THE ENTRAPMENT

DEFENSE

IN CRIMINAL PROSECUTIONS

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INTRODUCTION TO ENTRAPMENT

In the United States of America, the spirt of the Entrapment defense has emerged almost simultaneously with the independence of the country. In the era before the American Revolution, while a few English cases accepted the central notion of entrapment, few British judges reversed convictions on the basis of entrapment.[1] However, in the modern world of criminal appellate litigation, Entrapment, as an issue for the reversal of a conviction, has probably replaced the ineffectiveness of counsel claim, and perhaps even the appellant's frequently alleged charge of prosecutorial misconduct, as the most prevalent appellate issue in current criminal law cases.[2]

Nevertheless, in the United States, entrapment as a viable defense to criminal prosecution, has gained acceptance slowly. Initially, American courts were generally unwilling to offer any kind of criminal defense that was completely predicated on the circumstances surrounding the commission of the crime. The early American courts, like the English, were heavily influenced by the prominent Christian-based religion in society. This sort of biblical view is reflected in *Board of Commissioners v. Backus*,[3] where the New York Supreme Court was one of the first courts in the nation to articulate it's interpretation and attitude of the

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[1] See generally Norden's Case, Fost. Crim. Cas. 129 (1774).
[2] See e.g., Rivera v. State, 846 P.2d 1, 11 (Wyo. 1993) (stated in dissenting opinion)
[3] How. Pr. 33, (1864).

entrapment defense.[4] One portion of the court's opinion originated a now famous Biblical analogy:

> Even if the inducements to commit crime could be assumed to exist I this case, the allegation of the defendant would be but the repetition of the pleas as ancient as the world, and first interposed in Paradise: "The serpent beguiled me and I did eat." That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or code of civilized, not to say Christian ethics, it never will.[5]

Unquestionably, in the past two centuries, the courts' view on entrapment has evolved from a issue of confusion into a legitimate and well established defense, which is currently recognized by the Supreme Court, the federal government, and all fifty States.

ENTRAPMENT AT A GLANCE

(The Objective test v. Subjective test for predisposition)

Entrapment generally exist where law enforcement, or someone cooperating with law enforcement, induces an individual to commit a crime. However, entrapment is not a constitutional doctrine. Rather, it is a court made criminal law defense to police overreaching, which is now recognized in all states and the federal courts. Most often, entrapment occurs when the defendant was induced to commit the crime by the government or an agent of the

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[4] Id. at 221.(despite the influence, this decision displays unprecedented sympathy)
[5] *Id.* at 42.

government and the defendant would not have otherwise committed such a crime if it had not been for the police inducement.[6]

It is important to understand that there are two very distinct commonly stated rationales for the defense of entrapment. First, the *objective test*, is based on a standard that focuses on police conduct rather than the predisposition of the defendant. Under the objective test, the court considers the impact of police inducement on a hypothetical innocent person, instead of the actual defendant. Although this "objective" or "hypothetical person" test may take into consideration some general characteristics of the defendant.[7]

In states that use the objective test, they have undoubtedly had their particular formulation assisted by the Model Penal Code (MPC). In § 2.13 of the MPC, the definition of entrapment is formulated as follows:

> (1) A public law enforcement official or a person acting in co-operation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either: of the MPC, entrapment is said to occur when a law enforcement officer or informant induces or encourages another person to engage in conduct constituting a criminal offense by either:
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> a. making knowing false representations designed to induce the belief that such conduct is not prohibited; or
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> b. employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

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[6] See *United States v. Russell*, 411 U.S. 423 (1973) (use of an undercover police officer in a sting operation generally permitted)

[7] See e.g., Model Penal Code § 2.13, (however the application of the standard does not turn on the "character" of the particular defendant)

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

Not surprisingly, criminal law commentators often use the terms "MPC test" and "objective test" interchangeably, since both tests are completely and exclusively focused on the issue of whether the actions of the government are so reprehensible that the court should refuse, as a matter of public policy, to allow a conviction to stand.[8]

The *subjective test*, on the other hand, which is accepted by the federal government, a majority of the states, and by the United States Supreme Court of America, focuses on the defendant's predisposition, if any, to commit the crime solicited by the government agent. Incidentally, the defendant need not prove to be a completely law-abiding citizen in order to

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[8] See, e.g., Model Penal Code § 2.13, Subsection (1) states that a government agent can perpetuate entrapment by either making representations known to be false to induce a belief that conduct is legal or by employing methods of substantial persuasion. *See also*, Woo Wai, 223 F. 412 (9th Cir. 1915) (holding "public policy" as basis for entrapment defense)

assert a defense of entrapment, and a history of or a predisposition to engage in an unlawful activity unrelated to the crime at issue does not preclude the defense.[9]

One important procedural distinction between the two standards is that if the court applies the objective standard in determining entrapment, then the issue of entrapment as a matter of law, is a matter that is submitted to the judge, rather to the jury.[10]

REFLECTION ON PREDISPOSITION

(A Major Issue Under The Subjective Test)

Undeniably, the predisposition element of the subjective test has come to dominate the analysis of the entrapment defense.[11] Courts to this date and throughout the evolution of the entrapment defense have continued to focus very heavy attention on the whether the defendant was predisposed to commit the crime. Since majority of courts employ the subjective test for entrapment, and in such cases where entrapment is an issue, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to being approached by the government agents,[12] it is therefore, rather important to understand the

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[9] See generally Sorrells v. United States, 287 U.S. 435, 451 (U.S. 1932) (although Federal Rule of Procedure will allow prior bad acts to prove the defendant's predisposition, the court in Sorrells pointed out that relevant prior bad acts must be "bearing on conduct relevant of the offense charged")

[10] Model Penal Code § 2.13(2) recommends judicial determination of entrapment.

[11] Russell, at 233 ("the principle element in entrapment is whether the defendant is predisposed to commit the crime")

[12] See generally Jacobson v. United States, 503 U.S. 540, 112 S. Ct. 1535, 1198 (1992) (defendant must be "willing," in the sense that he is psychologically prepared to

concept of a defendant's predisposition to commit a particular crime, since it is virtually the exclusive basis for the subjective test for entrapment.

The notion of disposition and predisposition of individuals have been philosophically defined to be more narrow of a notion than of a general character trait of an individual.[13] Dispositions are entrench patterns of human behavior which are habitual actions that require less involvement for the individual's rational facilities than an ordinary willed action. Therefore, acts that stem from disposition makes actions of the relevant sort easier to perform.[14] Society has often captured this concept by saying that doing a particular thing "come naturally" to such a person, by which the meaning is that the person does it with naturally and with little time for reflection or to internally deliberate.[15]

Aristotle, the famous Greek Philosopher, has commented on the notion of an individual's disposition of character. He said:

> [t]hat which is in truth an object of wish is an object of wish to the good man," and also, famously, that "We deliberate not about ends, but about means.[16]

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commit the offense); United States v. Hollingsworth, 27 F. 3d 1196 (7th Cir. 1994) (ability of defendant to commit is presumed except when government uses extraordinary inducement)

[13] Claire Finkelstein, Excuses and Dispositions in Criminal Law, 6 Buff. Crim. L.Rev. 317 (2002)

[14] Id. at 339.

[15] Id.

[16] A Aristotle, Nicomachean Ethics, in The Basic Works of Aristotle 971, 970 (Richardf McKeon ed., W.D. Ross trans., Random House 1941)

Together, the Aristotelian theories,[17] society's modern perception of disposition, and the relevant articulations from the majority of courts,[18] are consistent in describing the essence of individual's disposition as the fully voluntary and intentional actions of an individual, largely without any significant inducement from an outside source.

THE ORIGINS OF ENTRAPMENT

Woo Wai v. The United States

It is clear from judicial history that, *Woo Wai*, was one of the first courts to distinctively mark the beginning of the modern doctrine of entrapment.[19] In *Woo Wai*, the court recognized the strong public policy considerations to prevent government agents from inducing citizens to commit crimes that they would otherwise not commit.

The court in *Woo Wai* stated that:

> "In considering the question of public policy.....is to be observed between measures used to entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and artifice used to detect persons suspected of being engaged in criminal practices, particularly if such criminal practices vitally affect the public welfare rather than individuals."[20]

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[17] Id. (Aristotle's quotes point out that a person's character is essentially shown by his evidence of character propensity)

[18] See generally Jacobson.

[19] *Woo Wai*, 223 F. 412 (9th Cir. 1915)

[20] Id. at 415. (this holding represents the earliest use of the "public policy" approach to entrapment)

As one of the first major court opinions on entrapment, the court recognized the existence of a strong public policy concern to curtailing unfair practices in governmental investigations. This ideology was originally articulated in the state court case of *Saunders v. People.*[21] In *Saunders*, the court took a strong stance on preventing government agents from engaging in controversial artifices and stratagem to assist their police investigations. However, since the court's rationale was centered on the conduct of the police, the issue of whether the defendant was predisposed to commit the crime became a factor primarily focused on the government's conduct, rather than the defendant's. Therefore, this case represents the rationale of the *objective test* for entrapment, which is rested on the strict analysis of the government's intrusion rather than the predisposition of the defendant.

HISTORY AND DEVELOPMENT OF ENTRAPMENT

Sorrells v. The United States

Nevertheless, the *Woo Wai* decision left much confusion surrounding the principles of entrapment. Many courts were unsure of what type of particular circumstances might warrant the application of the defense. Incidently, this lack of judicial guidance lead to many constitutional, procedural and sufficiency of evidence problems in various courts of law. However, a decade and a half later, the United States Supreme Court decided delivered a

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[21] *Saunders v. People*, 38 Mich. 218 (Mich. 1878)

landmark decision that changed the fundamentally applied basics and legal definition of entrapment. In *Sorrells v. United States*,[22] the Supreme Court held that the proper analysis of the defendant's predisposition to commit the crime should be based on a *subjective standard*, where the propensity and circumstances of a particular defendant are considered, rather than only the conduct of the government.[23] The Supreme Court reasoned that it's decision to proscribe a subjective standard for evaluating the entrapment defense was based on the public policy of preventing the wrongful convictions of innocent defendants.[24] The Supreme Court noted:

> [I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspried, incited, persuaded, and lured him to attempt to commit it.[25]

Additionally, the Supreme Court suggested that the literal interpretations of statutes should not be construed at the expense of law and reason, in such instances where it would produce absurd consequences or flagrant injustice.[26] The Court stated that it is a matter for the courts to control and supervise the conduct of law enforcement to prevent convictions outside the purview of legislative statutes and inconsistent with congressional intent. Therefore, the doctrinal basis for entrapment has a noteworthy premise on the legislative intent of congress.

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[22] *Sorrells v. United States*, 287 U.S. 435, 451 (U.S. 1932)

[23] Id. at 443. (the court found the prosecution's evidence that defendant was known as a "rum runner" was insufficient to prove predisposition to sell liquor when there were three visits to the defendant's home by a government agent, who also attempted to coax the defendant with the camaraderie of war experiences)

[24] Id. at 457. (the dissenting justices were vehemently opposed to the basis of entrapment resting on the subjective test, instead of the improper police conduct test "objective test")

[25] *Id.* at 444.

[26] *Id.* at 446.

Sherman v. The United States

In the late 1950's the Supreme Court revisited the defense of entrapment and reaffirmed the use of the subjective analysis of the defendant's predisposition for the entrapment defense, in the well known decision of *Sherman v. United States*, 356 U.S. 369 (1958). The facts of *Sherman* dealt with a defendant who met a government informant in a doctors's office, who were both, seemingly being treated for narcotics addiction. After several informal discussions between the two, the government informant prevailed upon the defendant to give information as to where the informant might purchase narcotics.

However, the facts of this case were not similar to a usual narcotic transaction stings, where the defendant simply supplied the government informant with narcotics in exchange for money. First and foremost, this case is different because the defendant initially tried to avoid the issue completely.[27] From that point, the government informant resorted to more drastic measures of inducement. In effort to seek acquiescence from the defendant, the informant appealed to his sense of compassion and sympathy, by telling the defendant that "he was not responding to his current treatment" and that he "he was suffering" from lack of narcotics. The defendant finally acquiesced and told the informant that the total cost of the drugs was twenty five dollars and that the informant owed him fifteen dollars, and the cost of a taxi ride to obtain the drugs. Thus, the defendant and the informer both bore the cost of the narcotics and the incidental expenses necessary to obtain the drugs.

[27] Sherman, at 375 (the investigative environment of a rehabilitation clinic is more conducive to the inference that the defendant was attempting to overcome his own addiction rather than ready to sell drugs)

The central issue in *Sherman* is whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether the defendant was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade.[28] Incidentally, the Supreme Court held that Sherman's offense was the product of police investigatory abuse since the conduct of the governmental agent was so inducing, under these particular circumstances, that it was likely that Sherman would have not bought the drugs for the informant if it had not been for agent's unrelenting persistence and over imposing appeal to Sherman's sense of humanity.[29] Therefore, the Court decided to reverse due to the extremely inducing methods employed on behalf of the government to bring about the conviction, even though it acknowledged that Sherman's conduct did not fall outside the proscription of the statute.[30]

United States v. Russel

In *United States v. Russell*, 411 U.S. 423 (1973), the Supreme Court further solidified the majority view of entrapment, and held that the defense of entrapment cannot be asserted by one who is predisposed to commit the crime. Interestingly, in *Russell*, the government agents were heavily involved in the commission of a offense. The government agents supplied the defendants with all the necessary ingredients to manufacture methamphetamine ("speed"), then

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[28] *Sherman* at 375.

[29] Id. (the court concluded that not only was Sherman induced to commit the crime, he was also induced to resume his drug habit, therefore presenting an even stronger basis for the prevention of such investigative techniques)

[30] *Id.* at 385. (the dissenting opinion criticized this as being against legislative intent)

after the drugs were manufactured, they arrested the defendants. The Court acknowledged that there was inducement on the part of the police, especially in regard to supplying the ingredients necessary to manufacture the of methamphetamine. However, the Court did not view this governmental action as conduct that was "fundamentally unfair" or "shocking to the universal sense of justice", as mandated by the Fifth Amendment.[31] Unlike *Sherman* and other previous cases were convictions were overturned on the basis of police overreaching, in this case, the police conduct fell short of violating Due Process because the chemical was otherwise readily obtainable.[32] Even though the government had been making it more difficult for illegal drug manufactures to obtain the chemical, it was by itself, a harmless and legal substance to possess.[33]

Therefore, the Court reaffirmed the rule of entrapment that precludes it's application as a defense in instances where the defendant is predisposed to commit the crime. Incidentally, the holding in this decision makes it quite clear that police conduct must be truly egregious for the Court to disregard the defendant's predisposition to commit the crime. In regard to the police conduct in relation to the "predisposition test", this decision decisively brightens the line of permissive governmental involvement, specifically declaring that governmental agents are allowed to gain a suspect's confidence by supplying something of value to the targeted criminal enterprise.

Jacobson v. United States

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[31] Russell at 432. (defendant argued that the government was too overly-involved)
[32] Id. (the court did not consider this action to violate "fundamental fairness)
[33] Id.

In one of the most famous cases regarding the doctrine entrapment, the Supreme Court, in *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535 (1992), firmly held that the subjective analysis should be applied with careful scrutiny, in considering the defendant's predisposition within the purview of an entrapment defense and that the government carries the burden of proving that the defendant was predisposed to violate the law before the government intervened.[34] However, the Court did not rule on the issue of inducement because the government conceded that they did induce the defendant to commit the crime.

In *Jacobson*, the defendant was charged with purchasing magazines that contained child pornography, under a newly enacted federal law that prohibited the receipt of such materials. However, the government's undercover operation in *Jacobson*, much like *Sherman*, was persistent and relentless. Over a 2 ½ year time period, there were "repeated efforts by two Government agencies, through five fictitious organizations, and a bogus pen pal, to explore the defendant's willingness to break [the law]" by ordering though the mail child pornography."[35] The government began it's investigation of Jacobson due to a report that postal inspectors had found his name on a mailing list of a California bookstore which had recently been shut down for selling obscene materials. However, the Supreme Court could not consider this a basis for a predisposition determination because at the time Jacobson purchased the materials from the

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[34] Jacobson, at 1540.

[35] Id. at 1538. (Justice White's description of the police investigation of Jacobson)

bookstore, the federal law outlawing such materials had not yet gone into effect and the ordering of the materials was not illegal.[36]

The Supreme Court stated:

> Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence.[37]

Essentially, this holding changed the entrapment doctrine by holding that government conduct may now be considered to create a predisposition to commit a crime, even before any government action to induce the commission of the crime or before the government even makes contact with the defendant. Previously, the doctrine of entrapment held that the inquiry of whether the defendant was predisposed to commit the crime was strictly based on the defendant's predisposition before the government induced the commission of a crime.

The *Jacobson* decision also reaffirmed the well developed principle of entrapment law, in that it discouraged the use of particularly egregious governmental investigation tactics. In relation to the government's second showing of proof of the defendant's predisposition (that the Jacobson continued to correspond with the contacts until he eventually acquiesced into purchasing the illegal materials) the Court held that if it had not been for the government's zealous investigation techniques, Jacobson's would not have gone to another source to complete the crime of receiving child pornography.[38]

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[36] *Id.* at 1541-42.(therefore, there was no basis for individualized suspicion)
[37] *Id.* at 1542. (this emerging concept is closely related to due process concerns)
[38] *Id.* (investigation reals that Jacobson was more inclined to join lobbying efforts)

The Court considered the notion that it took the government 10 contacts, over an extended period of time, before the defendant actually purchased the illegal material, and that the defendant's responses to contacts during the period "were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations."[39] It becomes clear that the Supreme Court felt that it was particularly offensive for law enforcement officials, as part of their investigation, to purport to be a part of a lobbying community in the process of changing the current law. The action of a governmental agent informing the defendant that their actions are not be illegal, is a concept now known as "entrapment by estoppel."[40] and was first articulated in the language of this decision:

> Law enforcement officials go too far when 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."[41]

Most importantly, this Court adds to the government's burden of proving predisposition. Once the defendant raises a colorable defense of entrapment, the government has the burden to prove beyond a reasonable doubt that the defendant has the predisposition to commit the offense.[42] However, this is a higher burden of proof than which is required for conviction, since the statute in this case, only requires that the recipient "knowingly" receive visual depictions produced with minors engaged in sexually explicit conduct. Therefore, under the precedent of *Jacobson*, the prosecution must prove more to show predisposition than it need prove in order to convict.

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[39] *Id.*

[40] See generally: *United States v. Clark*, 986 F.2d 65, 69 (4th Cir. 1993)

[41] *Jacobson* at 1543.

[42] *Id.* at 1540.

United States v. Hollingsworth

Shortly after the decision in *Jacobson*, the Supreme Court decided another landmark decision on entrapment in *United States v. Hollingsworth*, 27 F. 3d 1196 (7th Cir. 1994). The main issue in *Hollingsworth* was whether a reasonable jury could have found beyond a reasonable doubt that the government had not entrapped the defendants into committing the crime. Essentially, the Court's decision added a new element to the entrapment defense. Under *Jacobson*, the Court explained that for a defendant to have the requisite predisposition, he must be "Ready" and "Willing" to commit the offense in the absence of government inducement. However, the *Hollingsworth* decision added that the defendant must also be "Able" to commit the offense without the aid of the government.[43] Additionally, the Court also resolved some unclear issues on vicarious and private entrapment.

In *Hollingsworth*, the government conducted an investigation of a dentist (Pickard) and a farmer (Hollingsworth) in connection to money-laundering offense. In 1988, the two defendants decided form a corporation which would be involved in international financing. With closely held startup capital of nearly $400,000 dollars, the corporation was able to obtain a Grenadan banking license. However, after the corporation was having trouble obtaining customers through advertising, they were forced to sell their Grenadan license to raise some additional working capital. Thereafter, United States Customs Agent Rothrock approached Pickard, and presented him with the proposition of "wiring 10 structured $20,000 deposits (attempting to launder money

[43] Hollingsworth, at 1544. (this follows the notion of Sorrells, in that the government can not punish an individual for an activity that is a product of the agent's own activity)

obtained from the sale of guns to South Africa) into a off-shore bank account in exchange for a relatively small sum of money. The total amount of the money that was to wired was $200,000, but Pickard's fee was only $2,405. Additionally, the money-laundering scheme required that transactions to be made in Indianapolis, so Pickard recruited Hollingsworth to make one of the trips for him in exchange for a fee of $ 405.

However, the Court held that the defendants were entitled to a reversal of their conviction since they had a valid entrapment defense as a matter of law. The validity of the defendant's entrapment defense was centered on the their predisposition to commit the offense of money-laundering. Even though the Court believed that the defendants were both "Ready" and "Willing" to commit the offense, they were not otherwise "Able" to commit the offense without the assistance of the government.[44]

The Court determined that neither of the defendants had ever contemplated engaging in such criminal activity before Agent Rockrock began his campaign to inveigle the them into a money-laundering scheme.[45] Even though the defendants were less reluctant than Jacobson to violate federal law and had obtained foreign banking licenses, Pickard and Hollingsworth had "no prayer of becoming money launderers without the government's aid"[46] because they simply lacked the background, resources and connections to become international money launderers. Although, the Court acknowledged that the defendants were obviously capable of the act of

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[44] Id. at 1202. (the majority assured the dissent that this is not a new principle to entrapment law because the sole issue was whether the defendant was predisposed to violate the law before the government intervened)

[45] Id. at 1204. (selling a banking license does not equate to an illegal solicitation)

[46] Id.

wiring money to a bank account designated by the government agent, they did not have the underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets necessary for the commission of money-laundering. The Court concluded that even if the defendants wanted to go into the money-laundering business before they met Agent Rockworth (and there is no evidence that they did), they likelihood that could have successfully done so was so remote that they were objectively harmless.[47] In articulating the importance of the defendant's ability to commit the offense without the aid of the government, the Court reasoned that:

> The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation. For these and other traditional targets of stings all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability can be presumed. It is different when the defendant is not in a position without the government's help to become involved in illegal activity.[48]

However, this holding does not rule out or hinder the use of undercover sting investigations to apprehend criminals in situations where the government induces a defendant who is predisposed to commit the offense. The Court carefully points out that in routine governmental investigations were the government induces the defendant, the defendant is presumed to be able to commit the offense. However, if the governmental investigation involves an extraordinary level of inducement, then the defendant's ability to commit the offense can not

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[47] Id.

[48] Id. at 1200.

simply be presumed and requires the government to prove the defendant's ability to commit the offense beyond a reasonable doubt. It is apparent that the Court considered this new approach to the subjective predisposition analysis a complicated subject, so in order to clarify any confusion behind their rationale to add a new element to the entrapment defense, the Court illustrated the concept by example:

> Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, "Sure, but I don't know anything about counterfeiting." Suppose the government then bought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that all he had to do was press a button to print the money; and then offered him $ 10,000 for some quantity of counterfeit bills. The government's lawyer acknowledged that the counterfeiter would have a strong case that he had been entrapped, even though he was perfectly willing to commit the crime once the government planted the suggestion and showed him how and the government neither threatened him nor offered him an overwhelming inducement.[49]

Therefore, the decision of *Hollingsworth* is of major significance to the subjective determination of predisposition since now the government must prove beyond a reasonable doubt that the defendants were "Ready", "Willing", and "Able" to commit the offense without the assistance of the government.

One other key holding in *Hollingsworth* is that the Court provided insight on the seemingly unclear issues of vicarious and private entrapment. As the court concluded, Pickard

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[49] *Id.* at 1203.

has a viable defense of entrapment because his direct contact with the governmental agent. However, Hollingsworth, the principal's agent, did not have any contact with the governmental agent (Rothrock did not suggest, but he did induce, the association of Hollingsworth with Pickard in the scheme that Rothrock had hatched), so another question to be resolved is whether the entrapment defense is available to an agent of an acquitted principal. The Court was not willing to go so far as to hold that any defendant can be acquitted on the basis of private entrapment (situations where the a private civilian induces a defendant to commit a crime), yet, on the other hand, the Court felt that to acquit Pickard but convict Hollingsworth was an absurdity and not in the interests of justice.[50] The Court's main concern, however, was that if it recognized a defense of vicarious entrapment, it might enormously complicate the of trial of criminal cases.[51] In search of well grounded rationale, the Court turned to the Second Circuit case of *United States v. Pilarinos*, 864 F.2d 253, 256 (2nd Cir. 1988), which previously held that:

> If the government's inducement was directly communicated to the . . . [defendant]' by an unwitting middleman," the defendant would be entitled to submit his entrapment defense to the jury.

The *Pilarinos* court called this "derivative entrapment." Prompted by the Second Circuit's decisive terminology and rationale, the Supreme Court similarly stated that while there is no defense of either private entrapment or vicarious entrapment, there is a defense of derivative entrapment:

> when a private individual, himself entrapped, acts as agent or conduit for governmental efforts at entrapment, the government as principal is

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[50] *Id.* at 1204.

[51] *Id.*

> bound. This principle follows as we said from the unquestioned principle that the entrapment defense will lie whether the government uses its own employee as the stinger or an informant.[52]

Although, the defense of derivative entrapment is more limited than it appears. The Court carefully explained that if the first person whom the government entraps expands, embroiders, or elaborates the scheme proposed to him by the government, the accomplices with whom he associates himself in the larger scheme cannot shelter under his entrapment defense; nor could he if he, independent of any embroidery by the first "entrapee," had been predisposed to join in the scheme.[53] In other words, if in any case in which a government undercover agent or informant had been used, defendants with whom he had not dealt face to face or even over the phone can not argue that the real criminals with whom they had dealt had merely been transmitting the inducements furnished by the agent or informant. Irregardless of this subtle distinction, Hollingsworth is nevertheless, still covered by the doctrine of derivative entrapment because just as Pickard was entrapped by Agent Rothrock, so was Hollingsworth, since on some occasions, Rothrock appeared to be speaking to Hollingsworth through Pickard, even though he did not speak to Hollingsworth directly.[54]

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[52] *Id.*

[53] *Id.* at 1205.

[54] *Id.*

INTRODUCTION TO WHITE COLLAR CRIME

For various political and societal reasons, white collar crime has gained more attention of the past several years than it has in the past. Ever since the days of the Enron scandal, the American public has lessened it's tolerance toward white collar criminals. This newfound attention perhaps influenced my decision to select this particular case for my thesis. Additionally, new white collar crime law nicely illustrate many key issues in criminal law, including, symbolic legislation, vicarious liability, group criminality, complicity, the operation of "the special part" in modern criminal law, by they defined in criminal codes, other codes, or administrative regulation, or–as is often the case–some combination of the three.[55]

United States v. Weiner

In *United States v. Weiner*, 152 Fed. Appx. 38, (2nd Cir. 2005), the Second Circuit considered a case were the defendant, Paul Weiner, was tried and convicted by a jury of a conspiracy offense, specifically in violation of 18 U.S.C., Section 1956(a)(h).[56] For a conviction of this offense, the prosecution bears the burden of proof of proving that the defendant had knowledge that the money to be laundered was derived from the "proceeds of a particular criminal activity".[57] However, since the defendant raised the issue of entrapment, the

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[55] See generally Markus Dubber, 91 J Crim L& Criminology 829 (2002)

[56] (predicate offense was "a federal health care offense", in violation of 18 U.S.C., Section 1956(c) (7)(F)

[57] United States v. All Funds Distributed to Weiss, 345 F.3d 49, 53 n.2d (2nd Cir. 2003)

prosecution bears the burden of proving that he was predisposed to commit the crime.[58] At trial , Weiner raised the affirmative defense of entrapment by arguing that he was not predisposed to commit the offense of money laundering. He specifically contended that he would not have committed the crime if had not been for the extreme governmental conduct during the course of Weiner's investigation, since the undercover agents who conducted the investigation told him that they were "connected to the Russian Confederation." Weiner's allegation asserted that this governmental act created pressure from the impression of intimidation on him to engage in the crime, out of fear that they were, in fact, actual mobsters, who would not hesitate to use an unlawful method to obtain Weiner's cooperation.

Essentially, most entrapment issues raised in a criminal trail are particularly appropriate for jury consideration because the issue of predisposition is one of credibility.[59] Nevertheless, in a subjective test jurisdiction, like that of the Second Circuit and the underlying federal court in this case, after the defendant has raised the entrapment defense, if judge the decides that the evidence is beyond dispute with respect to a lack of predisposition, or the governmental conduct was so extreme as to require a verdict on the entrapment issue in favor of the defendant, he may rule on entrapment as a matter of law.[60] In an appellate context, the trial judge's ruling on a defendant's motion for entrapment as a matter of law, as well as whether the facts supported by the record constitute entrapment as a matter of law, may be examined by the appellate court.[61]

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[58] United States v. Bala, 236 F.3d 87, 94 (2nd Cir 2003)
[59] United States v. Armocida, 515 F.2d 49 (3rd Cir. 1975)
[60] See generally United States v. Huddacek, 7 F.3d 203, 205 (11th Cir. 1993)
[61] See Rivera, 846 P.2d 1, at 11

Consequently, in examining the merits of the case through the trial court's record, the Second Circuit did not accept Weiner's appellate argument of being entrapped as a matter of law, in that "the evidence was insufficient to permit a jury to rationally conclude that he was predisposed.....to commit the crime charged."[62] Rather, the court generally explained that it was not unreasonable for the jury to find that he was predisposed to commit the offense. In response to Weiner's plea to the court that he was in fear from intimidation, the court took special notice of the fact that Weiner did have a chance to present this testimony to the jury, who did not find it credible. This jury determination was of considerable relevance since the Second Circuit currently holds that appellate courts must defer to the jury's determination of the credibility of the evidence in considering it's sufficiency on appeal.[63] Therefore, the court was bound to presume that the jury correctly appraised the defendant's credibility as a witness, and as a result, the Court was in less of a position to hold that the jury's findings were unreasonable.

Nevertheless, the court explained that the defendant's own statements were the most significant indication of his predisposition to commit the offense. In the Second Circuit, *United States v. Salerno*,[64] is one of the leading cases on proving a defendant's predisposition to commit an offense when a entrapment defense is raised, which essentially derived from *Jacobson*, holds that "a defendant is predisposed to commit a crime if he is ready and willing without any persuasion to commit the crime charged and awaiting any propitious opportunity to do so."[65]

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[62] Bala, at 93 (Second Circuit holding that government must prove predisposition beyond a reasonable doubt, is consistent with the principles derived from Jacobson)

[63] United States v. Ceballos, 340 F.3d 115, 124 (2nd Cir. 2003)

[64] 66 F.3d 544, (2nd Cir. 1995)

[65] Id. at 547.

Therefore, the most inconsistent evidence of Weiner's lack of predisposition is undisputedly his own explicit statements in conversations with the undercover agents. In the most particularly relevant statement to Wiener's predisposition.....when the agents mentioned that they had recently "laundered $ 832,000 elsewhere", and that was business "that could have been Weiner's," Weiner quickly responded by saying "Absolutely," and offered to find the agents "another broker." This statement by Weiner was a crucial flaw to his defense and the court certainly considered it to show his "Readiness" and "Willingness" to commit the crime.

In conclusion, it appears that under the well developed doctrine of entrapment law, Weiner was most likely proven at trial to have had the predisposition to commit the offense, as we can only presume the motivation for jurors' decision, on the basis of his own statements. In my personal opinion, I believed that Weiner's argument regarding intimidation was more viable than the one of his lack of predisposition. Perhaps, if at trial, Weiner's defense was more centered on portraying the intimidating atmosphere of dealing with mobsters, and presented more evidence of high the frequency of violent dispositions resulting from business interactions between civilians and members of organized crime, it seems like Weiner could have had been a better chance of convincing the jury that he really would not have committed the offense if it had not been for the government's use of such an extreme tactic of using "thug" type characters in their investigation. As for his appeal, besides from possibly arguing ineffective assistance of counsel for not pursuing the notion of extreme government inducement at trial, it seems that he would have had a better chance for a reversal from the appellate court if in his appeal, he equated the particular facts of his case to the most recognized notions of extreme governmental conduct,

articulated from the most famous entrapment cases, by clearly and categorically comparing each recognized notion of extreme governmental conduct.