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Criminal Procedure - Entrapment as a Matter of Law: Contraband Supplied to Defendants by Government Agents - Epps v. State

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CRIMINAL PROCEDURE—Entrapment as a Matter of Law: Contraband Supplied to Defendants by Government Agents—*Epps v. State*, 417 So. 2d 543 (Miss. 1982).

According to evidence produced by the State, on March 27, 1979, Detective L. C. Russell and Alex Butler, a confidential informant, went to the house of Mary Jackson, Butler's girlfriend. Butler had told Detective Russell that Miss Jackson would take him to a local drug dealer where he could purchase cocaine. Miss Jackson, accompanied by Detective Russell, went to the home of Johnny Lee Epps, where Miss Jackson asked Epps whether he had any "stuff." Epps replied that he had a "small piece" left, and Detective Russell and Miss Jackson agreed to buy the cocaine.

Epps went into his house and returned with a small package which he gave to Miss Jackson, who handed it to Detective Russell. After examining it, he gave Epps sixty dollars for the cocaine. About five months later, on September 5, 1979, Epps was arrested and charged with the sale of cocaine.[1] Epps testified at trial that the cocaine was supplied to him by the police informant, Alex Butler.[2] Epps also testified that two days before the March 27, 1979, sale Alex Butler came to his residence and asked him to keep some cocaine for him, telling him that Mary Jackson would come by and give him forty dollars for the cocaine. Epps testified that Alex Butler said he would come by later and pick up the money, although he never did.[3] Otherwise, Mr. Epps corroborated Miss Jackson's testimony as to the details of the sale.

Alex Butler, the police informant, did not testify at the trial;[4] therefore, Epps' testimony that Mr. Butler came to him and asked him to hold the cocaine for him until Miss Jackson picked it up later remained uncontradicted. Detective L. C. Russell testified that he did not know how Johnny Epps obtained the cocaine. On

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1. Epps v. State, 417 So. 2d 543, 544 (Miss. 1982). Epps was sentenced to a term of twenty-five years with the Mississippi Department of Corrections, twenty years suspended, with five years to serve and five years on probation.

2. *Epps*, 417 So. 2d at 544.

3. *Id.*

4. *Epps*, 417 So. 2d at 545. "The confidential informant here was not an informant whose identity could not be disclosed because the record is replete with references to him and his identity." *Id.*

these facts, the Mississippi Supreme Court unanimously reversed the circuit court and discharged Mr. Epps.[5]

BACKGROUND AND ANALYSIS OF FEDERAL ENTRAPMENT LAW

A good way to understand what the Mississippi Supreme Court did in the *Epps* case and the reason for this decision is to compare it with the federal precedent on entrapment. The first suggestion of entrapment as a defense in federal court appears to be *United States v. Whittier*.[6] The first federal case to recognize and sustain a claim of entrapment by government officials as a defense was *Woo Wai v. United States*.[7]

The defense of entrapment must be distinguished from deceptive practices employed by government agents to detect and capture criminals. Deceptive police practices are usually upheld as a means of detecting and fighting crime.[8] No federal court has ever declared that a criminal defendant enjoys a recognized constitutional right not to be the subject of police deception.[9] "It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."[10]

Many different views have been expressed as to why entrapment should be a defense to criminal conduct on the part of the accused.[11] Perhaps the best reason came from Judge Sanborn when he said, "The first duties of the officers of the law are to prevent, not punish crime. It is not their duty to incite to and

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5. *Id.* (Justices Dan M. Lee and Lenore Prather took no part in the decision or the opinion of the court).

6. 28 F. Cas. 688 (E.D. Mo. 1878) (No. 16) (Treat, J., concurring) ("No court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime.").

7. 223 F. 412 (9th Cir. 1915). The defendant was induced into illegally bringing Chinese women across the Mexican border into California.

8. *See* Grim v. United States, 156 U.S. 604, 610 (1895) ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises."); United States v. Russell, 411 U.S. 423, 436 (1973) ("[f]or there are circumstances when the use of deceit is the only practicable law enforcement technique available.").

9. *See* Sorrells v. United States, 287 U.S. 435, 441-42 (1932).

10. United States v. Russell, 411 U.S. 423, 436 (1973).

11. *See generally Sorrells*, 287 U.S. 435, 436 (1932) (criminal statutes should not be applied to defendants when the circumstances under which the crime was committed would make the statute's application shocking to the sense of justice); *Id.* at 456 (Roberts, J., separate opinion joined by Brandeis and Stone, JJ.) (Entrapment "ought to be based on the inherent right of the court not to be made an instrument of wrong."). *See also* Sherman v. United States, 356 U.S. 369 (1958) (Frankfurter, J., concurring on the result) (convicting a defendant entrapped by the police an improper use of governmental power); Casey v. United States, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting) (to preserve the purity of the courts).

create crime for the sole purpose of prosecuting and punishing it."[12] There are three basic theories of entrapment most often advanced by the courts and writers. The oldest and most widely recognized is the intent or predisposition theory. The second theory is the due process approach, and the last major theory is the objective approach.

Sorrells v. United States[13] was the first major United States Supreme Court case to make an in-depth analysis of the entrapment defense and to discuss the predisposition theory. In that case, the Court found the defendant was entrapped into selling whiskey in violation of the National Prohibition Act[14] by a prohibition agent who repeatedly asked the defendant to get him some whiskey. *Sorrells* held that when determining whether the accused was entrapped, the controlling issue is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."[15] Obviously, to determine whether a person is otherwise innocent, "[t]he predisposition and criminal design of the defendant are relevant."[16] The focus of the entrapment defense is on the intent or predisposition of the defendant to commit the offense.[17] Considering the defendant's predisposition as the central factor when determining whether entrapment is a valid defense is clearly a subjective approach.

This subjective approach has always dominated the majority opinions of the Supreme Court.[18] However, a large and influential minority[19] has repeatedly criticized such an analysis. Because of the widely divergent views of the justices on what should be the focus of the entrapment defense, the Supreme Court has not synthesized one consistent line of analysis for entrapment problems.

The primary case exemplifying the due process approach to

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12. Butts v. United States, 273 F. 35, 38 (8th Cir. 1921) (cited in *Sorrells*, 287 U.S. at 443).

13. 287 U.S. 435 (1932).

14. 27 U.S.C. (1927) (repealed 1935).

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

16. *Id.*

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

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

19. *See* Hampton v. United States, 425 U.S. 484, 491-500 (1976) (Powell, J., concurring) (Brennan, J., dissenting); United States v. Russell, 411 U.S. 423, 436-50 (1973) (Douglas, J., and Stewart, J., dissenting); Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. 435, 453-59 (1932) (Roberts, J., separate opinion).

entrapment is *United States v. Russell*,[20] in which the Court held that the defendant was not entrapped into manufacturing methamphetamine when government agents supplied an essential chemical for the making of the contraband. In the *Russell* majority opinion,[21] the Court recognized a second line of analysis for determining when a defendant is entrapped. The Court stated that a fact situation could exist "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction . . . ."[22] Even prior to *Russell*, the Fifth Circuit and many federal district courts had taken a dim view of the government's supplying contraband to defendants. In *United States v. Bueno*,[23] the Fifth Circuit held that such activity constituted entrapment as a matter of law when the defendant's testimony was uncontradicted as to the fact that a government agent supplied the contraband the defendant was later charged with selling. The need for even tighter control on the government was recognized by Justice Douglas[24] as well as many other Supreme Court Justices.[25] To them, when the government supplies the nec-

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20. 411 U.S. 423 (1973).

21. It is interesting to note in *Russell*, 411 U.S. 423 (1973), Douglas, Marshall, and Stewart, JJ., dissented, while in Hampton v. United States, 425 U.S. 484 (1976) (conviction sustained even though government agents supplied the contraband), Powell, J., wrote a concurring opinion in which Blackmun, J., joined, and Brennan, J., wrote a dissenting opinion in which Marshall and Stewart, JJ., joined; Stevens, J., took no part in the case.

22. *Russell*, 411 U.S. at 431-32 (1973). Defendant Russell admitted that the jury could have reasonably found that he had the intent or predisposition to commit the offense. Russell, therefore, did not rely on the *Sorrells* predisposition test to determine whether he was entrapped. The defendant argued that the Court should adopt a rule holding that it is entrapment *per se* when a government agent supplies a defendant with an indispensable means to commit an offense. Citing Rochin v. California, 342 U.S. 165 (1952), the Court stated that a due process test might be applied when police conduct reached the "outrageous" level. *Russell*, 411 U.S. at 431-32 (1973). However, the Court would not substitute this test for the *Sorrells* test. *Id.* at 433. In any event, the Court found that the level of the government agent's conduct was short of violating due process considerations. *Id.* at 432.

23. 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973). *See, e.g.*, United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970) (A government agent supplied the defendant with counterfeit money and later arrested him for receiving the same. The court held defendant had been entrapped as a matter of law.). It is interesting to note that the Seventh Circuit followed a rationale similar to to that in *Bueno* in United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972), *vacated*, 412 U.S. 936 (1973). The Supreme Court remanded *McGrath* for reconsideration after its decision in United States v. Russell, 411 U.S. 423 (1973). Upon remand the Seventh Circuit reversed its holding, United States v. McGrath, 494 F.2d 562 (7th Cir. 1973), raising the question whether the *Bueno* rationale survived *United States v. Russell*. *See also* United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974) (entrapment established conclusively where defendant is charged with possession or sale of contraband to a government agent if the contraband was supplied to the defendant by a government agent).

24. United States v. Russell, 411 U.S. 423, 437 (1973) (Douglas, J., dissenting).

25. Sherman v. United States, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring

essary ingredient for the commission of the offense, regardless of whether the defendant could have obtained it from another source, the government is a participant in the offense. This violates fundamental fairness. Douglas' rule is the outer bounds of the due process approach; the rule in *Bueno* seems to apply this due process approach but limits that approach in a way similar to the holding of the later case of *Hampton v. United States*.[26] In *Hampton*, the plurality[27] held that the defendant, who sold heroin to federal agents pursuant to arrangements made by them, was not entrapped because he was predisposed to commit the crime. The plurality held that the only remedy for predisposed defendants is in prosecuting the police for their misconduct under provisions of state or federal law.[28] The concurring justices found the entrapment defense to be based on due process but held that the degree of government involvement in *Hampton* did not rise to the level of a due process violation, however, they did not rule out the possibility of entrapment based on due process considerations.[29] Using *Hampton* as a guide, the level of governmental involvement present in a case must be very high indeed before a person will be held to have been entrapped on a due process basis.

Hampton teaches that a due process "entrapment" defense does exist; however, the Fifth Circuit has been consistently reluctant to apply it.[30] On the other hand, some circuit courts have barred prosecutions based on a due process rationale because of governmental over-involvement.[31] Even though a majority of the

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in the result); Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring opinion); Casey v. United States, 276 U.S. 413, 421 (1928) (Brandeis, J., dissenting).

26. 425 U.S. 484 (1976).

27. Rehnquist, J., wrote for the plurality and was joined by Burger, C.J., and White, J.; Powell, J., wrote a concurring opinion and was joined by Blackmun, J. To further illustrate how divided the decision was, it is notable that the concurring and dissenting justices criticized the restriction of the entrapment defense. *Id.* at 492-93 (Powell, J., concurring); *Id.* at 497 (Brennan, J., dissenting). These justices constituted an actual majority of the Court.

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

29. "In these circumstances I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles." *Hampton*, 425 U.S. 484, 493 (Powell, J., concurring).

30. *See, e.g.*, United States v. Nicoll, 664 F.2d 1308 (5th Cir. 1982), *cert. denied*, 457 U.S. 1118 (1982); United States v. Garrett, 583 F.2d 1381 (5th Cir. 1978); United States v. Thomas, 567 F.2d 638 (5th Cir. 1978), *cert. denied*, 439 U.S. 822 (1978); United States v. Graves, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); United States v. Evers, 552 F.2d 1119 (5th Cir. 1977), *cert. denied*, 434 U.S. 926 (1977).

31. United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978) (a government agent suggested establishment of a drug laboratory, supplied indispensable ingredient, made almost all of supply purchases, provided technical information and site for laboratory). *See* Green v. United States, 454 F.2d 783 (9th Cir. 1971) (After the defendants had been paroled for

members of the United States Supreme Court[32] and several circuit courts recognize a due process entrapment defense, the rule in the Fifth Circuit seems to require an almost impossibly high level of police involvement before due process will bar prosecution.[33]

Along with predisposition and due process, Justice Frankfurter, concurring in *Sherman v. United States*,[34] seemed to suggest a third approach, objective in nature, that questions whether the level of police conduct "falls below standards, to which common feelings respond, for the proper use of governmental power."[35] Due process entrapment analysis will protect only against outrageous conduct.[36] Those in accord with the Frankfurter approach[37] feel that this method would make predisposition irrelevant[38] and better protect the government's true self-interest in preserving its purity and respectability.[39] In *Sherman*, the Supreme Court held entrapment was established when a government agent succeeded in convincing the defendant to sell him narcotics after persistent solicitation and appeals to sympathy in the face of reluctance by the defendant to cooperate. The Court, in an opinion written by Chief Justice Warren, declared Mr. Sherman a vic-

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bootlegging, a government agent solicited them to resume production of liquor. The agent sold sugar to defendants at discount prices and offered to provide them with a still operator as well as necessary equipment.).

32. *See supra* note 27.

33. "[T]he government may not instigate the criminal activity, provide the place, equipment, supplies and know-how, and run the entire operation with only meager assistance from the defendants without violating fundamental fairness." United States v. Tobias, 662 F.2d 381, 386 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982).

34. Sherman v. United States, 356 U.S. 369 (1958).

35. *Id.* at 382 (Frankfurter, J., concurring in result).

36. United States v. Russell, 411 U.S. 423, 431 (1973).

37. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962). *See also* Hampton v. United States, 425 U.S. 484, 497 (1976) (Brennan, J., dissenting); United States v. Russell, 411 U.S. 423, 436 (1973) (Douglas, J., dissenting); Sherman v. United States, 356 U.S. 369 (1958) (Frankfurter, J., concurring in result); Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., separate opinion).

38. *Sherman*, 356 U.S. at 382.

39. Justice Holmes, writing about an equally unseemly governmental practice, stated the following:

> It is desirable that criminals should be detected, and to that end all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained . . . . [F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting), *quoted in* Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring in result).

tim of creative law enforcement activity.[40]

Clearly, the law of entrapment in federal courts is a mixed bag of various views about entrapment's foundations and the methods of analysis that should be used to determine its application and effects.

BACKGROUND AND ANALYSIS OF MISSISSIPPI ENTRAPMENT LAW

The defense of entrapment is not of constitutional significance; therefore, the federal decisions are not binding on the states.[41] However, they are often cited in the Mississippi cases on entrapment and do seem to provide the theoretical starting points for the court's decisions.

In Mississippi, the defense of entrapment got off to a lackluster start in the case of *French v. State*,[42] where the defendant's conviction of illegally selling liquor was affirmed. The Court held that the sale of intoxicating liquor was a violation of the law regardless of the intent of the seller. A jury instruction on entrapment was held properly refused even though the defendant testified that the liquor he sold was the property of the prohibition officer who induced him to sell it. The old rule as employed in *French* did not embody a "subjective" or an "objective" approach but an effective ban on the entrapment defense in the area of offenses relating to possession and sale of contraband.

In *McLemore v. State*,[43] the Court adopted a "subjective" approach to entrapment when it stated:

> The word 'entrapment,' as a defense, has come to mean the act of inducing or leading a person to commit a crime not originally contemplated by him, for the purpose of trapping him in its commission and prosecuting him for the offense. However, defendant cannot rely on the fact that an opportunity was intentionally given him to commit the crime which originated in the mind of the accused. The fact that an opportunity is furnished constitutes no defense.[44]

This definition of entrapment and the subjective considerations of intent it embraces were reaffirmed in several Mississippi

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40. *Sherman*, 356 U.S. at 372 (citing *Sorrells*, 287 U.S. at 451).

41. United States v. Russell, 411 U.S. 423, 433 (1973); Ainsworth v. Reed, 542 F.2d 243 (5th Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); Jones v. State, 285 So. 2d 152, 159 (Miss. 1973).

42. 149 Miss. 684, 115 So. 705 (1928) (en banc).

43. 241 Miss. 664, 125 So. 2d 86 (1960).

44. *Id.* at 675, 125 So. 2d at 91 (citing 1 ANDERSON'S WHARTON'S CRIMINAL LAW AND PROCEDURE § 132 (1957)).

cases which also recognized the existence of the defense of entrapment in contraband possession and sale cases.[45]

Jones v. State[46] was the first case in Mississippi that involved a fact situation similar to *Epps*. Mississippi narcotics agents were not aware that a paid confidential informant working for them had furnished the marijuana to Mr. Jones, from whom the agent later purchased the same marijuana. The court held that when a defendant asserts the affirmative defense of entrapment and goes forward with proof tending to establish the defense, the burden of proof shifts to the state.[47] In this case, the confidential informant did not testify, and there was no rebuttal offered by the state as to whether the state actually supplied the marijuana.[48] The court held that entrapment was established as a matter of law. Justice Sugg, writing for the court in *Jones*, offered this quote from *People v. Strong*:[49]

> While we are sympathetic to the problems of enforcement agencies in controlling the narcotics traffic, and their use of informers to that end, we cannot condone the action of one acting for the government in supplying the very narcotics that gave rise to the alleged offense. We know of no conviction for sale of narcotics that has been sustained when the narcotics sold were supplied by an agent of the government. This is more than mere inducement.[50]

This quote, in the most recent Mississippi case addressing the *Epps*-type situation, gives much insight into the theory on which the defense of entrapment is now based in Mississippi. The language "we cannot condone the action of one acting for the government in supplying the very narcotics that gave rise to the alleged offense," suggests an "objective" approach that focuses on the level of activity of the law enforcement officials and their agents. When the quantum of governmental involvement reaches a certain level, such as the level reached when the government agents actu-

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45. Alston v. State, 258 So. 2d 436 (Miss. 1972); Reeves v. State, 244 So. 2d 5 (Miss. 1971); Laughter v. State, 235 So. 2d 468 (Miss. 1970); Hogan v. State, 233 So. 2d 786 (Miss. 1970).

46. 285 So. 2d 152 (Miss. 1973).

47. *Id.* at 159 (citing Alston v. State, 258 So. 2d 436 (Miss. 1972)).

48. *Id.* at 154, 159.

49. 21 Ill. 2d 320, 172 N.E.2d 765 (1961), *cited with approval in* Jones v. State, 285 So. 2d 152, 159 (Miss. 1973).

50. *Strong*, 21 Ill. 2d at 325, 172 N.E.2d at 768. *See also* People v. Carmichael, 80 Ill. App. 2d 293, 225 N.E.2d 458 (1967) (A police informer supplied the defendant with narcotics which subsequently were sold to government agents. No rebuttal by the state was offered. The court held the defendant was entrapped as a matter of law.).

ally supply the defendant with marijuana, then the criminal intent is that of the state.[51] No mention of a violation of the defendant's due process rights was made. This reluctance of the Mississippi Supreme Court to condone such a level of governmental activity is a derivative of feelings expressed in the United States Supreme Court by Justice Frankfurter when he said, "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government . . . cannot be countenanced."[52] Justice Frankfurter's views were also shared by many of his colleagues on the Court.[53]

In *Sylar v. State*,[54] one narcotics agent, a "friend" of the defendant, induced him, after several unsuccessful attempts, to carry a package of marijuana to a second narcotics agent, and sell it to him. The first narcotics agent did not testify. The one who consummated the purchase did give testimony relevant to predisposition.[55] However, the Mississippi Supreme Court reversed the trial court and discharged the defendant, calling the whole transaction a play, a charade, and a fiction.[56] The Mississippi Supreme Court dealt with the holding in *Hampton*,[57] and the due process approach, by distinguishing *Hampton* from *Sylar*. This distinction centered on the fact that Hampton originally proposed the idea to commit the offense, thereby being predisposed; the government merely gave him the opportunity to carry out his wish. The court held that in this instance Sylar "did no more than yield to the importunities of one state agent to deliver marijuana supplied by the State to another state agent."[58]

Entrapment *per se* is a term used to describe situations like those in *Jones* and *Epps* where the level of state involvement is too high as a matter of law to let a conviction stand. This most

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51. *Jones*, 285 So. 2d at 159.
52. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring).
53. *See supra* notes 11 and 39 and accompanying text.
54. 340 So. 2d 10 (Miss. 1976).
55. *Id.* at 11. The agent testified about a conversation at the time of the sale during which he tried to get Sylar to take less money for the marijuana due to its low quality. Sylar refused to recede from the $120 he was instructed to collect and stated the quality would be better next time. *Id.*
56. *Id.*
57. A predisposed defendant cannot validly assert entrapment contending that the governmental conduct was so outrageous as to violate due process. Hampton v. United States, 425 U.S. 484 (1976). The Court recognized the passage in *Russell*, 411 U.S. at 431-32, but did not adopt a due process test for determining the level of government misconduct. *See supra* note 22 and accompanying text.
58. *Sylar*, 340 So. 2d at 11.

often comes up when government agents sell illegal drugs to citizens. The Mississippi Supreme Court has adopted the holding in a New Jersey case as its rule on entrapment *per se* in those cases where the government supplies the defendant with the contraband which is the subject of a later prosecution:[59]

> We hold that where an informer or other agent generally acting in concert with law enforcement authorities, furnishes a defendant with heroin for the purpose of then arranging a sale of the heroin by the defendant to an undercover officer, which sale is then consummated, defendant has been entrapped as a matter of law even though predisposition to commit the crime may appear . . . .[60]

This is a purely "objective" approach to determine when a defendant is entrapped *per se* in a contraband sale case. Presumably, the same rule would apply if the prosecution were for contraband possession when a government agent supplied the contraband. This rule has been followed in all subsequent Mississippi cases dealing with fact patterns where the state has supplied the defendant with the contraband he is accused of selling.[61]

ANALYSIS OF *Epps v. State*

The holding in *Epps*[62] was directly controlled by the holdings in *Jones, Sylar*, and *Torrence v. State*.[63] The Mississippi rule of entrapment *per se* established in those cases holds that when state agents supply the defendant with the contraband which provides the basis of the charges against him, entrapment as a matter of law is established.

Johnny Epps testified that Alex Butler, a confidential informer, gave him the cocaine; this made out a prima facie case of entrapment. When the state failed to offer rebuttal evidence to the contention that it had supplied Epps with the cocaine through its agent, Alex Butler, the court was bound to follow the rule that

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59. *Id.* at 12 (quoting from State v. Talbot, 71 N.J. 160, 364 A.2d 9 (1976)).

60. *Talbot*, 71 N.J. at 168, 364 A.2d at 12.

61. *See* Torrence v. State, 380 So. 2d 248 (Miss. 1980). *Contra, Id.* at 250 n.1, which states: "There may well be circumstances where the authorities, in order to flush out criminal activity, may furnish a suspect with contraband and subsequently purchase that contraband from him. *Compare* United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637, 36 L.Ed. 2d 366 (1973). But this is not the case."

62. 417 So. 2d 543 (Miss. 1982).

63. *Torrence*, 380 So. 2d 248 (Miss. 1980), wherein a state agent provided the drugs which were the basis of the offense for which the defendant was convicted. The Mississippi Supreme Court discharged the defendant, holding he was entrapped as a matter of law.

this sort of state misconduct toward the defendant constituted entrapment as a matter of law.

The importance of *Epps v. State* lies in what the court did not do rather than in what it did. Even in these times of increasing emphasis on fighting drug-related crime, coupled with the general conservative tide in the nation, the Mississippi Supreme Court did not follow the United States Supreme Court's more conservative rule of entrapment propounded in *Hampton v. United States* (i.e., that predisposed defendants can still be convicted, even though the government supplied the contraband).[64] The rule derived from *Epps* makes predisposition irrelevant. Simply put, when the state, through one of its agents, supplies the contraband that is the subject of later charges, entrapment is established as a matter of law. This rule, which has its genesis in *Jones v. State*,[65] holds that when the government supplies the contraband to the defendant, the criminal intent is that of the supplier and not the defendant.[66] Therefore, in cases with fact patterns similar to *Epps*, the court has predetermined that the intent for criminal action is not in the defendant but with the state. This method of analysis automatically makes predisposition or intent on the part of the defendant irrelevant. Possibly there are ways the state can supply the contraband to the defendant and later charge him with its possession or sale. For example, suppose the defendant himself first proposes the commission of a crime to a government agent and the two cooperate. If as a part of this cooperative enterprise the agent supplies the defendant with the contraband, it could be held that the agent was merely furnishing the defendant with an opportunity to commit the offense and not supplying the criminal intent.[67] However, the chance that this method would be upheld seems legally doubtful in light of the fact that the Mississippi Supreme Court has so strongly embraced the New Jersey case of *State v. Talbot*,[68] which held, after a review of the *Hampton* decision, that predisposition does not bar the valid assertion of the entrapment defense where the government supplies the defendant

64. 425 U.S. 484 (1976) (It must be remembered this "rule" was only a plurality decision.).

65. 285 So. 2d 152 (Miss. 1973).

66. *Id.* at 159.

67. *Cf. Sylar*, 340 So. 2d 10 (The court distinguished *Sylar* from *Hampton* on the basis that in *Hampton* the defendant initially proposed the crime.).

68. 71 N.J. 160, 364 A.2d 9 (1976). The Mississippi Supreme Court has cited this case and quoted from it at length in *Sylar*, 340 So. 2d at 11; *Torrence*, 380 So. 2d at 250; *Epps*, 417 So. 2d at 545.

with the contraband. In this situation, entrapment is established as a matter of law.[69]

The possibility of the state's properly furnishing contraband to a defendant and later successfully prosecuting him for its possession or sale is somewhat enhanced by Justice Walker's first footnote in *Torrence v. State*.[70] There he suggested that, in certain circumstances, the government may supply a suspect with contraband and later purchase it from him in order to discover criminal activity. Whether this purchase of contraband supplied to the suspect by government agents is to constitute the basis of the charges to be brought against the suspect or just to be used as a decoy or detection device is not entirely clear.

The Mississippi rule that entrapment is established *per se* when the state supplies to the defendant the contraband which is later the subject of the charges against him is to be preferred from a public policy standpoint to the predisposition centered rule in *Hampton*. It is not the place of the government or its officials, who should be setting the example for the rest of society to follow, to be engaged in creating crimes.[71] Objective and specific rules as to what constitutes entrapment *per se*, are to be preferred to a due process based approach. There is a great chance that barring prosecution because the level of governmental misconduct involved in a case violates the defendant's due process rights might produce irreconcilable variations in holdings as to exactly the level of state misconduct that will bar prosecution in various fact situations.

Contraband cases, where entrapment is a viable defense, can be generally categorized into two basic classifications. First is the situation where government agents ask the defendant to obtain contraband and sell it to them. In this type of case, entrapment is almost always determined on the basis of whether the defendant was predisposed to sell the agent the contraband or whether the agent, through his persistence, implanted the criminal design in the mind of the defendant. If the agent is found to have implanted the criminal design in the defendant's mind, entrapment will be a valid defense. In this type of case, the predisposition or intent of the defendant is relevant and should be considered. However, in the second class of cases, where the government supplies the contraband to the defendant and then purchases it from him, predis-

69. *Sylar*, 340 So. 2d at 11-12.
70. 380 So. 2d 248 (Miss. 1980); *see supra* note 61.
71. *See supra* note 39 and accompanying text.

position should be irrelevant,[72] either because the criminal intent can be viewed to be that of the government agent[73] or because the level of governmental misconduct in the case cannot be condoned by the court.[74]

The value of the *Epps* decision lies in its unqualified reaffirmance of the concept of fair play on the part of the government, which is necessary to foster respect for the courts and law enforcement in general. The rule of entrapment *per se*, upheld in *Epps*, serves the needed purpose of taking a complicated and theoretical area of the law and providing substantive and consistent guidelines for its application.

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72. *Epps*, 417 So. 2d at 545, citing State v. Talbot, 71 N.J. 160, 168, 365 A.2d 9, 13 (1976).

73. *Jones*, 285 So. 2d at 159.

74. Sherman v. United States, 356 U.S. 369, 378-80 (1958) (Frankfurter, J., concurring in the result).