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Criminal Law - Entrapment - Will Defendant's Prior Intent Preclude the Defense - United States v. McGrath

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CASE NOTES

CRIMINAL LAW—Entrapment—Will Defendant's Prior Intent Preclude the Defense? *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972).

The defendant with the aid of several other persons, embarked upon a scheme to print over one million dollars in counterfeit twenty dollar bills. Prior to any involvement by the government, the defendant on his own purchased rag paper and ink of the type and color necessary to duplicate paper currency and made inquiries about a printer. At some point in the scheme the Secret Service discovered the plan, infiltrated the ring, and exercised substantial control over its operations. The agents' activities included supervising the printing of the counterfeit bills as well as arranging for their delivery to the defendant. Upon delivery by an agent posing as a printer, the defendant was arrested and subsequently convicted for unlawful possession and conspiracy to produce and pass counterfeit obligations. The Seventh Circuit Court of Appeals held the defense of entrapment may lie, even though the defendant has set the initial plan in motion, if a complicated criminal scheme is involved and the government itself has performed essential parts of the criminal offense that might not otherwise have been committed.¹ The purpose of this note will be to test this, and other recent holdings, against the traditional requirements of the entrapment defense.

INTRODUCTION: THE MAJORITY AND MINORITY TESTS

It is not surprising that the subject of entrapment should be in confusion both as to the results of the cases and the grounds on which they are decided. In truth there seems to me no rational basis for the doctrine. Its origin is to be found in the natural feeling, shared by judges, that a person should not be made the victim of what Mr. Justice Holmes called . . . "dirty business."²

1. *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972).

2. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 263 (1942).

The two major Supreme Court cases establishing the so-called "majority" and "minority" tests for entrapment³ are *Sorrells v. United States*⁴ and *Sherman v. United States*.⁵ The Court in *Sherman* propounded the following as the basic rationale⁶ of the defense:

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." . . . Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.⁷

This general statement gives rise to the following elements of the "majority" test: first, it is a two part test requiring the defendant to show not only that the original criminal design originated with the government officials, but also that he had no predisposition to commit the offense;⁸ second, the theoretical basis of the defense is that there is an implied exception in the criminal statute in that the legislature could not have intended an act to be a crime which is the result of the "creative activity" of the government;⁹ third, there is no entrapment if the government merely affords the opportunity

3. For a discussion of the historical development of the defense of entrapment and an analysis of these traditional tests see Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963); 73 HARV. L. REV. 1333 (1960).

4. 287 U.S. 435 (1932).

5. 356 U.S. 369 (1958).

6. While purportedly not accepting either the "majority" or the "minority" test, the Court again accepted this rationale in *Lopez v. United States*, 373 U.S. 427 (1963), the latest Supreme Court decision on entrapment.

7. *Supra* note 5, at 372.

8. Under the rule of the majority here [*Sorrells*] there are two principle considerations: police misconduct on the one hand, and the character of the defendant on the other. Both police misconduct and the initial innocence of the defendant must be proved in order to establish the defense of entrapment.

Williams, *supra* note 3, at 410.

9. LAFAYE, CRIMINAL LAW § 48, at 369 (1972). See Mikell, *supra* note 2. The author there critically analyzed the underlying rationale of the "majority" and "minority" tests and rejected both as illogical.

for the commission of the offense;¹⁰ and finally, evidence of the defendant's prior conduct (including prior convictions of like crimes) is admissible to prove his predisposition.¹¹

The concurring judges in both *Sorrells* and *Sherman* were unable to accept two elements of the majority's test: the rationale of the "implied exception" and the attention given to the "predisposition" of the defendant. Their theory of the defense began from a different premise and in effect shifted the focus from the character of the governmental activity vis-a-vis the defendant's predisposition to a consideration of the governmental activity standing alone. The following statements by Justice Roberts (concurring in *Sorrells*) and Justice Frankfurter (concurring in *Sherman*) are illustrative of their approach.

The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own function and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.¹²

Furthermore, a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.¹³

This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively con-

10. *Sorrells v. United States*, *supra* note 4, at 441.

11. *Sorrells v. United States*, *supra* note 4, at 451. See also PERKINS, CRIMINAL LAW § 9, at 1036 (2d ed. 1969).

12. *Sorrells v. United States*, *supra* note 4, at 457.

13. *Sherman v. United States*, *supra* note 5, at 382-83.

sidered, that it would entrap only those ready and willing to commit the crime.¹⁴

As to the rationale of the defense:

The courts refuse to convict an entrapped defendant, not because his conduct falls outside the prescription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced.¹⁵

While it is apparent from the above that the "minority" test (as the test set forth in the concurring opinions in *Sorrells* and *Sherman* is commonly called) does focus attention upon the activity of the government, it is important to note, for purposes of the present discussion, that the concurring opinions in neither case challenged the fact that "original intent" in the mind of the government official is a prerequisite to the defense of entrapment.¹⁶ This element was treated, in fact, as such a basic presupposition that Frankfurter and Roberts hardly felt it was worth consideration.¹⁷ What the concurring Justices in both cases objected to in the majority's test was not the "intent" restriction on the defense, but rather the requirement of an "innocent" defendant who had no "predisposition" to commit the offense.

This distinction between intent and predisposition is made clear upon a careful reading of Frankfurter's opinion in *Sherman*, but has become the source of confusion when his comments have been taken out of context. It is important to note the full development of Frankfurter's criticism of the majority's approach:

14. *Id.* at 384.

15. *Id.* at 380.

16. *Sorrells v. United States*, *supra* note 4, at 454 (Roberts concurring): "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not otherwise have perpetrated it except for the persuasion . . . of the officer."

17. *Sherman v. United States*, *supra* note 5, at 382 (Frankfurter concurring): "Of course in every case of this kind the intention that the particular crime be committed originates with the police, and without their inducement the crime would not have occurred." *See also*, *Lafave*, *supra* note 9, at 371 where it is stated that showing intent in the mind of the police is the first step under either "majority" or "minority" tests. And *see Sorrells v. United States*, *supra* note 4, at 458 (Roberts concurring): "[The defendant] has committed the crime in question, but, by supposition, only because of instigation and inducement by a government officer."

The crucial question . . . is whether the police conduct revealed in the particular case falls below standards . . . for the proper use of governmental power. For answer it is wholly irrelevant to ask if the intention to commit the crime originated with the defendant [which the majority test on first glance would apparently ask]. . . . Of course in every case of this kind the *intention* that the particular crime be committed originates with the police. . . .

The *intention* referred to, [by the majority and attacked by the minority] therefore, must be a general intention or predisposition to commit . . . crimes of the kind solicited [and not the specific intention to commit the particular crime in question] (Emphasis added).¹⁸

In other words, Frankfurter recognized that the majority's test placed two obstacles in the way of defendant's defense of entrapment: he must show he had no prior intent (specific intent to commit the particular offense) and no predisposition (general "intent") to commit crimes of the same type. It was only as to the latter obstacle that the concurring Justices complained. It is only the latter type of intent which is "irrelevant." The reason for their objection is clear. Since predisposition is a factor in the defense, the majority test allows a searching inquiry into the defendant's prior conduct (including prior convictions)¹⁹ and this evidence may be submitted to the jury. The danger seen by Frankfurter is that:

The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged.²⁰

To avoid this danger, the Roberts-Frankfurter solution was to ignore defendant's predisposition (but not his intent) and focus upon whether the police conduct involved a substantial risk of entrapping persons other than those ready and willing to commit the crime.

18. *Sherman v. United States*, *supra* note 5, at 382.

19. *Sorrells v. United States*, *supra* note 4, at 451.

20. *Sherman v. United States*, *supra* note 5, at 382.

ANALYSIS

Confusion has resulted in a number of recent cases because courts have failed to make the distinction between "intent" and "predisposition," discussed above. The following two examples are illustrative.

In *United States v. Tartar*²¹ it appeared from the evidence, and from statements by the defendant's own counsel, that the defendant on his own initiative offered to bribe a Government agent who was auditing his tax return. The court, allegedly adhering to the "majority" test in *Sherman*, held that the jury could properly have found that the defendant was "predisposed" to offer a bribe to the agent and upheld his conviction. The defense of entrapment in this case clearly was not proper under the "majority" test. However, the defense should not have fallen on the grounds that the defendant was "predisposed." Predisposition is a factor to be considered under the "majority" test only after it is shown that the "intent" to commit the crime originated with the government official who then induced the defendant. In this case it was the defendant who originally approached the agent with the offer of the bribe. Only after this initial act by the defendant did the agent begin to give him slight encouragement. The defense of entrapment, under the "majority" test, should have fallen here because the defendant had the original intent to commit the crime and not because he was "predisposed to offer a bribe."

An even clearer example of the confusion in this area is found in *People v. Moran*.²² The defendant in this case had been in possession of 20 tablets of LSD for two months prior to his initial contact with the government agent who later made the purchase. The defendant at first refused to deal with the police informant, a friend and classmate of his, but finally agreed to the sale after repeated solicitations by the informant who told the defendant that he wanted the drugs for a friend who needed them badly. The defendant was later convicted of possession and sale of LSD.

21. 439 F.2d 1300 (9th Cir. 1971).

22. 1 Cal. 3d 755, 463 P.2d 763, 83 Cal. Rptr. 411 (1970).

The majority opinion stated as a general rule that entrapment is not established if there is evidence from which it can be inferred that the intent to commit the particular offense originated in the mind of the defendant. Such evidence existed, the majority concluded, in the fact that the defendant had possessed the drugs for two months prior to the sale. Upon this finding the jury's verdict was upheld.

Two things must be made clear at this point before the mistake made by the majority and the even greater mistake made by Justice Traynor in his dissent can be fully appreciated. First, the rule stated by the majority is correct. Under either the "majority" or "minority" test the defense cannot stand if the intent to commit the particular crime originated in the mind of the defendant rather than in the mind of the police. Second, however, it must be pointed out that the evidence of the defendant's possession of the drugs for two months prior to the sale did not show intent. At the most, this evidence merely tended to prove the defendant's predisposition. "Intent" in the context of the entrapment defense means intent to commit the particular offense, in this case the sale of LSD to the agent. This must be distinguished from the defendant's predisposition, or willingness to sell drugs in general. Possession of the drugs for period prior to the sale might be evidence of "predisposition", but cannot be said to be evidence of the defendant's "intent" to sell to the agent on this particular occasion. The defendant was not even aware of the existence of the agent during the two months he had the drugs in his possession.

Justice Traynor's first mistake in his dissenting opinion was accepting the majority's reasoning as being correct. The Chief Justice was aware that under the "minority" type test adopted by the California Supreme Court in *People v. Benford*,²³ the evidence relied on by the majority in *Moran* should have been ignored. He recognized the likelihood of prejudice if such evidence were to be shown to the jury. He also recognized the general theory of the "minority" test that the court should be basically concerned with the degree of impermis-

23. 53 Cal. 2d 1, 345 P.2d 928 (1959).

sible police conduct involved. However, Justice Traynor attempted to reach this result within the boundaries and definitions established by the majority opinion.

Instead of distinguishing between intent and predisposition as the true "minority" test does, the Chief Justice tried to reason his way to the same result working solely with the "intent" of the defendant. He first narrowly summarized the "majority" test as:

According to its [majority in *Sorrells* and *Sherman*] test, if the intent to commit the offense originated in the accused's mind, entrapment cannot be established; if the intent originated in the mind of a law enforcement officer the defense is established.²⁴

This statement of the test is only partly correct. It tends to make the "majority" test a pure "origin of intent" test. While it is true that, under the "majority" test, the defense can never stand where the intent is found to have originated in the mind of the defendant, it is not true that the defense is established if the intent is found to have originated in the mind of the official. As to the latter situation, the defense is established only if it is shown in addition that there was inducement by the official and the defendant was not predisposed to commit the crime.

Justice Traynor went on to chastise the majority in the *Moran* case for deviating from the "minority" type test adopted by the California Supreme Court in *People v. Benford*.²⁵ Had the Chief Justice recognized the distinction between "predisposition" and "intent", his criticism could simply have stated:

The majority's statement of the rule is correct under either the "majority" or "minority" test since under either the defense is precluded if the intent originated in the mind of the defendant. However, the "minority" type test adopted in California by *Benford* ignores evidence of the defendant's predisposition since this type of evidence is likely to be prejudicial to the jury. In this case the evidence of the defendant's possession of the drugs merely showed

24. *People v. Moran*, *supra* note 22, at 767.

25. *People v. Benford*, *supra* note 23.

“predisposition” and a conviction based upon this evidence cannot stand.

However, since the Chief Justice had accepted the finding by the majority that the evidence of possession showed “intent” to commit the crime he could logically ignore this evidence only by concluding: first, that the “majority” test was purely an “origin of the intent” test (as noted above), and second, that the minority in *Sorrells* and *Sherman* had reacted to this narrow test of the majority by completely ignoring “intent” and focusing solely on the methods used by the police. He supported this content on the statement by Frankfurter in *Sherman* that “‘it is wholly irrelevant to ask if the ‘intention’ to commit the crime originated with the defendant or government officers. . . .’”²⁶ Out of context this quotation appears to say that the prior intention of the defendant to commit the crime is irrelevant. In context (as discussed in the introduction of this note) it is clear that Justice Frankfurter actually meant that the defendant’s “predisposition” was irrelevant.

Justice Traynor correctly found that under the “minority” type test as established by *Benford* the evidence in the *Moran* conviction should have been excluded. His reasoning, however, did not follow the true “minority” test. He had fallen into the trap of failing to distinguish between “intent” and “predisposition.” Under the true “minority” test, “intent” of the defendant is always relevant. Just as under the “majority” test, its absence is a prerequisite to the defense.

The problems discussed above take a confusing twist when the court, as in the principle case of *McGrath*, is faced with the dilemma of a defendant who clearly had the original intent to commit the crime, but at the same time there existed activity by the Government which was of the type condemned by both the “majority” and “minority” tests.

In *McGrath*, the agents’ activity in effectively taking control of the printing of the counterfeit money and arranging the time and place of the delivery went well beyond merely providing an opportunity for the commission of the crime.

26. *People v. Moran*, *supra* note 22, at 768.

Were it not for the prior intent of the defendant, the defense would certainly have been established under the "minority" test, which focuses primarily on the degree of involvement by the police and not upon the predisposition of the defendant. On the other hand, since there was some evidence of a predisposition on the part of the defendant to commit the offense,²⁷ it is doubtful whether the defense would lie under the "majority" test even if prior intent were not present.

The court in *McGrath* analogized the factual situation there with cases where a government agent supplies contraband to the defendant and then arrests him for selling it back to the agent.

The court quoted the following from the case of *People v. Strong*:²⁸

"While we are sympathetic to the problems of enforcement agencies in controlling the narcotics traffic, and their use of informers to that end, we cannot condone the action of one acting for the government in supplying the very narcotics that gave rise to the alleged offense. We know of no conviction for sale of narcotics that has been sustained when the narcotics sold were supplied by an agent of the government. This is more than mere inducement. In reality the government is supplying the *sine qua non* of the offense."²⁹

While *Strong* does support that part of the court's holding that the government was guilty of performing essential parts of the criminal offense itself, the cases can be distinguished. The majority in *Strong* clearly accepted the traditional definition of entrapment as the "'conception and planning of a offense by a officer, and his procurement of its commission by one who would not have perpetrated it except for the . . . persuasion . . . of the officer.'"³⁰ Entrapment was allowed to stand in *People v. Strong* not because the court ignored the "intent" question but rather because the court felt that the un rebutted evidence of the defendant

27. The court intimated the defendant may have had previous convictions of counterfeiting. *United States v. McGrath*, *supra* note 1, at 1029.

28. 21 Ill. 2d 325, 172 N.E.2d 765 (1961).

29. *United States v. McGrath*, *supra* note 1, at 1031.

30. *People v. Strong*, *supra* note 28, at 767.

that the drugs were supplied by an agent of the government indicated that he was induced to perform the unlawful act and was not apprehended "in the execution of a criminal act of his own conception."³¹ There is nothing in *People v. Strong* to indicate the court would have allowed the entrapment defense to stand had it been shown that the original intent was the defendant's. The failure of the government to deny the defendant's testimony gave rise to an inference (of intent) against the state. Far from being irrelevant, "intent" was the key factor in this decision.

The *McGrath* decision finds its strongest support in *United States v. Chisum*.³² In this case the defendant contacted a known counterfeiter seeking to buy counterfeit money. The defendant was put in contact with a Government agent who sold him counterfeit bills and then arrested him for receiving counterfeit bills with the intent to pass them as genuine. The court there noted that the intent originated with the defendant:

If the defense of entrapment must be confined solely to the issue of intent, then the defendant's motion must fail. It is clear that the facts as presented here reveal that the intent to commit the crime arose solely in the mind of the defendant without inducement by the government.³³

Despite the existence of this intent, the *Chisum* court held that the defense of entrapment would still stand. It drew support for this decision from *People v. Strong* and from the concurring opinion of Frankfurter in *Sherman*. The court quotes, out of context, that part of Frankfurter's opinion which reads, "[I]t is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or governmental officers. . . ." ³⁴ As discussed in the introduction, however, it is evident that Frankfurter was really saying that "predisposition" is irrelevant and not "intent" to commit the particular act.³⁵ It is clear that *Chisum* presents an unwarranted expansion of the defense of entrap-

31. *People v. Strong*, *supra* note 28, at 767.

32. 312 F. Supp. 1307 (D.C. Cal. 1970).

33. *Id.* at 1310.

34. *Id.* at 1311.

35. See text *supra* p. 648.

ment under either the "majority" or "minority" tests which both recognize lack of defendants' intent as a prerequisite. This court too fell into the trap of failing to distinguish between "predisposition" and "intent".

As in *Chisum*, the court in *McGrath* found support in the concurring opinions in *Sorrells* and *Sherman*. The court here did not make the same mistake the *Chisum* court did, however. It recognized that the "minority" test was objecting to the attention paid the defendant's "predisposition" by the "majority" test. It recognized that this is what the "minority" test found "irrelevant." It recognized that the "minority" test focused upo the police behavior. However, the court failed to recognize that what the defendant had here was "intent" and not a mere "predisposition". It failed to recognize that, while under the "minority" test predisposition can be ignored, "intent" can never be "exacerbated by official intervention."³⁶ Once again this indicates a failure to distinguish between "intent" and "predisposition".

A more logical approach to the dilemma was taken in *Greene v. United States*.³⁷ In this case a Government agent posing as a "syndicate" man had, through previous activities with the defendants, succeeded in setting up their arrest in 1963 for selling bootleg whiskey. Once released from custody the rather naive defendants re-contacted the agent, whom they still believed to be a "syndicate" man, and informed him they were going back into the bootlegging business. Their subsequent arrest in 1966 was overturned, but not on the basis of entrapment. Rather the court reversed simply on the grounds that the Government had become too involved.³⁸ The court stated:

Entrapment is shown where government agents go beyond the mere affording of opportunities or facilities for the commission of the offense and exert persuasion or pressure of one kind or another which induces the commission of a crime by one who had no predisposition to do so. . . . (Citations omitted)

36. *United States v. McGrath*, *supra* note 1, at 1030.

37. 454 F.2d 783 (9th Cir. 1971).

38. *E.g.*, the agent had offered to provide a still and equipment, had provided 2,000 pounds of sugar, had continuously put pressure on the defendants, and was their only customer.

[The defendant] had a predisposition [really a intent] to manufacture and sell bootleg whiskey from the time [the agents] first contact with them, and the usual entrapment defense is therefore not available.

However, the facts presented by this unique record do reveal circumstances which, in combination, require reversal of these convictions. . . .³⁹

. . . .

We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators. . . . [A] certain amount of stealth and strategy "are necessary weapons in the arsenal of the police officer." But, although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative.⁴⁰

If it is accepted that the defense of entrapment, under either the "majority" or "minority" tests, cannot be established where the defendant originally formulated the intent, the approach taken in *Greene* seems logical.⁴¹

Under the rationale in *Greene*, the conviction of *McGrath* could have been reversed without attempting to tie the decision to the defense of entrapment. *McGrath* was clearly a case where the government had become completely enmeshed in the criminal activity from beginning to end.

CONCLUSION

Since this article was first sent to the printer, the United States Supreme Court has again addressed itself to the prob-

39. *Supra* note 37, at 786.

40. *Supra* note 37, at 787. The dissent agreed that this was not an entrapment case, but disagreed that it presented a special case justifying reversal.

Entrapment . . . is repugnant not because of the Government has, through successful infiltration of a conspiracy, become an active participant in a criminal enterprise; it is repugnant because the Government has acted unworthily or unfairly in inducing commission of the crime. I do not regard it as unworthy or unfair to play a demanding cover role or to take advantage of the eagerness and naivete of suspects.

Id. at 788.

lems involved in the entrapment defense. In *United States v. Russell*,⁴¹ the Court in a 5 to 4 decision reversed the Ninth Circuit Court of Appeals and affirmed the conviction of a defendant despite the alleged "intolerable degree of governmental participation in the criminal enterprise" upon which the appellate court, following *Chisum and Greene*, had relied in reversing the conviction.

This decision, which might have served more properly as the focal point of this discussion had it been handed down earlier, would seem to be supportive of the basic contentions set forth herein.

The basic propositions of this note, simply stated, are these: that there is a basic distinction between "intent" and "predisposition" as the terms are applied to entrapment; that under either the "majority" or "minority" test, origin of specific intent in the mind of the government officer is always a prerequisite to the defense; and finally; that certain courts, e.g., *McGrath* have unwarrantedly extended the so-called "minority" test to allow the "intent" as well as the "predisposition" of the defendant to be ignored when the degree of governmental involvement has reached a prohibitive point.

In *Russell*, a Government agent supplied chemical, phenyl-2-propanone (essential in the manufacture of "speed") to the defendant, who, even before this transaction, was actively engaged in manufacturing the illicit drug. The finished product was purchased by the agent and the defendant was convicted for its manufacture.

Delivering the opinion of the Court, Justice Rehnquist basically reaffirmed the "majority" test set out in *Sorrells* and *Sherman* and rejected the defendant's contention that only the degree of police involvement should be considered in determining whether entrapment was established as a matter of law. While the court spoke generally in terms of this defendant being "predisposed" to commit the crime, it is apparent that what was actually being referred to was the fact that the defendant had the specific intent to commit the crime and that this factor could not be ignored.

41. *United States v. Russell*, _____ U.S. _____, 41 U.S.L.W. 4538 (U.S. Apr. 24, 1973) (No. 71-1585).

The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. . . .⁴²

. . . .

[It does not] seem particularly desirable for the law to grant complete immunity from prosecution to one *who himself planned to commit the crime*. . . .⁴³

. . . .

. . . It is only when the *government's* deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.⁴⁴ (Emphasis added).

Entrapment could not be claimed here because the defendant had failed to meet the first step under either the "majority" or "minority" tests i.e., that the "intent" to commit the crime did not originate with the defendant. Viewing the case in this manner, it would not seem to present a direct rejection of the true "minority test" nor any new "hard-line" by the Court. The opinion tends, rather, to undercut decisions such as *McGrath* which proposed to look solely at the degree of police involvement ignoring both "intent" and "predisposition," decisions which offend both traditional tests of entrapment. Finally, it should be noted that the Court did not entirely rule out all possibility of reversal of a conviction based solely upon the degree of police involvement without regard to entrapment, as suggested by *Greene*, if "the conduct of law-enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction."⁴⁵ However, the court noted that some degree of infiltration and participation in the criminal activity is permissible. Whatever the degree of involvement necessary to demand reversal, it was not met by the situation in *Russell*. Presumably it would not be met by the circumstances in *McGrath* either.

It would appear that the "minority" test of entrapment is growing in acceptance⁴⁶ and is perhaps the better view if

42. *Id.* at 4540.

43. *Id.* at 4541.

44. *Id.* at 4542.

45. *Id.* at 4540.

46. MODEL PENAL CODE § 2.13; Magness, *The Defense of Entrapment—Definitions, Bases and Procedure*, 3 TEX. TECH. L. REV. 117 (1971); 1971 UTAH L. REV. 266 (1971); N.Y. PENAL LAW 40.05 (McKinney 1967).

the purpose is to deter reprehensible police practices.⁴⁷ The *Russell* decision on a close reading would not seem to preclude its future development and acceptance, especially since the court has held that entrapment is not a constitutional defense.⁴⁸ However, expansion of the defense beyond this test to situations where the original intent arose in the mind of the defendant appear unlikely in view of *Russell*. The defendant's prior intent will almost assuredly preclude the defense.

DAN J. PAULI

47. LAFAYE, CRIMINAL LAW § 48 (1972).

48. *United States v. Russell*, *supra* note 41, at 4541.