) (a female police informant misleadingly told the defendant she would be killed unless the defendant engaged in an illegal drug sale and gave the informant the money); *State* v. *Taylor*, 599 P.2d 496, 503 (Utah 1979) (a female police informant's plea to a former lover to provide her with heroin constituted entrapment).

23 See, e.g., *Pascu* v. *State*, 577 P.2d 1064, 1068 (Alaska 1978) (police informant's exploitation of defendant's friendship was a factor in determining that defendant was entrapped); *People* v. *Graczyk*, 402 N.W.2d 60, 61 (Mich.App. 1986) (court held it was improper for the police informant to use a longtime friendship with defendant to induce him into delivering illegal drugs).

24 See, e.g., *People* v. *Gratzer*, 305 N.W.2d 300, 301 (Mich.App. 1981) (defendants turned all of their drug proceeds over to the cocaine supplier and made no profit); *People* v. *Duis*, 265 N.W.2d 794, 795 (Mich.App. 1978) (defendant supplied the illegal drugs only as a favor and received no profits from their sale).

Note, however, that the fact a friendship exists does not mean that police may not offer an inducement to an investigative target. It merely means that the friendship itself should not be the main reason that the defendant commits the crime.

Sexual Inducements

Under the objective test, entrapment is likely to be found whenever the inducement takes the form of a sexual enticement. For example, a physician's conviction for prescribing drugs illegally was reversed because the informant performed fellatio on him after his initial refusal to commit the crime.[25] Occasionally, courts have even criticized the practice of using an attractive undercover female to establish a close personal relationship with the target.[26] Though this practice, standing alone, usually is not troublesome, courts do not tolerate creating "sexual relationships between undercover agents and defendants."[27]

Easy Inducements

Unusually easy inducements have often resulted in findings of entrapment. The most common situation has involved decoy operations aimed at enticing persons to steal money from an officer posing as a drunkard or sleeping vagrant.[28] Usually, the money is placed on the decoy in a manner making it easy to remove without apparent detection.

Courts have had two objections to this practice. First, because the practice does not simulate reality, it does not address a serious law enforcement problem. Rather, it improperly involves the police in "manufacturing" crime. Second, given the easy nature of the inducement and placement of the decoy in a locale likely to be frequented by vagrants and other persons

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25 *People* v. *Wisneski*, 292 N.W.2d 196, 198 (Mich.App. 1980); see also *Starkey* v. *State*, 647 S.W.2d 353, 356 (Tex.App. 1982) (summarizing *People* v. *Wisneski*, 292 N.W.2d at 198).

26 *State* v. *Kaufman*, 734 P.2d 465, 466-68 (Utah 1987) (police officer established close relationship with defendant by representing herself as an attractive divorced young woman); *Commonwealth* v. *Thompson*, 484 A.2d 159, 166 (Pa. Super. 1984) (see *infra*, note 35).

27 THE ENTRAPMENT DEFENSE, *supra*, note 15, at 210; see, e.g., *Commonwealth* v. *Thompson*, 484 A.2d 159, 166 (Pa. Super. 1984) ("The use of a young, blonde female to coax a middle age male, after months of kissing and socializing . . . is not police conduct which presents 'mere opportunity' to commit a crime"); *People* v. *Perry*, 254 N.W.2d 810, 812 (Mich.App. 1977) (police did not entrap the defendant because the sexual relationship already existed).

28 See, e.g., *Sheriff, Washoe County* v. *Hawkins*, 752 P.2d 769, 771 (Nev. 1988) (drunken "decoy operations constitute impermissible entrapments"); *State* v. *Powell*, 726 P.2d 266, 268 (Hawaii 1986) (engaging in a drunken decoy operation amounts to manufacturing crime when it is unrelated to the crimes police are attempting to control).

desperately in need of cash, the practice creates a substantial risk that the theft would be committed by persons other than those predisposed to do so.

Extreme Inducements

Under the objective test, a few jurisdictions have suggested that unusually high monetary inducements create an unreasonable risk that ordinarily non-predisposed persons will commit a crime. For example, in a narcotics context, one court made the following statement:

> . . . an officer should be able to offer money in reasonable amounts at a prevailing price level in an unlawful traffic. But offers of profit which are grossly disproportionate to what is reasonably expectable in that traffic should not be permitted when those offers would have the effect of overwhelming the self-control of a normal person.[29]

This viewpoint is justified by two related factors. First, if the inducement does not reflect reality, the investigation is not being aimed at persons who constitute a true threat to society. Second, when an inducement is inordinately high, persons generally not predisposed to commit crimes might for the first time be motivated to violate the law.

Repeated Badgering

Several courts have found that extreme pressure or repeated badgering constitutes entrapment under the objective test.[30] For example, if numerous requests and pestering precede the delivery of drugs, the defendant is likely to prevail because excessive police pressure creates an unreasonable risk of causing non-predisposed ordinary citizens to commit crimes.

"Take-Backs"

A "take-back" occurs when an agent provides a controlled substance to a defendant who then sells the material to another agent. Courts differ widely in their treatment of drug "take-back" cases. Federal courts regularly permit agents both to supply the controlled substance to the

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29 *Grossman* v. *State*, 457 P.2d 226, 230 (Alaska 1969); accord *Commonwealth* v. *Thompson*, 484 A.2d 159, 165 (Pa. Super. 1984); *Ramos* v. *State*, 632 S.W.2d 688, 691 (Tex.App. 1982); but see *State* v. *Martin*, 713 P.2d 60, 62 (Ut. 1986) (offer of a large profit did not constitute entrapment because police knew nothing of defendant's identity).

30 See, e.g., *Myers* v. *State*, 494 So.2d 517 (Fla.App. 1986) (police informant targeted defendant, initiated the transaction of illicit drugs, and pressured defendant into committing the crime through the use of repeated phone calls); *People* v. *Duis*, 265 N.W.2d 794, 796 (Mich.App. 1978) (police informant "continued to 'bug' defendant, who was not willing to accede to [the informant's] entreaties, until defendant agreed to sell the [illicit drugs]").

defendant and then to purchase the material from him.[31] On this basis, the defendant may be prosecuted for illicit distribution. Many states, however, do not permit this practice—especially when the distribution activity was largely directed by a government agent.[32] Thus, it is critical that law enforcement officers be familiar with court practice within their particular jurisdiction. Some jurisdictions, operating under the objective test, have stated that this practice is entrapment as a matter of law.[33] While this is not the prevailing view, to avoid problems, officers must be familiar with their own state law.

DUE PROCESS VIOLATIONS: GUIDELINES

A majority of the Supreme Court and many state courts have recognized that, even if a defendant is predisposed to commit the crime charged, due process may be violated if the police have induced the violation through "outrageous" conduct of some kind. Because conduct is not outrageous unless it falls well below accepted norms, relatively few cases have found police action violative of due process.

Whether the due process defense will succeed depends on the circumstances of each case. Occasionally, the presence of a single factor may prompt a court to find a due process violation. More often, a variety of factors, taken together, will be considered. Regardless, police officers must recognize all of the factors that may cause a case to be lost on due process grounds. These factors are discussed below.

Manufacturing of the Crime by the Police

Several courts have stressed that due process is violated if the government manufactures—rather than investigates—criminal activity. Although judges understand that the police must often employ unusual methods in order to infiltrate criminal organizations, such methods may not include governmental involvement in virtually every step of the illicit operation.

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31 *Hampton* v. *United States*, 425 U.S. 484, 489 (1976) ("Here the drug which the government informant allegedly supplied to petitioner both was illegal and constituted the corpus dilecti for the sale of which petitioner was convicted"); see also notes 7-8, *supra*, and accompanying text.

32 See, e.g., *People* v. *Jamieson*, 423 N.W.2d 655, 658 (Mich.App. 1988) ("the police not only supplied the drugs which gave rise to the crime, but also, through the juvenile, directed the entire operation"); *Sylar* v. *State*, 340 So.2d 10, 11 (Miss. 1976) (defendant merely acted as a conduit between one state agent acting as a supplier and another state agent acting as a buyer).

33 *Baca* v. *State*, 742 P.2d 1043, 1045-46 (N.M. 1987) ("take backs" constitute improper investigative procedure where a defendant "[acts] as nothing more than a conduit, conveying [illicit drugs] from a police informant to a policeman").

Due process is violated if the government instigates the crime at the outset and predominantly controls each phase of the illicit activity.[34]

For example, in *United States* v. *Twigg*,[35] a drug conviction was overturned on the basis of such overreaching. The court found that the confidential informant had approached a defendant, who had no previous involvement with drugs, and discussed establishing a methamphetamine laboratory. After several months of discussions, the parties agreed to set up a lab. Under the agreement, the informant was to obtain the necessary equipment/materials and the defendant was to provide the requisite capital. Pursuant to this understanding, the government eventually provided all of the needed production items and its informant manufactured the methamphetamine. The defendant's role throughout the operation was minor. In reversing, the Court of Appeals stressed two factors: (1) that, prior to contact by the police, the defendant had not been engaging in ongoing illicit activity; and (2) that the police had generated the crime by participating and controlling virtually every aspect of the production process. Other cases likewise suggest that these two factors, taken together, constitute a due process violation.[36]

Arbitrary Targeting

Although most courts do not require the government to justify its decision to investigate anyone, a few have suggested that inducements should not be made without reasonable suspicion that the target is engaged in ongoing criminal activity.[37] The cases reason that no citizen's privacy should be invaded without some prior justification, and that a reasonable suspicion requirement protects against targets being singled out for political or other improper reasons. In addition, absent reasonable suspicion, an undue risk exists of an informant arbitrarily targeting someone simply to obtain some reward from the police.

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34 THE ENTRAPMENT DEFENSE, *supra*, note 15, at 282.

35 588 F.2d 373 (3rd Cir. 1978).

36 See, e.g., *United States* v. *Lard*, 734 F.2d 1290, 1296-97 (8th Cir. 1984) (a government agent's activities were "aimed at creating new crimes for the sake of bringing criminal charges against [defendant], who, before being induced, was lawfully and peacefully minding his own affairs") (citation omitted); *United States* v. *Batres-Santolino*, 521 F.Supp. 744, 752 (N.D.Cal. 1981) (government agents manufactured the crime by creating the organization and providing, to apparent novices, the source for illicit drug trafficking).

37 See *United States* v. *Jacobson*, 893 F.2d 999, 1002 (8th Cir. 1990) (a "reasonable suspicion based on articulable facts is a threshold limitation on the authority of government agents to target an individual for an undercover sting operation"); *United States* v. *Luttrell*, 889 F.2d 806, 813 (9th Cir. 1989) (police "violate constitutional norms when, without reasoned grounds, they approach apparently innocent individuals and provide them with a specific opportunity to engage in criminal conduct") (footnote omitted); *United States* v. *Gardner*, 658 F.Supp. 1573, 1578-79 (W.D.Pa. 1987) (summarizing various cases in which government conduct violated due process).

Excessive Pressure by the Police

Notwithstanding a defendant's guilty predisposition, the courts have sustained the entrapment defense, under a due process analysis, when the police have imposed "outrageous" pressure on the defendant to violate the law. For example, the government may not use threats of physical harm to coerce a target into selling drugs.[38] Likewise, the police may not use extreme psychological coercion or repeated badgering to induce commission of a crime.[39]

Misleading Statements

When offering an inducement to a suspect, the police may not mislead him concerning the legal consequences of his actions. Thus, due process is violated if a target is falsely advised that the proposed activity is not illegal. For example, an immigration sting operation was rejected on due process grounds for improperly advising targets that the United States border could be legally crossed without proper immigration papers.[40]

Crimes by Government Agents

Most courts recognize that undercover operations sometimes require police officers to commit crimes in order to preserve their cover. For example, though obviously not a preferred practice, an officer may sample a controlled substance if necessary to avoid detection. However, if police agents engage in crimes more egregious—or to a greater degree—than their investigative target, due process may be violated. Thus, due process was violated when the government arranged a burglary, committed entirely by police agents, solely to convict a third party of aiding and abetting.[41] Likewise, courts have expressed their irritation at police agents using controlled

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38 Cf. *United States* v. *Bradley*, 820 F.2d 3, 6 (1st Cir. 1987) (defendant could not claim entrapment because threats of physical harm were not directed at him but at an intermediary between the defendant and the government); *People* v. *Isaacson*, 378 N.E.2d 78, 85 (N.Y. 1978) (defendant was denied due process when police physically coerced an informant into inducing defendant into selling illicit drugs).

39 See, e.g., *United States* v. *Bogart*, 783 F.2d 1428, 1435 (9th Cir. 1986); *United States* v. *Gardner*, 658 F.Supp. 1573, 1576 (W.D.Pa. 1987) (government agent deceitfully persuaded and repeatedly induced defendant into obtaining drugs even though defendant had no criminal felony record or prior involvement with drugs).

40 *United States* v. *Valdovinois-Valdovinois*, 588 F.Supp. 551, 556 (N.D.Cal. 1984), rev'd on issue of defendant's standing, 743 F.2d 1436 (9th Cir. 1984), cert. denied, 469 U.S. 1114 (the government was involved in creating crime when it set up "an undercover cold line, disseminat[ed] that telephone number in Mexico, and then us[ed] the operation to advise Mexican nationals still within Mexico that it was appropriate to violate United States law"); but see *United States* v. *Lansing*, 424 F.2d 225, 226-27 (9th Cir. 1970) (reliance on the government's misleading information must be reasonable "in the sense 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").

41 *State* v. *Hohensee*, 650 S.W.2d 268, 274 (Mo.App. 1982).

substances without need or adequate supervision.[42] Ultimately, police involvement in criminal activity will be tolerated if it is investigatively necessary; however, such conduct must neither be excessive nor artificially "manufacture" a crime by the target.

Contingent Fees

A few older cases have suggested that due process may be violated by using confidential informants on a contingent fee basis. Upon a careful reading, however, these decisions do not prohibit all contingent fee arrangements. Some courts have rejected contingent fee arrangements that give the informant too much of a financial stake in the outcome of a case.[43] The vast majority, however, state only that contingent fees may not be employed to target specific defendants for conviction.[44] Under such circumstances, too great a risk exists that the informant will be motivated to entrap a defendant or otherwise to act improperly (e.g., through perjured testimony). Accordingly, in most cases the determinative issue is whether the informant randomly implicated the defendant or whether the police directed him towards a specific target in exchange for a contingent fee.

Reverse Stings

Although reverse stings are outlawed in some jurisdictions, the federal courts and most state jurisdictions have recognized that this practice is essential to effective drug enforcement.[45] On this basis, reverse stings have been sustained, provided that they do not arbitrarily target a

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42 *United States* v. *Gardner*, 658 F.Supp. 1573, 1575 (W.D.Pa 1987) (agent, while employed by the police, repeatedly snorted cocaine in violation of the law); *People* v. *Jamieson*, 423 N.W.2d 655, 658 (Mich.App. 1988) (lack of police supervision was reprehensible where they allowed a teenage convicted felon to orchestrate an entire reverse sting operation).

43 See, e.g., *State* v. *Glosson*, 462 So.2d 1082 (Fla. 1985) (police agent was promised 10 percent of all civil forfeitures if he would testify and cooperate in the successful prosecution of the defendant).

44 See, e.g., *United States* v. *Yater*, 756 F.2d 1058, 1067 (5th Cir. 1985) (defendant was not specifically targeted by police); *United States* v. *Lane*, 693 F.2d 385, 387-88 (5th Cir. 1982) (police agent approached defendant and purchased illicit drugs; "However, there [was] no indication . . . that [the police agent] was to implicate government-targeted defendants"); *Williamson* v. *United States*, 311 F.2d 441, 444 (5th Cir. 1962), cert. denied, 381 U.S. 950 (employing contingent fee arrangements to target specific individuals for conviction may "cause an informer to induce or persuade innocent persons to commit crimes").

45 See, e.g., *United States* v. *Chavis*, 880 F.2d 788, 793 (4th Cir. 1989), cert. denied, 110 S.Ct. 144 ("This circuit has previously found reverse sting operations involving contraband not to constitute outrageous government conduct") (citations omitted); *United States* v. *Walther*, 867 F.2d 1334, 1339 (11th Cir. 1989) (a reverse sting "is constitutionally impermissible only where it violates fundamental fairness and shocks the universal cause of justice"); *Kemp* v. *State*, 518 So.2d 656, 660 (Miss. 1988) (Griffin, J., dissenting) (reviewing case law) (reverse stings are proper unless they rise to the level of outrageous government conduct).

particular defendant.[46] For example, this practice is permissible if reasonable grounds exist to believe that a defendant is interested in buying drugs. Alternatively, the reverse sting will be approved if undercover agents merely offer a chance to buy drugs comparable to opportunities readily available to the defendant.[47] Street-level sting operations provide a good example. Typically, they target areas known for drug trafficking activity and offer opportunities to purchase drugs. As these opportunities simulate reality, the practice does not violate due process.

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46 See, e.g., *United States* v. *Mulherin*, 710 F.2d 731, 735-36 (11th Cir. 1983) (at the beginning of the operation, the government had no reason to suspect these particular defendants); *United States* v. *Savage*, 701 F.2d 867, 870 (11th Cir. 1983) (government set up a trap only for those who were already willing to commit the crime).

47 *United States* v. *Savage*, 701 F.2d 867, 870 (11th Cir. 1983) (see *supra*, note 54, and accompanying text).

CHAPTER 4

NEED FOR SUPERVISORY OVERSIGHT

Given the complexity of entrapment doctrine, the need for supervisory oversight is apparent. Indeed, no inducement should be offered to any potential defendant without prior approval by a supervisory law enforcement officer. Moreover, whenever possible, guidance from a prosecutor should be obtained so that police personnel are fully aware of the consequences of their actions. In this manner, potential mistakes can be avoided before they are made.

Close supervisory oversight of potential entrapment situations can achieve the following benefits:

1. The decision to offer the inducement will be made by someone who can readily be held accountable both within the law enforcement agency and to the courts. Such accountability helps to ensure that entrapment concerns will be carefully considered in each case.

2. The supervisor's accountability will also motivate him or her to ensure compliance with applicable legal standards by all police personnel within his or her control. At a minimum, this means that the supervisor will try to keep informed of those legal standards and of any pertinent developments in the law.

3. In jurisdictions applying the objective police conduct test, supervisory officials are more likely to understand what types of inducements risk causing innocent citizens to commit crimes. Given this understanding, such inducements can more readily be avoided.

4. In jurisdictions operating under the subjective predisposition test, the supervisor is likely to target for inducement only those persons predisposed to committing specific crimes. Whether any particular person is predisposed to commit a specific crime is a matter that must be carefully considered *before* the inducement is offered. A supervisor is in a good position to ensure that the predisposition factors outlined in this paper are present in each case.

5. Whenever possible, a supervisor will also direct subordinates to obtain pertinent evidence to prove predisposition. Often this means that an undercover officer or informant will be instructed to elicit statements indicative of predisposition from a potential defendant. It is always best, if possible, to tape record such statements. Absent supervisory control, opportunities to obtain critical evidence of this kind are often overlooked.

6. Supervisory oversight also helps to prevent overreaching by police officers or informants. In this way, citizens are protected from "words being put into their mouths" or crimes somehow being "manufactured." Special efforts must be made to control informants. Absent such control, the risk is great that an informant may act unfairly to help himself at an innocent person's expense. Informants must be controlled so that they do not offer excessive inducements, impose undue pressures, manufacture crimes, commit perjury, or the like. Indeed,

the failure to protect against these dangers through supervisory oversight has resulted in successful entrapment defenses.[48]

7. Finally, even in jurisdictions applying the subjective test, supervisors can be expected to make entrapment decisions with the objective test in mind. Compliance with this latter standard, which focuses on the propriety of the police conduct, is always desirable. Both public relations and due process problems can ultimately be avoided if the inducement reflects reality and no police action conveys the impression of overreaching.

For these reasons, supervisory oversight is essential to every investigation potentially raising the entrapment defense. The result will be effective enforcement efforts that protect society without jeopardizing the rights of innocent citizens.

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48 See, e.g., *People* v. *Jamieson*, 423 N.W.2d 655, 658 (Mich.App. 1988) (the court was "bothered by . . . the lack of supervision by police over the whole operation" where they allowed a teenage convicted felon to orchestrate an entire reverse sting operation); *United States* v. *Gardner*, 658 F.Supp. 1573, 1576 (W.D.Pa. 1987) ("The Court is shocked by the lack of supervision exercised by the Postal Inspectors over its informant and the allowing of psychological coercion of [defendant] by [the] informant . . . to acquire drugs for him").

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