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CLEARING THE PATH FOR AN ENTRAPMENT DEFENSE

The defense of entrapment, one of several affirmative defenses upon which a criminally accused can presently rely to assert his innocence, was not recognized at the common law. Prior to 1932 the concept of the defense of avoidance centered around the idea of "inducement." It was not until Sorrells v. United States that the United States Supreme Court established a theory for the modern defense of entrapment. In Sorrells the defendant was repeatedly asked by a government agent to purchase a quantity of liquor in violation of Amendment XVIII of the Constitution. The defendant was found guilty of the illicit purchase and his conviction was affirmed by the United States Court of Appeals for the Fourth Circuit. The case reached the Supreme Court upon writ of certiorari and subsequently the grounds for a valid entrapment defense were promulgated. At the close of his opinion Mr. Chief Justice Hughes pointed out that the government, in its brief, assumed that in utilizing the defense of entrapment the accused was not denying his guilt, but was alleging special facts upon which he could rely regardless of his guilt or innocence of the crime charged. This, the Court noted, was a misconception. The defense of entrapment is available to preclude the government from contending that the defendant is guilty of a crime where government officials have been the instigators of the accused's conduct. The position of the federal courts, then, is that in such circumstances the defendant is not guilty.

Since the Sorrells decision entrapment has come to be defined as "[t]he act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him." Although the defense, accepted as defined, is available in most state courts and is firmly established in the federal courts, it enjoys no judicially affirmed constitutional basis. In both Sorrells and Sherman v. United States the Supreme Court ruled that the defense of entrapment was based on the fact that Congress, in the statutes involved, did not intend to punish

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2 Wuu Wai v. United States, 223 F. 412, 415 (9th Cir. 1915).
3 287 U.S. 435 (1932).
4 Sorrells v. United States, 57 F.2d 973 (4th Cir. 1932).
6 Id. at 452.
entrapped defendants. The concurring Justices in these cases expressed the view that regardless of Congressional intent, the courts, as a matter of public policy which does not countenance such impermissible police conduct, could not convict entrapped defendants.\(^\text{11}\) It is not necessarily true, therefore, that an entrapment defense could not be omitted in a criminal prosecution under state law.

Beyond the general questions of what is the basis for the defense of entrapment and what factors must be present to invoke the defense, there lies a more specific issue which recently was raised in *United States v. Shameia*:\(^\text{12}\) Can an accused raise the defense of entrapment without admitting commission of the alleged crime? This question is hardly a new one. The Sixth Circuit Court of Appeals alluded to the issue as long ago as 1925—prior to any definitive formulation of a schema of the entrapment defense— in *Scriber v. United States.*\(^\text{13}\) The majority noted in *Scriber* that, in deciding on the utilization of any type of avoidance defense, the defendant might enjoy the benefit of that defense despite the existence of an apparent inconsistency. Since the *Scriber* decision, the Sixth Circuit has been unpredictable in its holdings on this issue. For example, in *United States v. Baker*\(^\text{14}\) Judge Edwards expressed the opinion that the apparent inconsistency between an accused's defenses of denying the commission of the crime and also assuming the position that any of his actions, if criminal, occurred as a result of entrapment, does not necessarily preclude submission of both defenses to the jury.\(^\text{15}\) In *Shameia* the defendant, a grocery store owner and operator, was convicted of violating the Food Stamp Act.\(^\text{16}\) Evidence introduced by the prosecution revealed that government agents went to the defendant's store on several occasions and received nonfood items or cash in exchange for food stamps in violation of the Act. The defendant denied any transactions with government agents and at the close of evidence submitted to the court proposed instructions on entrapment. The trial court refused to charge the jury in accordance with the defendant's instructions. On appeal the Sixth Circuit held that if a defendant denies commission of the alleged crime he is precluded from asserting the defense of entrapment.


\[^{12}\text{464 F.2d 629 (6th Cir.), cert. denied, --- U.S. --- (1972).}\]

\[^{13}\text{134 F.2d 97, 98 (6th Cir. 1943).}\]

\[^{14}\text{373 F.2d 28 (6th Cir. 1967).}\]

\[^{15}\text{Id. at 30.}\]

The Shameia decision serves to exemplify one aspect of the inconsistency among the circuits of the United States Courts of Appeal on this question.17 Basically, three positions have been assumed by the courts. The first is clearly stated in Ortega v. United States:18 "To utilize the entrapment defense, an accused must admit he committed acts which constitute a crime. . . ."19 The second position finds no inconsistency where an accused denies commission of the alleged crimes but nevertheless urges that any acts which he did commit were induced by law enforcement officials.20 Finally, a number of decisions have been rendered which permit assertion of the entrapment defense where evidence of entrapment is introduced by the testimony of government witnesses, notwithstanding a denial of commission of the crime by the accused.21

Any attempt to rectify this inconsistency within the federal court system must look to the rationale behind the entrapment defense. Justice Frankfurter stated the reasoning well in Sherman v. United States22 where he noted that the fundamental public policy underlying the defense of entrapment is the protection of "public confidence in the fair and honorable administration of justice" which may well be threatened if the courts permit "enforcement of the law by lawless means."23 In order to mitigate the effect of unlawful police practice, therefore, an accused is permitted to choose as his shield the defense of entrapment.24 Overlooking the issue of alternative defenses for

17 See United States v. Johnson, 426 F.2d 112 (7th Cir. 1970); Harris v. United States, 400 F.2d 264 (5th Cir. 1968); Martinez v. United States, 373 F.2d 810 (10th Cir. 1967); Ortega v. United States, 348 F.2d 874 (9th Cir. 1965); Sylvia v. United States, 312 F.2d 145 (1st Cir. 1963). But see Rider v. United States, 391 F.2d 260 (5th Cir.), cert. denied, 393 U.S. 1040 (1968); United States v. Ramsey, 374 F.2d 192 (3d Cir. 1967); United States v. Alford, 373 F.2d 508 (3d Cir.), cert. denied, 387 U.S. 937 (1967); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966); Sears v. United States, 343 F.2d 159 (5th Cir. 1965); Redfield v. United States, 328 F.2d 532 (D.C. Cir.), cert. denied, 377 U.S. 972 (1964); Gorin v. United States, 313 F.2d 641 (1st Cir. 1965), cert. denied, 379 U.S. 971 (1964); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Crisp v. United States, 262 F.2d 320 (4th Cir. 1954).
18 348 F.2d 874 (9th Cir. 1965).
19 Id. at 876.
20 See Rider v. United States, 391 F.2d 260 (5th Cir.), cert. denied, 393 U.S. 1040 (1968); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Crisp v. United States, 262 F.2d 320 (4th Cir. 1954); People v. Perez, 62 Cal.2d 769, 401 P.2d 934 (1965); 70 Harv. L. Rev. 1302, 1303 (1957).
21 See United States v. Ramsey, 374 F.2d 192 (3d Cir. 1967); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966); Sears v. United States, 343 F.2d 139 (5th Cir. 1965); Gorin v. United States, 313 F.2d 641, n.10 (1st Cir. 1965), cert. denied, 379 U.S. 971 (1964).
23 Id. at 380.
24 Cf. People v. Perez, 62 Cal.2d 769, 401 P.2d 934, 938 (1965), where Chief Justice Traynor observes that entrapment is recognized as a defense of the public (Continued on next page)
the moment, on whom does the burden of proof rest once the entrapment defense has been chosen? In State v. Good the majority states: "[e]ntrapment is an affirmative or positive defense, and one that the defendant must prove." The federal courts, however, seem to take a different view. In Notaro v. United States the Court of Appeals for the Ninth Circuit noted that when the entrapment issue has arisen and the appropriate instruction has been submitted to the jury, it should not be phrased in terms of any burden whatsoever on the defendant. It is the prosecutor's burden to establish guilt beyond a reasonable doubt and this must be accomplished by proving that the defendant was not wrongfully entrapped.

The Ninth Circuit rationale thus leaves the burden of proof with the prosecution, but does it leave the defendant in an equitable position if he has been compelled to choose between defenses? When the entrapment defense has been relied upon at the cost of foregoing all denials of commission of the alleged crime, the burden of proof on the government has surely been mitigated; it is no longer necessary for the prosecution to prove commission of the crime at all. The burden which remains with the prosecution is undoubtedly alleviated since evidence of the defendant's predisposition, which can include criminal convictions, prior criminal activity notwithstanding conviction and general character evidence, can be introduced as proof. Compelled to make this choice, the accused is placed in a precarious situation.

As mentioned earlier the defense of entrapment has not been established on an affirmative constitutional basis. Despite this shortcoming, when an accused is compelled to choose between denial of commission of a crime and reliance upon the entrapment defense, he is confronted with a choice between two judicially affirmed rights. The United States Supreme Court considered a somewhat analogous

(Footnote continued from preceding page) against unlawful police schemes or actions, which are designed to promote rather than prevent crime. He asks how a rule designed to deter any such unlawful conduct could fairly be limited by compelling a defendant to incriminate himself as a condition precedent to invoking that rule. Such compulsion of incrimination and admission, he contends, would result in the defendant's relieving the prosecution of its burden of proving his guilt beyond a reasonable doubt, and at the same time risking not being able to meet his own burden of establishing entrapment.

26 Id. at 38.
27 303 F.2d 169 (9th Cir. 1966).
28 Id. at 175.
29 Orfield, supra note 9, at 59-61.
30 Id. at 53.
31 See Comment, 56 IOWA L. REV. 686, 690 (1971), for a discussion of the significance of this same choice if it is presumed that the defense of entrapment finds its roots in the Constitution.
situation in *Simmons v. United States*, a case which involved the compulsion of a defendant to choose between his fifth amendment right against self-incrimination and his fourth amendment right against unreasonable search and seizure. In holding that self-incriminating testimony given to establish standing in support of a motion to suppress evidence on fourth amendment grounds could not be admitted against the defendant at trial on the issue of guilt, the Court pointed out that this involved a choice between two constitutionally protected rights. There appears to be no logical reason why this rationale should not extend to the situation where one judicially recognized defense must be capitulated in order to assert another.

Besides being deprived of the protection against a mandatory choice of defenses as awarded in *Simmons*, because the right to an entrapment defense is not founded on a constitutional guarantee, the fate of an accused who attempts to invoke the defense of entrapment might well depend upon the judicial circuit in which the alleged unlawful act was committed. The three aforementioned positions which have been taken on this issue of the availability of alternative defenses are expressed in decisions of the various circuits. Both the Tenth Circuit and the Seventh Circuit have consistently held that the defense of entrapment cannot be applied to a particular case unless commission of the crime charged is admitted by the accused. The decisions of the Ninth Circuit unfailingly assume a like position with the exception of *Notaro v. United States*, in which the majority implies that where evidence of entrapment is introduced by the testimony of government witnesses, a defendant might utilize the entrapment defense despite his denial of the unlawful activity.

The only circuit which—given the opportunity—has failed to rule out the basic right of a defendant to submit to a jury the alternative defenses of denial and entrapment is the Fourth. On several occasions the Fifth Circuit has ruled that a defendant must choose between denying wrongful acts and invoking an entrapment defense. However, there are notable ambiguities and inconsistencies among

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33 See 56 Iowa L. Rev., supra note 31, at 691.
34 See United States v. Gibson, 446 F.2d 719 (10th Cir. 1971); United States v. Johnston, 426 F.2d 112 (7th Cir. 1970); Munroe v. United States, 424 F.2d 243 (10th Cir. 1970); Rowlette v. United States, 392 F.2d 437 (10th Cir. 1968); United States v. Roviaro, 379 F.2d 911 (7th Cir. 1967); Martínez v. United States, 373 F.2d 810 (10th Cir. 1967).
35 363 F.2d 169, 174 (5th Cir. 1966) (dictum).
36 Id. at 175.
37 Crisp v. United States, 262 F.2d 320 (4th Cir. 1954) (dictum).
38 See Harris v. United States, 400 F.2d 264 (5th Cir. 1968); McCarty v. United States, 379 F.2d 285 (5th Cir.), cert. denied, 389 U.S. 929 (1967); Rodriguez v. United States, 227 F.2d 912 (5th Cir. 1955).
various decisions of the Fifth Circuit.\textsuperscript{39} This is especially evident in \textit{Sears v. United States}\textsuperscript{40} where the court notes that if the government injects evidence of entrapment into a trial, the defendant is entitled to an instruction that if the jury finds that he committed the alleged acts, it must further consider whether he was entrapped into committing them.\textsuperscript{41}

The decisions of both the First and the Second Circuits also lack finality on the question of these alternative defenses of denial and entrapment.\textsuperscript{42} In \textit{United States v. Alford}\textsuperscript{43} the majority indicated that if the trial court is to consider whether a defendant has a right not only to deny the alleged offense but also to rely on the defense of entrapment, the evidence must merely be of a nature which would have entitled the accused to a charge on entrapment were it not for his denial.\textsuperscript{44} It is also interesting to note that in this same case the court admitted that a final decision has not been made on the issue of the alternative defenses.\textsuperscript{45}

The Court of Appeals for the District of Columbia established in \textit{Hansford v. United States}\textsuperscript{46} that it was possible—and consistent with the defendant's denial of the alleged transaction in this case—for the accused to argue that if the jury believed that the unlawful transaction did occur, the prosecution's evidence as to how it occurred could indicate entrapment and require an equivalent instruction.\textsuperscript{47} This position was either modified or reversed two years later when the same court noted that where a defendant's evidence fails to establish the defense of entrapment, he is not entitled to submission to the jury of an entrapment instruction.\textsuperscript{48}

Keeping in mind the diverse positions of the Circuit Courts of

\textsuperscript{39} See Rider v. United States, 391 F.2d 260 (5th Cir. 1968), where the court approved a district court instruction that an accused is entitled to any and all defenses he might desire, regardless of their consistency, and Siglar v. United States, 208 F.2d 865 (5th Cir.), \textit{cert. denied}, 347 U.S. 991 (1954), where the court implied that if the issue of entrapment was raised by the defendant himself or through the testimony of witnesses, the defense might be entitled to an instruction on that issue.

\textsuperscript{40} 343 F.2d 139 (5th Cir. 1965).

\textsuperscript{41} \textit{Id.} at 143. The court adds that what might be a valid defense should not be forfeited by an accused nor should improper conduct of law enforcement officers be ignored by the court merely because the defendant elected to put the government to its proof.


\textsuperscript{43} 373 F.2d 508 (2d Cir. 1967).

\textsuperscript{44} \textit{Id.} at 509.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} 303 F.2d 219 (D.C. Cir. 1962).

\textsuperscript{47} \textit{Id.} at 221.

Appeals, and remembering that in many situations an accused is compelled to choose between two judicially recognized and affirmed defenses, the question of what can be done to clear the path for the equitable vindication of a defendant's rights inevitably arises. The Supreme Court consistently has declined to rule on the issue of whether an accused can deny the commission of a crime and yet retain the right to have an entrapment instruction submitted to the jury.\textsuperscript{49} It appears that in \textit{Shameia} the Sixth Circuit majority merely counted decisions and concluded that there was a greater number of cases which denied the alternative defenses than which permitted the practice. Regardless of what approach was used in reaching the \textit{Shameia} holding, it seems clear that the issue awaits resolution. Several commentators have made suggestions,\textsuperscript{50} but the question remains.

\textbf{CONCLUSION}

By refusing to grant a writ of certiorari in \textit{Shameia}, the United States Supreme Court has implied that the inconsistencies among the holdings of the Circuit Courts of Appeals are not so formidable as to threaten the rights of criminal defendants. As the situation now exists, however, an individual's right to liberty is jeopardized in a circuit where the right to alternative jury instructions on the defenses of denial and entrapment is prohibited. The fact that a defendant is compelled irrevocably to choose one defense at the cost of relinquishing another only in certain circuits borders on denial of both equal protection and due process as guaranteed by the Constitution.

The power to rectify the inequities discussed rests with the United States Supreme Court. In this era of concern over law and order it is quite possible that governmental agents can become overzealous in performing their law enforcement duties. When evidence of such action is brought out during the course of a criminal proceeding, there seems to be no cogent reason why the jury should not be instructed


\textsuperscript{50} See Orfield, \textit{supra} note 9, at 65, in which the author posits that the \textit{Shameia} rule is a receding one and in need of change; Note, \textit{The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense}, 74 \textit{Yale L.J.} 942, 950 (1965), which draws an analogy between entrapment and coerced confessions and points out that the basic objectives of interrogation and solicitation are similar, i.e., to induce the accused to supply evidence of his guilt; 56 \textit{Iowa L. Rev.}, \textit{supra} note 31, which indicates the factors which make a change from the \textit{Shameia} rule imperative.
by the court that the question of entrapment may be considered even though the defendant has denied commission of the crime. Such a uniform practice, which adds to the discretion of the trial court by allowing the judge to decide whether the issue of entrapment has been raised by the evidence, would eradicate the present inconsistencies among the circuits and contribute to clearing the path for an effective entrapment defense.

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