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Abstract

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> Certain types of criminal activity are consensual and covert. Hence they are virtually undetectable without the use of a government agent or informer. Narcotics peddlers, brokers of counterfeit currency . . . all do business clandestinely. Their crimes are likely to go unchecked unless the government can itself approach a suspect to offer him the opportunity to commit a crime and thus give evidence of his guilt.[1]

Introduction

A sentiment clearly evinced by the Fifth and Eleventh Circuit Courts of Appeals is that informants and undercover government agents are necessary to combat crime.[2] The use of these methods by law enforcement agencies has caused an outcry from criminal defendants and their attorneys.[3] The cry "I was entrapped" has become quite commonplace, and thus a popular avenue of defense. However, the general principles of law regarding the defense of entrapment are multi-faceted. The purpose of this note is to review those principles as they have been applied by the recently organized Eleventh Circuit and its progenitor, the former Fifth Circuit.[4]

Burdens of Proof

The entrapment defense was first recognized by the United States

1. Pierce v. United States, 414 F.2d 163, 165 (5th Cir. 1969), *cert. denied,* 396 U.S. 960 (1969).
2. United States v. Tobias, 662 F.2d 381, 385 (5th Cir. 1981), *cert. denied,* 102 S. Ct. 2908 (1982).
3. *See* Winter, *Probing the Probers, Does Abscam Go Too Far?* 68 A.B.A. J. 1347 (1982).
4. The Eleventh Circuit in the case Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc), adopted as precedent the decisions of the former Fifth Circuit handed down prior to the close of the business day September 30, 1981.

Supreme Court in *Sorrells v. United States*.[5] The Court has since restated that entrapment occurs "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."[6] Thus, the central theme of the entrapment defense is that the individual lacked the predisposition to commit the crime.[7]

Since entrapment is an affirmative defense, the defendant must present some initial evidence before the issue is properly raised.[8] Although the Fifth Circuit employed various formulations of the defendant's burden of production in *United States v. Hill*,[9] the Eleventh Circuit has arrived at a definitive standard:

> If there is any evidence in the record that, if believed by the jury, would show that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it, then, as in all other cases, involving questions of guilt or innocence, the jury must be permitted to resolve the matter.[10]

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5. 287 U.S. 435 (1932).

6. United States v. Branca, 677 F.2d 59, 61 (11th Cir. 1982) (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)).

7. United States v. Bagnell, 679 F.2d 826, 834 (11th Cir. 1982). *See also* United States v. Humphrey, 670 F.2d 153, 155 (11th Cir. 1982); United States v. Webster, 649 F.2d 346, 348 (5th Cir. 1981) (en banc).

8. *See Humphrey*, 670 F.2d at 155; *Tobias*, 662 F.2d at 384.

9. 626 F.2d 1301, 1303 n.3 (5th Cir. 1980), the court noted that the different constructions of the defendant's burden of production had not lead to dissimilar results. They settled with the *Pierce* formulation, while inviting comparisons of the various tests. *Compare e.g.*, United States v. Wolffs, 594 F.2d 77, 80 (5th Cir. 1979)("defendant must adduce some evidence, more than a scintilla, which tends to show government inducement and lack of predisposition"), *with* United States v. Timberlake, 559 F.2d 1375, 1379 (5th Cir. 1977)(defendant must submit entrapment theory "for which there is any foundation in the evidence"), *and with* United States v. Gomez-Rojas, 507 F.2d 1213, 1218 (5th Cir. 1975), *cert. denied*, 423 U.S. 826 (1975) (defendant must present "a prima facie case of entrapment indicating the government created a 'substantial risk that the offense would be committed by a person other than one ready to commit it' ").

10. *Humphrey*, 670 F.2d at 155 (originally enunciated by the Fifth Circuit in *Pierce*, 414 F.2d at 168).

This standard requires the defendant come forward with evidence showing the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.[11] Whether the defendant's evidence is sufficient to meet this burden of production is a question of law for the court.[12] Former Fifth Circuit opinions appear to only require some evidence of government inducement. In *Hill,* however, the Fifth Circuit Court made clear that "a reading of those cases reveal[ed] that 'inducement' represent[ed] more than mere suggestion, solicitation, or initiation of contact and, in fact, embodies an element of persuasion or mild coercion functionally equivalent to that denoted in the *Pierce* formulation. . . ."[13] To raise entrapment, a defendant must, therefore, prove more than that the government solicited him or provided the opportunity for the crime.[14] He must show "mild persuasion or coercion"[15] by the government. Evidence from the government's case in chief may be sufficient to raise the issue.[16] Once the defendant has sustained this burden, the issue of entrapment becomes a question of fact for the jury.[17]

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11. The Eleventh Circuit recalled the comparisons made by the *Hill* court, and similarly adopted the "substantial risk" formulation of *Pierce* in *Humphrey,* 670 F.2d at 155.

12. United States v. Tate, 554 F.2d 1341, 1344 (5th Cir. 1977).

13. 626 F.2d at 1304. Also, in *Hill* the court invited perusal of prior cases in which defendants had submitted evidence of government inducement. These cases included United States v. Hammond, 598 F.2d 1008, 1011 (5th Cir. 1979) (testimony indicated that the government had thought of a scheme, attempted to "push" it on defendant, and that defendant had not favorably received the government plan); *Timberlake,* 559 F.2d at 1379 (numerous attempts at setting up illicit deals had failed and witness testified that on at least one occasion defendant had directly rejected government entreaty); United States v. Costello, 483 F.2d 1366, 1367-68 (5th Cir. 1973)(upholding trial court's refusal to submit entrapment question, finding no "inducement" where there was no evidence of persuasion or coercion, even though government agent proposed the illicit transaction to the defendant).

14. 679 F.2d at 835. *See also Tobias,* 662 F.2d at 384 (citing United States v. Dickens, 524 F.2d 441 (5th Cir. 1975), *cert. denied,* 425 U.S. 994 (1976)): "A prosecution cannot be defeated merely because a government has provided the accused with the opportunity or the facilities for the commission of the crime."

15. *Bagnell,* 679 F.2d at 835.

16. United States v. Reyes, 645 F.2d 285 (5th Cir. 1981). *Accord Hill,* 626 F.2d 1301, and *Pierce,* 414 F.2d 163.

17. United States v. Groessel, 440 F.2d 602 (5th Cir. 1971).

After having satisfied the burden of production, the burden of persuasion will then be on the government to prove that the defendant was predisposed to commit the charged offense beyond a reasonable doubt.[18] The government must show that the defendant was ready and willing without persuasion to commit the offense and that the government merely provided a propitious opportunity.[19]

In addition, the law of the Eleventh Circuit requires that the defendant admit the acts charged against him when he pleads entrapment.[20] The rationale for this rule is based on the fact that it would be inconsistent to deny the very acts upon which the prosecution is predicated at the same time as pleading the defense of entrapment, which assumes that acts charged were committed.[21]

Predisposition

"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 of-

18. *Humphrey*, 670 F.2d at 155.

19. *See Wolffs*, 594 F.2d at 80; United States v. Benavidez, 558 F.2d 308, 310 (5th Cir. 1977); United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952)(Hand, J.).

20. *See* United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982) and United States v. Nicoll, 664 F.2d 1308 (5th Cir. 1982). This premise has been hotly debated throughout the circuits. *Compare* United States v. Greenfield, 554 F.2d 179 (5th Cir. 1977), *with* United States v. Demma, 523 F.2d 981 (9th Cir. 1975)(en banc) (both cases allowed defendant to both deny wrongdoing and plead entrapment). A narrow exception to this rule was articulated in Sears v. United States, 343 F.2d 139, 143-44 (5th Cir. 1965). The court held that a defendant may argue simultaneously that he was entrapped to commit the overt acts charged in the indictment but was not a member of the conspiracy. This holding, however, is limited to the situation where the government's own case in chief injects substantial evidence to support a theory of entrapment. In this event the defense is raised by a motion of acquittal and by a requested jury instruction in which the government must still prove beyond a reasonable doubt defendant's guilt of the act charged. For a discussion of this debate see note, *Denial of the Crime and the Availability of the Entrapment Defense in the Federal Courts*, 22 B.C.L. REV. 911 (1981).

21. United States v. Williamson, 482 F.2d 508, 513 (5th Cir. 1973).

ficer."[22] Nevertheless, the fact that government agents merely afford opportunity for the commission of an offense does not constitute entrapment: "[T]o determine whether entrapment has been established a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[23] The defendant's lack of predisposition to commit the crime is the principal element of the entrapment defense.[24]

Evidence Admissible to Prove Predisposition

The United States Supreme Court has enunciated a number of elements which can be considered in determining whether a defendant was a person "otherwise innocent"[25] in whom the government had implanted the criminal design. These elements were more distinctly stated by the Ninth Circuit in *United States v. Reynoso Ulloa*:[26]

> 1. The character of the defendant including any previous criminal activity.
> 2. Whether the suggestion to engage in criminal activity originated with the government.
> 3. Whether defendant sought financial profit from the criminal activity.
> 4. Whether there is evidence of reluctance on the part of the defendant to proceed with the offense.
> 5. Whether the government induced the defendant to act by repetitive persuasion.
> 6. The nature of the government's inducement or persuasion.[27]

The United States Supreme Court has found evidence of a reluctance to engage in criminal activity which was overcome by repeated government inducement to be highly significant.[28]

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22. Sherman v. United States, 356 U.S. 369, 372 (1958).
23. *Id.* at 372.
24. United States v. Russell, 411 U.S. 423 (1973).
25. *Sherman,* 356 U.S. at 372.
26. 548 F.2d 1329, 1336 (9th Cir.), *cert. denied,* 436 U.S. 926 (1977).
27. *Id.* at 1336. However, fact number two does not prove entrapment since mere solicitation is insufficient. See Lopez v. United States, 373 U.S. 427 (1963).
28. *See, e.g., Sherman,* 365 U.S. at 373 (one request by government was not enough, "additional ones were necessary to overcome, first petitioners refusal, then his evasiveness, and then his hesitancy . . . "); *Sorrells,* 287 U.S. 436 (The government

By raising a defense of entrapment, the defendant opens himself up to a "searching inquiry into his own conduct and predisposition."[29] Evidence of the defendant's prior similar acts is essential to the question of predisposition, and under Federal Rule of Evidence 404(b) evidence of prior convictions are admissible to prove predisposition.[30] The government, however, is not restricted to only introducing past crimes to prove predisposition. A defendant's use of drugs may be effective to establish a predisposition to deal in narcotics when he is charged with an offense of this nature.[31] In addition, the defendant's own statements may provide evidence of his predisposition. In *United States v. Jenkins,*[32] the court found that the defendant's post-crime statement ("if you need more, I'll be there"[33]) constituted sufficient evidence to permit the trier of fact to infer a prior willingness to commit a narcotics offense. It is important to note, however that the government may not introduce out-of-court statements about the defendant's reputation for criminal conduct as evidence of predisposition.[34]

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agent asked for liquor and was twice refused, but the agent persisted in soliciting the defendant and taking advantage of sentiment aroused by conversation about their service together as companions in World War I.).

29. *Sorrells,* 287 U.S. at 451.

30. Federal Rule of Evidence 404(b) states:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

31. United States v. Smith, 407 F.2d 202 (5th Cir. 1969). It is also significant to note that testimony concerning a defendant's drug use at the time of the crime would have been admissible to establish the res gestae. *See* United States v. McDaniel, 574 F.2d 1224, 1227 (5th Cir. 1978).

32. 480 F.2d 1198, 1200 (5th Cir. 1973).

33. *Id.* at 1200.

34. *See* United States v. Webster, 649 F.2d 346, 347 (5th Cir. 1981)(en banc), where the court held that "only in special circumstances may the government prove what its agents have been told about the defendant as evidence of good faith, reasonableness or proper motive of the government and then only to rebut contrary assertions by the defendant." In *Webster,* the defendant was charged with possessing and distributing cocaine. The defendant's defense was entrapment. He tried to prove that his illegal acts were precipitated by the incessant urgings of a female informant. To rebut this claim that the defendant was just an "innocent dupe," a Drug Enforcement Administration Agent testified for the prosecution that a few months before the arrest he had

Once a defendant makes it clear that his defense is entrapment, there is nothing to prevent the prosecution from going forward with its evidence on predisposition. Thus, the prosecution need not wait until rebuttal to introduce predisposition evidence, but may do so in its case in chief. In *United States v. Vendetti,*[35] after the defendant raised the entrapment defense in his opening statement, the government presented its evidence of predisposition during its case in chief. The defendant attacked this order of proof in his appeal. The court responded: "No cases are cited, nor can be found which require the prosecutor to wait until a defendant has fully developed his proof before presenting evidence on predisposition."[36]

Entrapment as a Matter of Law

Many defendants have argued entrapment as a matter of law relying upon *United States v. Bueno.*[37] In *Bueno,* the facts gave rise to what later has been called a "full circle" transaction[38] in which a government agent supplied drugs to the defendant for sale to another government agent.[39] This type of transaction is distinguished from the more common one, where the defendant procures the narcotics from a private source. However this case and others like it, which have found entrapment as a matter of law, have been undermined, if not rejected entirely.[40] The United States Supreme Court, in *Hampton v. United*

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been told by a reliable informant that he had purchased cocaine from the defendant on several occasions. The trial court had allowed this testimony because prior to *Webster* the Fifth Circuit had permitted the prosecution to introduce both hearsay and double-level hearsay as a means of proving the defendant's predisposition. This evidence was permitted through the character/reputation provisions of the Federal Rules of Evidence 404(a)(1), 405 and 803(21) collectively). In striking down this practice the *Webster* court adamantly asserted: "predisposition is a state of mind, not a character trait." 649 F.2d at 350.

35. No. 7805668, slip op. at 1 (5th Cir. Apr. 24, 1979).

36. *Id.* at 2. In addition, the procedure under attack was followed and approved in Rocha v. United States, 401 F.2d 529, 530 (5th Cir. 1968), *cert. denied,* 393 U.S. 1103 (1969).

37. 447 F.2d 903 (5th Cir. 1971), *cert. denied,* 411 U.S. 949 (1973).

38. *See* United States v. Evers, 552 F.2d 1119, 1122 (5th Cir. 1977), *reh'g denied,* 556 F.2d 579 (5th Cir. 1977), *cert. denied,* 434 U.S. 929 (1977).

39. *Id.*

40. *Id.* The court intimated that the *Bueno* defense had become obsolete in the

States,[41] indicated that not even a "full circle" transaction was entrapment "per se". This is because the primary focus of the entrapment defense is not on what acts the government agents committed, but rather on whether the defendant was predisposed to commit the offense.[42] If the defendant was willing to commit the act, no entrapment occurs regardless of surrounding circumstances.

Governmental Misconduct and Overreaching

The governmental misconduct defense, also available to defendants and often employed in tandem with entrapment, is based on principles of due process and the supervisory powers of the court. While the entrapment defense requires the court to focus on predisposition of the defendant to commit the crime, the United States Supreme Court has established that, for cases involving alleged governmental misconduct, the focus of the court's inquiry shall be directed solely toward the government's conduct.[43] Often cited by defendants in support of this defense is the following statement from *United States v. Russell:*[44] "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . . . "[45] This was the type of defense employed in *Rochin v. California.*[46] In *Rochin,* the United States Supreme Court found that the record revealed "a shocking series of violations of constitutional rights."[47] In that case, deputy sheriffs illegally broke into

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wake of Hampton v. United States, 425 U.S. 484 (1976) and United States v. Russell, 411 U.S. 423 (1973). In United States v. Graves, 556 F.2d 1319 (5th 1977), *reh'g denied,* 562 F.2d 1257, (1977) *cert. denied,* 435 U.S. 923 (1978), the court stated "whatever the fate of *Bueno,* it is now clear that the expression 'entrapment as a matter of law', has become a misnomer with respect to predisposed defendants." *Id.* at 1324.

41. 425 U.S. at 489-90.

42. Whether the defense is designed to deter objectionable police conduct or to protect "otherwise innocent" defendants is discussed in Note, *Entrapment: A Source of Continuing Confusion in the Lower Courts,* 5 AM. J. TRIAL AD. 293 (1981).

43. *Hampton,* 425 U.S. at 490.

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

45. *Id.* at 431-32.

46. 342 U.S. 164 (1952).

47. *Id.* at 172.

Rochin's home and forceably attempted to extract capsules which Rochin had ingested. At the hospital, the deputy sheriffs directed a doctor to "pump" Rochin's stomach in order to obtain two morphine capsules. The Court found this was conduct that "shocks the conscience"[48] and offends even those with hardened sensibilities, constituting methods "too close to the rack and screw."[49] Both the *Hampton* and *Rochin* decisions indicate the defense is intended to embody only profoundly outrageous and shocking conduct which violate the defendant's constitutional rights.[50]

While the Court in those cases stated they cannot condone police activity as employed in *Rochin,* the Supreme Court asserted that it will not allow defendants to raise "defenses" which in essence, would give the federal judiciary an absolute veto right over law enforcement practices.[51]

Use of Confidential Informants

An issue often appearing in relation to government conduct is the government's use of confidential informants.[52] Defendants frequently rely on *Williamson v. United States.*[53] In *Williamson,* a Fifth Circuit case, an informer was hired by a government agent to procure evidence against persons known by the agent to be involved in an illicit whiskey business. The informer would be rewarded predetermined sums upon

48. *Id.*

49. *Id.*

50. Due process considerations are given excellent treatment in Note, *Entrapment as a Due Process Defense: Developments After Hampton v. United States* 57 IND. L.J. (1982) and Abramson & Lindeman, *Entrapment and Due Process in the Federal Courts,* 8 AM. J. CRIM. LAW 139 (1980).

51. *Hampton,* 425 U.S. at 490. *See also* United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), *cert. denied,* 102 S. Ct. 2908 (1982), which sets the "outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit," *id.* at 387, without violating due process notions. (D.E.A. established a chemical supply plant, placed an advertisement in *High Times Magazine* offering chemicals and laboratory equipment, set-up and advised the defendant how to manufacture Phencyclidene (P.C.P.)).

52. For a discussion on how law enforcement agencies are using unsuspecting middlemen to, in effect, destroy the entrapment defense, see Note, *Entrapment Through Unsuspecting Middlemen,* 95 HARV. L. REV. 1122 (1982).

53. 311 F.2d 441 (5th Cir. 1962), *cert. denied,* 381 U.S. 950 (1965).

conviction of several specified individuals. The informant made the transaction for which the defendants were convicted. However, the record lacked evidence to indicate the agents had sufficient knowledge of defendant's involvement in the illicit whiskey trade to justify contracting on a contingent fee basis to obtain legally admissible evidence. Further, the record did not show whether the agents carefully instructed the informer on the rules of entrapment. Under these circumstances, the court held that it could not sanction the contingent fee arrangement.

The Fifth Circuit, however, declined to extend *Williamson* to other contingency fee arrangements.[54] The court, in *United States v. McClure,*[55] listed the following factors for taking a case out of the domain of *Williamson:* (1) the possibility that the informant was instructed in the law of entrapment,[56] (2) that the agent and not the informant made the purchase[57] and (3) prior to employing the informant, the agent did not know the defendant.[58] Additionally, in *United States v. Edwards,*[59] the court held that *Williamson* would not be useful to defendants where the informant had been given a subsistence allowance, with a later reward following conviction, so long as he was not given a specific sum to convict a particular person.

Jury Instructions

The defendant must show "mild persuasion or coercion"[60] on the

54. *See, e.g.,* United States v. Jenkins, 480 F.2d 1198 (5th Cir. 1973), *cert. denied,* 414 U.S. 913 (1973)(where the Court refused to apply *Williamson* to a case in which no specific arrangement for payment existed, no particular person was the target of the effort to buy, and in which the purchase was made by the government agent, not the informer); United States v. Onori, 535 F.2d 938 (5th Cir. 1976) (the court held that the fact that an informant was paid on a contingent fee basis for making a case did not make it entrapment).

55. 546 F.2d 670 (5th Cir. 1977).

56. *Id.* at 673. *See also* United States v. Garcia 528 F.2d 580 (5th Cir. 1976), *cert. denied,* 429 U.S. 898 (1976).

57. *McClure,* 546 F.2d at 673. *See also Jenkins,* 480 F.2d 1198.

58. *McClure,* 546 F.2d at 674. *See also* United States v. Joseph, 533 F.2d 282 (5th Cir. 1976), *cert. denied,* 431 U.S. 905 (1977).

59. 549 F.2d 362 (5th Cir. 1977).

60. United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982).

part of the government before he is entitled to an entrapment instruction.[61] While evidence from the government's case in chief may be sufficient to raise the issue of entrapment,[62] the entrapment issue need not be presented to the jury if the evidence does not sufficiently raise the issue.[63] The United States Supreme Court stated in *Lopez v. United States*:[64] "Indeed the paucity of the showing [of entrapment] might well have justified a refusal to instruct the jury at all on entrapment."[65] *United States v. Pierce*[66] enunciated the Eleventh Circuit's policy on the instruction: "If the record as a whole is devoid of such [entrapment] evidence, astute defense counsel may not invite confusion of the jury by seeking charges on this or any other problem not presented by the case before the court."[67] Nevertheless, failure to give an instruction when the defendant has met his burden is reversible error.[68] The instruction should state that the government has the burden of proof beyond a reasonable doubt to show the defendant was predisposed to commit the crime.[69]

Conclusion

Entrapment has been employed to defend those charged with crimes ranging from counterfeiting to illegally shipping obscene materials. Most frequently it has been relied upon to defend those charged with crimes involving the purchase of narcotics. This defense is most

61. *Id.* at 835 (only showing made was government made initial contact).

62. United States v. Reyes, 645 F.2d 285 (5th Cir. 1981). *Accord* United States v. Hill, 626 F.2d 1301 (5th Cir. 1980); Pierce v. United States, 414 F.2d 163 (5th Cir. 1969).

63. *Pierce,* 414 F.2d at 167.

64. 373 U.S. 427 (1963).

65. *Id.* at 436.

66. 414 F.2d 163 (5th Cir. 1969).

67. *Id.* at 168.

68. *Bagnell,* 679 F.2d at 835.

69. However, it is *not* reversible error if the jury charge fails to unequivocally state that the government had the burden of proving beyond a reasonable doubt that the defendant was not entrapped so long as the court has given a general instruction on the burden of proof and has told the jury to consider the charge as a whole. United States v. Sonntag, 684 F.2d 781 (11th Cir. 1982); United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979).

appropriate when the defendant has been apprehended because of evidence developed by undercover police officers and confidential informants.

However, the entrapment defense often has been misapplied and misunderstood. Prosecutors and defense counsel alike must be alert to its subleties for there are traps which lie in wait for the unwary practitioner.

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