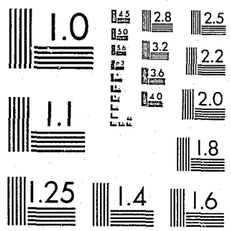

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William H. Webster, Director

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Acoustic Gunshot Analysis
The Kennedy Assassination and Beyond
(Conclusion)

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FBI Review

On November 19, 1980, the Technical Services Division of the FBI released a written review that was very skeptical of the acoustical reports prepared for the House Select Committee on Assassinations (HSCA). The review was limited to the written and oral reports prepared by Bolt Beranek and Newman (BBN) and Weiss and Aschkenasy for the HSCA, and no direct examinations of the Dallas Police Department (DPD) recordings were conducted. The findings of the FBI questioned the analyses of the acoustical evidence by BBN and Weiss and Aschkenasy, revealing that they did not prove scientifically that another person fired a gunshot from the grassy knoll in Dealey Plaza or that the recording of DPD's channel 1 contains gunshot sounds or any other sounds originating in Dealey Plaza during the assassination. The FBI's review stated that the HSCA's findings that "scientific acoustical evidence established a high probability that two gunmen fired at President John F. Kennedy" is invalid.[16]

The FBI's conclusion was based on a thorough review of the written findings and oral testimony of BBN and Weiss and Aschkenasy. For the HSCA's acoustical reports to be accurate, the FBI determined that two basic underlying premises would have to be correct:

1) The specified impulsive information recorded on channel 1 must have originated in or very

Special emphasis should be placed on finding a team member who may, because of past experience, be familiar with the general interior structure or design of the buildings in the neighborhood. Many times, adjoining or neighboring homes may have identical floor plans. A rough sketch of the house should be drawn and all windows and doors should be clearly marked.

A specific plan should then be developed by the sergeant and team leader who must ensure each police officer clearly understands his role, as well as how his actions relate to the overall team effort. The plan must include such details as weapon selection, equipment to be carried, and tools needed in the event forced entry is required. To reduce the approach time to the building, seat position and vehicle selection for each team member should also be addressed. Information concerning route of travel and specific parking locations for each automobile should be provided. Additionally, individual members must be given key fixed-post assignments to ensure strict containment is maintained as the entry team begins its approach toward the door.[6]

The role of the tactical team should be limited to gaining entry and neutralizing the occupants of the building. Once the interior is rendered safe, the scene should immediately be relinquished to the original supervisor requesting assistance. Tactical personnel should never initiate a physical search or interview of persons in the residence. Observations of the entry team which could be of value to the investigating officers should, of course, be retained for later inclusion in the official police report.

Once control of the scene has been transferred to the original officers, tactical operations personnel should return to the original assembly area. If time permits, the tactics used should be critiqued. Many improvements can be made by discussing tactical strategies and alternative methods that may be employed in future encounters.

There is always the potential of conflict between the primary objectives of the police officers who obtained the warrant and those of the tactical team members serving it. This problem is most likely to surface in cases involving drugs or other easily destructible evidence. Traditional police methods in narcotics-related search warrant executions usually dictate entering and hurrying to the restroom to prevent the destruction of evidence. This type of entry—referred to by police officers as "kick and run"—enhances the "fatal funnel" effect and increases the likelihood of death or injury to the first officer through the door.[7] The other option is the methodical, planned tactical entry where safety is foremost in the minds of those involved.

Police officers should be aware of the hazards involved in entering totally unfamiliar residences/buildings. The advantage is always with the occupant, since he knows both the interior layout of the building and his own intentions. Because of this, the tactical operations unit has adopted the following six-step approach to warrant execution entries;

1) Observe/view the target building, recording as much detail as possible;
2) Systematically and carefully approach and enter each area—stick to your plan;
3) "Clear" each area and neutralize any danger to police/bystanders;
4) Secure each area;
5) Move to the next area; and
6) If an area is "unsafe," take proper cover or safely retreat, if necessary.

Individual agencies should consider the relative importance of a large evidence seizure, and in certain cases, be willing to sacrifice total contraband recovery rather than jeopardize the safety of police personnel.

The St. Louis County Police Department has found that by using the Tactical Operations Bureau to execute "high-risk" warrants, a twofold advantage is realized. The warrant is served with a total emphasis on officer safety by an element of the department best equipped and trained to function as a team when every minute counts, and tactical personnel are provided with additional opportunities to develop, plan, and execute precision team strategies.

FBI

Footnotes

[1] U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed*, 1981 pp. 32-33.

[2] Ibid., p.28.

[3] U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States*—1981 (Washington, D.C.: U.S Government Printing Office. 1982), pp. 305-309.

[4] U S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States*—1980 (Washington, D.C.: U.S. Government Printing Office, 1981), pp. 331-336.

[5] St. Louis Globe-Democrat, January 10, 1983, p. 1A.

[6] While announcement is generally required, no such step is necessary where compliance would place the searching officers in jeopardy.

[7] Ronald J. Adams, Thomas M. McTernan, and Charles Remsberg, *Street Survival* (Northrock, Ill.: Calibre Press Inc., 1980), p. 61.

ENTRAPMENT, INDUCEMENT, AND THE USE OF UNWITTING MIDDLEMEN (Part I)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

The U.S. Supreme Court first recognized the defense of entrapment in the 1932 case of *Sorrells* v. *United States.*[1] Two distinct approaches to the entrapment concept emerged from this case. The majority opinion recognized the right of a defendant to offer evidence that his commission of the offense charged was the product of Government inducement. It made equally clear that when the defense is raised, the Government is permitted to offer proof that the defendant was predisposed to commit the offense. The majority view has come to be called the "subjective view" because its focus is on the defendant's state of mind and whether he was predisposed to commit the offense charged. Predisposition can be defined as a defendant's pre-existing willingness to commit a crime whenever an opportunity is presented to him.

The concurring Justices believed that the defense should focus upon the conduct of the Government and whether that conduct falls below judicially acceptable standards. This view of entrapment has come to be called the "objective view" because it concentrates exclusively upon the conduct of the police. Under this view, predisposition of the defendant is irrelevant.

These diverse views of entrapment have competed for dominance over the years. The subjective view has emerged as the clear winner in the courts and has been adopted by the U.S. Supreme Court for the Federal system.[2] Moreover, the subjective view has been accepted by an overwhelming majority of the States.[3] By contrast, only a handful of States follow the objective view.[4]

This article analyzes one significant aspect of the subjective view, namely, the concept of inducement. Several aspects of the inducement concept are examined: (1) Whether the entrapment defense is available to a person induced by a private party to commit a crime; (2) the meaning of Government inducement; and (3) the issue of whether a person can claim entrapment when induced by an unsuspecting middleman.

Assertion of Entrapment

Federal appellate courts differ on the meaning of Government inducement in entrapment cases. In order to comprehend its meaning and function in the entrapment context, it is essential to understand the procedure by which the defense is asserted.

Entrapment is an affirmative defense which must be raised by the defendant.[5] The defendant bears the initial burden of producing evidence to show that the Government initiated, suggested, or proposed the crime. Moreover, he must produce evidence that he was not predisposed to commit it.[6] The initial objective of the defense is to obtain a ruling by the judge that entrapment clearly occurred as a matter of law and thus achieve dismissal of the case.[7] Alternatively, the defendant seeks to raise a factual question as to whether entrapment occurred, thus gaining a jury instruction on the issue. In the latter case, the jury would be instructed by the judge to acquit the defendant unless the prosecution produces evidence during trial which demonstrates beyond a reasonable doubt the defendant's predisposition to commit the offense.[8] If the court does not find entrapment as a matter of law and refuses to refer the question to the jury,

Special Agent Callahan

it has effectively suppressed the entrapment defense. What all this means is that at least on the entrapment issue, the defendant wins when the court finds entrapment as a matter of law, he stands a chance of winning (or losing) when the question is sent to a jury, and he loses when the court takes neither of these steps.

If the defendant meets the initial burden and the Government is unable to produce meaningful evidence of predisposition, there is no factual issue for submission to the jury and the judge should rule as a matter of law that entrapment occurred. For example, in *Sherman* v. *United States*,[9] a Government informant made repeated requests that Sherman provide him with heroin. Sherman continually rejected these overtures until he was reminded of the horrors of heroin addiction withdrawal, which the informant was suffering. The Government's predisposition evidence consisted primarily of two prior narcotics convictions within the past 9 years. The trial judge submitted the entrapment issue to the jury, and a conviction ensued. A Federal appellate court affirmed. The U.S. Supreme Court reversed and held that the trial judge erred in submitting the case to the jury. The Court observed that the Government's proof of predisposition was so deficient that the judge should have ruled that entrapment existed as a matter of law.

Private Inducement

The U.S. Supreme Court has never directly addressed the issue of whether for purposes of the entrapment defense, inducement of a defendant to commit a crime can be generated by a non-Government agent. However, Justice Hughes, writing for the majority in *Sorrells*, observed:

> "We are unable to conclude that it was the intention of the Congress in enacting this statute 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." [10] (emphasis added)

This language seems to limit availability of the entrapment defense to persons who have been induced by Government officers or their agents.

Several Federal appellate decisions have addressed this issue. For example, in *United States* v. *Perl*,[11] the defendant, a member of the Jewish Defense League, was approached by Lev-tov, a former member of the elite special forces of the Israeli Navy. According to his trial testimony, Lev-tov became upset with alleged acts of terrorism perpetrated in the name of various Jewish causes. He conceived a plan to induce a leading Jewish figure to join him in committing a violent act. Before commission of the act, however, it was his intention to alert the authorities. Lev-tov proposed to Perl that they shoot out the windows in the homes of two Soviet officials. Perl agreed and obtained a rifle and ammunition. Prior to the date agreed upon for the shooting, Lev-tov alerted the Israeli Embassy to the plan and embassy officials notified the FBI. Subsequent meetings between Perl and Lev-tov were monitored by the FBI with Lev-tov's consent. Finally, the planned shooting was carried out with a weapon and blanks provided by the FBI. Perl was indicted, and at trial, requested the judge to furnish an entrapment instruction to the jury. This request was denied and Perl was convicted. A Federal appellate court reversed on other grounds but approved the trial court's refusal to instruct the jury on entrapment. Perl argued that no showing of Government involvement in the scheme to entrap need be made when a person is induced for the sole purpose of handing him over to Government authorities. The court rejected this argument and held that entrapment cannot result from the inducements of a private citizen. In order for the defendant to receive a jury instruction on entrapment, evidence of Government involvement must be produced.

"In order for the defendant to receive a jury instruction on entrapment, evidence of Government involvement must be produced."

Another illustration is found in *United States* v. *Garcia*.[12] Here, although the Government's involvement was arguably more significant, the defendant's entrapment argument was futile. Garcia was introduced to an undercover agent of the Drug Enforcement Administration (DEA) by Bobby Villareal, an informant. Shortly thereafter, Garcia sold heroin to the agent. He was subsequently indicted for distribution of heroin. At trial, he requested a jury instruction on entrapment. This request was denied and a conviction ensued. The conviction was affirmed by a Federal appellate court. On appeal, Garcia claimed that 8 weeks prior to the sale of heroin to DEA, the informant's brother, Bernardo Villareal, began to pressure him to sell heroin to the agent. Garcia alleged that after repeated refusals, he finally agreed to make the sale. The court noted that Garcia's entrapment claim was based upon the alleged inducements by Bernardo Villareal and not those of the admitted informant Bobby Villareal. Garcia pointed to evidence in the trial record that a week before the sale occurred, DEA agents met with both Villareal brothers and discussed how they could help them in drug investigations. The court discounted this testimony by crediting further DEA testimony that Bernardo was specifically told that his assistance was not being sought since he was on Federal parole. Moreover, the court observed that this meeting occurred several weeks after Bernardo allegedly began to pressure Garcia into selling narcotics. The court held that even if Bernardo did pressure Garcia into selling heroin, there was no indication that Bernardo ever entered into an explicit or implied agreement to assist the Government to make a case against Garcia. Because there was no evidence of Government inducement, the entrapment defense could not be raised.

By contrast, if a defendant can establish that a private citizen induced him to commit a crime and the citizen had a prior informant relationship with the Government, the result may be different. This point is illustrated in *Sherman* v. *United States*.[13] Kalchinian, an active Government informant, met the defendant in a doctor's office where both were being treated for drug addiction. Kalchinian, without authorization or knowledge of Federal drug agents, made repeated requests to Sherman that he provide him with narcotics. Only after the informant appealed to Sherman's sympathy, based upon his knowledge of addiction withdrawal, did the defendant acquiesce. After several unmonitored sales occurred, the informant alerted Federal agents. They subsequently observed the later sales for which Sherman was indicted. Sherman claimed entrapment at his trial and a conviction ensued. A Federal court of appeals affirmed. On appeal to the Supreme Court, Sherman argued that entrapment had been established as a matter of law and the trial judge erred in allowing the jury to consider the issue. The Government argued that since the trial record contained evidence of predisposition, the trial judge properly allowed the jury to consider the entrapment issue. To support this argument, the Government pointed to several sales made by Sherman to Kalchinian before he alerted the drug agents. The Supreme Court rejected this argument and reversed. The Court observed:

> "It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts . . . but part of a course of conduct which was the product of the inducement." [14]

Government Inducement

One of the early Federal appellate decisions which explored the meaning of Government inducement was written by Judge Learned Hand.[15] He suggested that when entrapment is asserted, two questions of fact

". . . proof of solicitation by law enforcement to commit a crime, standing alone, is not sufficient to trigger a jury instruction on entrapment. The defendant must also point to some evidence of lack of predisposition."

arise:

> "(1) did the agent *induce* the accused . . . . (2) if so, was the accused ready and willing without persuasion and . . . awaiting any propitious opportunity to commit the offense. On the first question the *accused has the burden;* on the second the prosecution has it." [16] (emphasis added)

Judge Hand believed that inducement is established by a defense showing that Government agents solicited, suggested, proposed, or initiated the commission of the crime. By implication, defense proof of inducement triggers a jury instruction on entrapment. He did not believe that a defendant has to produce evidence of nonpredisposition in order to receive an entrapment instruction.

A survey of Federal entrapment cases suggests that Federal appellate courts have not adopted Judge Hand's formula. Some Federal circuits have accepted his definition of inducement, but also have required defense production of some evidence of nonpredisposition before granting a jury instruction on entrapment.[17] Other circuits define inducement to mean more than mere Government solicitation. These circuits require defense production of some evidence demonstrating Government persuasion or defendant nonpredisposition before an entrapment instruction is given.[18] At least one circuit has abandoned the term "inducement" altogether. This circuit requires the defendant to show more than mere solicitation and this showing must include evidence tending to show unreadiness.[19] Although there is disagreement among the circuits on the meaning of inducement, all agree that a jury instruction on entrapment will not lie in the absence of defense evidence of nonpredisposition.

Jury Instruction Denied

The following cases are illustrative of defendants' failure to receive a jury instruction on entrapment because of their inability to produce some evidence of nonpredisposition.

In *United States* v. *Licursi,*[20] a Government informant initiated contact with Licursi and asked if he had cocaine. Licursi responded that he did not. Later, a second request was made, and Licursi replied that a friend had cocaine. During the second contact, arrangements were made for a meeting to consummate a sale. Eventually, Licursi was indicted for aiding and abetting a sale of cocaine. During trial, the Government offered substantial evidence of Licursi's predisposition to commit the crime. The trial judge refused to instruct the jury on entrapment, and a conviction ensued. The Federal appellate court affirmed. The court observed that although it was clear that the Government solicited Licursi to commit the crime, his failure to produce some evidence of lack of predisposition was fatal. At trial, Licursi testified that he had never before been involved in a narcotics sale. On appeal, he argued that this was sufficient to meet his burden of showing some evidence of nonpredisposition. The court rejected this evidence as inadequate.

United States v. *Jackson*[21] provides another example. A Government informant introduced an undercover agent to defendant Jackson. Jackson told the agent that he wanted to purchase cocaine. Later, they met at a motel and agreed on a plan to consummate the deal. During this meeting, defendant Hicks appeared and furnished the agent an envelope which contained $60,000 in cash. Hicks was later indicted for conspiracy to possess cocaine with intent to distribute. At trial, the judge refused to instruct the jury on entrapment, and a guilty verdict followed. A Federal appellate court affirmed and held that Hicks was not entitled to an entrapment instruction because he failed to show some evidence of lack of predisposition. The court observed that the prosecution produced evidence of predisposition at trial. Hicks testified at trial that he had a reputation in the community of being a successful businessman with no record of past illegal conduct. He argued that this testimony was sufficient to suggest nonpredisposition. The court rejected this evidence as insufficient.

Pierce v. *United States*[22] is also instructive. An undercover Secret Service agent was introduced to Pierce by an informant. The agent initiated the contact and requested that Pierce provide him with counterfeit money. Pierce indicated a willingness but later reported that he was having difficulty with the manufacturer. Later, during another meeting, Pierce told the agent that his source of supply suspected him (the agent) of being an FBI Agent. Eventually, an illegal sale was consummated and Pierce was arrested. At trial, the judge refused to charge the jury on entrapment and Pierce was convicted. On appeal, Pierce argued that his reluctance to consummate the deal because he suspected the agent was an FBI man was sufficient to show his lack of predisposition. The court of appeals rejected this contention and affirmed the conviction. The court explained that fear of detection does not constitute lack of predisposition.

Jury Instruction Granted

The Supreme Court's decision in *Sorrells* examined the issue of whether the trial judge erred in refusing to give an entrapment instruction to the jury. During trial, Sorrells testified that he was visited at home by an undercover agent. The agent made several requests for contraband liquor. Sorrells responded that he had no whiskey. Finally, after conversation disclosed that both men had been members of the same division in World War I, Sorrells left and returned with whiskey. A sale was completed. Sorrells was charged with possession and sale of illegal whiskey. At trial, a defense witness who was present at the time of the offense corroborated Sorrells' story. The witness testified that Sorrells' initial response to the agent's importuning was that he did not fool with whiskey. The trial judge ruled as a matter of law that entrapment was not present. A conviction followed and the Federal appellate court affirmed. The Court reversed, observing that the trial evidence was sufficient to warrant a jury instruction on entrapment.

In *United States* v. *Riley,*[23] the defendant was convicted of participating in a narcotics transaction. At trial, a Federal agent testified that he met the defendant through an informant. The agent told Riley that he wanted to purchase drugs and they negotiated a sale of heroin. The sale was consummated and an indictment followed. Riley testified at trial that the informant was a close friend and that they often used drugs together. He claimed that the agent purported to be a friend of the informant. Moreover, the agent told Riley that he and his wife were in urgent need of heroin. Riley responded that he was not a seller of narcotics. The inference that Riley hoped the trial judge would draw is that he was not disposed to sell narcotics but did so because of his close friendship with the informant and his knowledge of the agony of narcotics addiction withdrawal. The trial judge refused to instruct the jury on entrapment, and the conviction followed. The court of appeals reversed and held that Riley's testimony at trial was sufficient to raise a jury issue regarding predisposition. Since the Government initiated the transaction and the defendant produced some evidence of unreadiness, he was entitled to a jury instruction on entrapment.

United States v. *Burkley*[24] is also instructive. Burkley was indicted for selling heroin to an undercover officer. The trial record disclosed that the officer initiated contact with Burkley and inquired about the possibility of purchasing heroin. During cross-examination, the officer admitted making comments to Burkley which the trial judge decided were sufficient to constitute some evidence of lack of predisposition. These comments consisted of the following:

> "I thought you were going to be able to do this thing for me. I am disappointed that you were unable to do so." [25]

Since the Government initiated contact with Burkley and the trial record disclosed some evidence of nonpredisposition, Burkley received a jury instruction on entrapment. Burkley was convicted. The conviction was affirmed on appeal.

The court was not faced with the issue of whether the jury should have received an entrapment instruction on these facts since one was given. Nevertheless, the court agreed that an instruction was required. The court observed that proof of solicitation by law enforcement to commit a crime, standing alone, is not sufficient to trigger a jury instruction on entrapment. The defendant must also point to some evidence of lack of predisposition. The testimony elicited on cross-examination was sufficient for that purpose.

Inducement Through Unsuspecting Middlemen

Proof of inducement by a private person who has no relationship with the Government will not support a claim of entrapment. Conversely, if a Government agent or informant solicits a person to commit a crime, the defense of entrapment may be available. In recent years, it has become common for law enforcement to use unsuspecting middlemen in an effort to insure success of undercover operations.[26] Middlemen are not law enforcement officers or informants. They are private, unwitting individuals who are being used by the Government to

"Proof of inducement by a private person who has no relationship with the Government will not support a claim of entrapment."

further the goals of an undercover operation. Middlemen are willing criminals who fully expect monetary rewards for their efforts. Government agents or informants have, at times, encouraged them to involve others in illegal activity. Since middlemen are unaware of their law enforcement role, there is a question as to whether a person induced by them can claim entrapment.

The U.S. Supreme Court has never addressed this problem. Although the issue has been considered in both Federal and State appellate courts, the response has not been uniform. This part of the article will categorize the diverse approaches that courts have taken in this matter. Moreover, it will examine the analytical soundness of the principal approaches. Finally, it will suggest the best approach for courts to take.

It already has been pointed out that the several Federal appellate courts have construed the term "inducement" differently. Some interpret it to mean Government solicitation alone. Others have defined it to mean Government solicitation plus lack of defendant predisposition. For purposes of analysis, whenever the term "inducement" appears in this section of the article, it means solicitation to commit a crime.

Inducement Through Middleman Impossible

At least one Federal circuit appears to have rejected the idea that a person can be entrapped by means of an unsuspecting middleman. In the ninth circuit decision of *United States* v. *Shapiro*,[27] an undercover DEA agent met with Shapiro, who agreed to sell him cocaine. At the time of sale, defendant Howard suddenly appeared and conversed with Shapiro. She left and returned shortly thereafter with cocaine. Howard was drawn into the case by Shapiro. At trial, the judge refused to instruct the jury on Howard's entrapment claim. A conviction followed and Howard appealed. The appeals court affirmed and held that a defendant must offer proof that inducement came from a Government agent before a jury instruction on entrapment is possible.

Middleman Not Induced

B, a middleman, initiates contact with A, an undercover agent, and offers to sell A cocaine. A agrees to purchase cocaine. B, without A's knowledge, induces C to enter the deal. C participates in the sale and is arrested. Is the entrapment defense available to C?

United States v. *Lee* [28] provides an answer. Lee initiated a chain of events which led to negotiations with undercover agents for a sale of cocaine. Lee, on his own, brought Grimrod into the picture. Grimrod met the agents and showed them how to smuggle cocaine into the country. Negotiations eventually collapsed, and Lee and Grimrod were indicted for conspiracy. Grimrod was convicted and a Federal appellate court affirmed. He argued on appeal that the trial judge erred in refusing to instruct the jury on entrapment. The court observed that Grimrod was not induced by the Government to join the conspiracy. The court noted that if he was induced at all, it was Lee who induced him. The court explained that the Government could not be held responsible for this inducement:

> "[Lee] was neither an agent of the government officials, nor an unsuspecting third party passing on an inducement upon Grimrod by government officials. Such inducement as may have been made upon Grimrod originated with Lee . . . . However, Lee was not induced and had no entrapment defense." [29]

The result in this case is correct. The Government did nothing to involve Grimrod. Lee initiated the crime and was not induced by the Government to commit it. Entrapment is a defense to Government conduct which is designed to lure innocent persons into the commission of a crime. Since the Government did nothing to lure Grimrod, the defense should be unavailable to him.

Transmitted Inducement

A, an undercover officer, induces B, a middleman, to sell cocaine. A does not instruct B to communicate the inducement to any third party. B nonetheless transmits A's inducement to C. C becomes involved in the sale. Is the entrapment defense available to C?

In *United States* v. *Valencia*,[30] Olga and William Valencia were indicted for selling cocaine to undercover DEA agents. At trial, Olga testified that a Government informant told her that they could make money selling cocaine. She claimed that the informant pushed her for 4 months to become involved and supplied her with a small amount of cocaine. William Valencia subsequently participated with his wife in sale of cocaine to a DEA agent. William requested an entrapment instruction at trial. This request was denied and he was convicted. A Federal appellate court reversed and observed that when a person is brought into a criminal scheme by a non-Government agent, the entrapment defense may nevertheless be available to him. The court explained that when an informant induces an unwitting party to commit a crime and that party transmits the inducement to another, the third party should be able to assert entrapment. The court stated that the entrapment defense can be presented to a jury only where the third party can show that the agent's inducement was directly communicated to him by a middleman. The case was remanded for a ruling on whether there was sufficient evidence to show that Olga transmitted the informant's inducement to William.

On remand, the trial court ruled that there was no evidence which showed that Olga communicated the informant's inducement to William. William filed a second appeal and the appellate court affirmed.[31] William argued that the marital relationship suggested an inference that the informant's inducement was transmitted to him by his wife. The court rejected this contention.

The first appellate decision in *Valencia* is incorrect. The entrapment defense was intended to keep the Government from enticing innocent people to commit a criminal act. The Government never intended to entice William Valencia into a drug sale. The informant's inducement went only to Olga Valencia. She was not instructed to bring anyone else into the scheme. The Government had no control over her conduct and did not direct her to involve any third party in the transaction. Moreover, making the defense available to persons in this context invites perjury from the defendant. He can testify that the middleman passed along the Government inducement to him. There is no way for the Government to refute this claim since it is not privy to the meeting between the middleman and the defendant. Refutation of the defendant's testimony by the middleman is unlikely since he will, in most cases, be a codefendant who would have a fifth amendment right against incriminating himself. In one recent case, the trial judge granted the middleman "defense immunity" in order to allow him to testify on behalf of the defendant.[32] This procedure is very suspect. It invites perjury and collusion between the middleman and the third party. The case against the middleman is often very strong, and he is likely to be a friend of the third party. This procedure would allow them to create testimony which would make it appear that the third party definitively resisted a substantial inducement from the middleman. This testimony would be difficult to rebut since no one else was present at the meeting. The middleman might be willing to involve himself in this fraud upon the court out of friendship for the codefendant and because his own chance of acquittal is minimal. Judge Van Graafeiland, dissenting in the initial *Valencia* decision, makes the point most effectively:

> ". . . while arguably the lofty purpose of deterring improper police conduct . . . may be served by acquitting defendants entrapped by Government agents, the same purpose would not be served by setting guilty men free who were never even in the agents' gunsights." [33]

Middleman Initiated Inducement

A, an informant, induces B, a middleman, to commit a crime. B, on his own, brings C into the picture. B does not transmit A's inducement to C but initiates his own inducement to C, who participates in the crime. Is the entrapment defense available to C?

United States v. *Fischel* [34] offers some guidance. Marlin, a DEA informant, approached Ludwig about a purchase of cocaine. Marlin offered to introduce Ludwig to a potential buyer and arranged a meeting. The buyer was an undercover DEA agent. Ludwig arrived at the meeting with Fischel. Fischel's presence was not expected by the agents. He took an active role in the sale and was later indicted. He was convicted and argued on appeal that the trial judge erred in refusing to instruct the jury on entrapment. The Federal appellate court affirmed and rejected the entrapment claim. Fischel argued that the Government induced Ludwig to commit a crime and Ludwig, an unwitting Government pawn, induced him to participate. Therefore, the entrapment defense should be available. The court observed that even if Ludwig was an unwitting pawn whose conduct is attributable to the Government, his entreaties to Fischel fell far

"Inducement created by a middleman and offered to a third party without the knowledge, participation, or consent of a Government agent should not permit an entrapment claim by the third party."

short of inducement. The court noted that all Ludwig did was to tell Fischel that he needed a ride to take drugs to a friend. The court did not believe that this request for a ride amounted to inducement. By finding no inducement from Ludwig to Fischel, the court fails to reach the question raised in the hypothetical. At the same time, the decision suggests that if Ludwig's comments to Fischel amounted to inducement, the entrapment defense would have been available to him.

By contrast, another Federal appellate court appears to summarily reject the availability of the entrapment defense under similar circumstances. In *Crisp* v. *United States*,[35] a Government agent approached Warren and offered to purchase morphine from him. Warren made two sales to the agent. The agent requested that Warren make a third sale. The agent never asked Warren to introduce him to his source. Warren, nonetheless, introduced the agent to Crisp who sold morphine to him. At trial, Crisp testified that Warren owed her money but could not pay his debt. Warren allegedly told her that he knew a man who would pay her $30 dollars for morphine that cost her $1. The trial judge refused to submit the entrapment defense to the jury and Crisp was convicted. The court of appeals affirmed and observed that Warren was not a Government agent. Moreover, the Government did not direct him or suggest to him how he might obtain the narcotics. Thus, the entrapment defense was not available to Crisp.

The result in *Crisp* is correct. Inducement created by a middleman and offered to a third party without the knowledge, participation, or consent of a Government agent should not permit an entrapment claim by the third party. To allow the entrapment defense in this situation would be an invitation for both middleman and defendant to commit perjury. The potential for collusion among the parties and for a fraud to be perpetrated upon the court is significant. The Government would be faced with a very difficult proof problem in negating the defense because no Government agent was present at the time of the alleged inducement from the middleman to the third party. Even if the credibility of the parties was not in doubt, the defense should not lie. Permitting its use would make the Government responsible for inducements it never intended or approved.

The conclusion of this article will continue to examine the question of whether third parties can assert entrapment when their conduct is induced by unsuspecting middlemen. This analysis will include a discussion of inducement by middlemen when they are instructed by the Government to induce specific persons or persons within targeted groups. Finally, consideration will be given to the question of whether the Due Process Clause of the Constitution might be violated by Government use of middlemen to pass on inducements to third parties.

(To be continued)

Footnotes

[1] 287 U.S. 435 (1932). In *Sorrells*, all of the Justices except one agreed that the entrapment defense was a valid defense which may be asserted in Federal court. The Justices disagreed on the nature, content, and origin of the defense. This dichotomy is further explained in the text of this article.

[2] *Sorrells* v. *United States*, 287 U.S. 435 (1932); *Sherman* v. *United States*, 356 U.S. 369 (1958); *United States* v. *Russell*, 411 U.S. 423 (1973); *Hampton* v. *United States*, 425 U.S. 484 (1976).

[3] *See* Comment, Causation and Intention in the Entrapment Defense, 28 U.C.L.A. L. Rev. 859, at 860 n. 4.

[4] *Id.* at 862 n. 16. This note lists eight States which have adopted the objective view. They are identified as Alaska, California, Hawaii, Iowa, Michigan, New Hampshire, North Dakota, and Pennsylvania.

[5] 21 Am. Jur. 2d 461.

[6] *United States* v. *Watson*, 489 F. 2d 504 (3d Cir. 1973); *United States* v. *Riley*, 363 F. 2d 955 (2d Cir. 1966).

[7] *Sherman* v. *United States*, 356 U.S. 369 (1958).

[8] *See*, Park, The Entrapment Controversy, 60 Minn. L. Rev. 163, at 184.

[9] *Supra* note 7.

[10] *Supra* note 1, at 448.

[11] 584 F.2d 1316 (4th Cir. 1978).

[12] 546 F.2d 613 (5th Cir. 1977).

[13] *Supra* note 7.

[14] *Id.* at 374.

[15] *United States* v. *Sherman*, 200 F.2d 880 (2d. Cir. 1952).

[16] *Id.* at 882-883.

[17] *United States* v. *Licursi*, 525 F.2d 1164 (2d Cir. 1975); *United States* v. *Armocida*, 515 F.2d 49 (3d Cir. 1975).

[18] *United States* v. *Brandon*, 633 F.2d 778 (9th Cir. 1980); *United States* v. *Hill*, 626 F.2d 1301 (5th Cir. 1980); *United States* v. *Burkley*, 591 F.2d 903 (D.C. Cir. 1978); *United States* v. *Chrnstopher*, 446 F.2d 849 (9th Cir. 1973); *United States* v. *Devore*, 423 F.2d 1069 (4th Cir. 1970).

[19] *Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967).

[20] 525 F.2d 1164 (2d Cir. 1975).

[21] 700 F.2d 181 (5th Cir. 1963).

[22] 414 F.2d 163 (5th Cir. 1969).

[23] 363 F.2d 955 (2d Cir. 1966).

[24] 591 F.2d 903 (D.C. Cir. 1978).

[25] *Id.* at 909.

[26] *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), *United States* v. *Jannotti*, 673 F.2d 578 (3d Cir. 1982), *cert. denied*, 102 S.Ct. 2906 (1982).

[27] 669 F.2d 593 (9th Cir. 1982).

[28] 694 F.2d 649 (11th Cir. 1983), *cert. denied*, 103 S.Ct. 1779 (1983).

[29] *Id.* at 654.

[30] 645 F.2d 1158 (2d Cir. 1980).

[31] *United States* v. *Valencia*, 677 F.2d 191 (2d Cir. 1982).

[32] *United States* v. *Jannotti*, 673 F.2d 578 at 603 (3d Cir. 1982). At the close of the prosecution's case, the judge granted immunity to a nondefendant middleman to permit him to testify regarding conversations that he had with the defendant. The use of "defense immunity" is doubtless tied to the court's inherent authority to cause all relevant facts to be produced at trial.

[33] *Supra* note 30, at 1178.

[34] 686 F.2d 1082 (5th Cir. 1982).

[35] 262 F.2d 68 (4th Cir. 1958). *See also United States* v. *Dove*, 629 F.2d 325 (4th Cir. 1980).

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