

DENIAL OF THE CRIME AND THE AVAILABILITY OF THE ENTRAPMENT DEFENSE IN THE FEDERAL COURTS

Entrapment occurs when an agent of the government induces a person to commit a crime, not previously contemplated by that person, for the purpose of instituting a criminal prosecution.¹ The Supreme Court first recognized the entrapment defense in *Sorrells v. United States*.² In *Sorrells*, the defendant had been convicted of selling liquor to a federal prohibition agent.³ The agent, posing as a tourist, had discussed war experiences with the defendant.⁴ After twice refusing the agent's requests for liquor, the defendant finally acquired some liquor and sold it to the agent.⁵ At trial, the defendant argued that he had been entrapped into doing so.⁶ The trial court, however, had refused to allow the defendant to rely on an entrapment defense.⁷ The Supreme Court, in an opinion by Chief Justice Hughes, reversed.⁸ The Court held that as a matter of statutory construction, Congress could not have intended that its laws be applied where the government instigates criminal acts by "persons otherwise innocent in order to lure them to its commission and to punish them."⁹ The Hughes opinion was construed to focus on the defendant's predisposition to commit the crime.¹⁰ A concurring opinion asserted that the Court should have reached its decision on a different ground by finding that the government acted improperly in instigating a crime.¹¹ The opinion notes that the Court should be concerned with whether the government instigated the crime because, as a matter of public policy, courts should not try crimes instigated by the government.¹² Although the Supreme Court has continued to be divided over the proper basis for the entrapment defense,¹³ the majority still endorses the Hughes

¹ See *United States v. Russell*, 411 U.S. 423, 428-29 (1973).

² 287 U.S. 435 (1932).

³ *Id.* at 438.

⁴ *Id.* at 439.

⁵ *Id.*

⁶ *Id.* at 438.

⁷ *Id.*

⁸ *Id.* at 452.

⁹ *Id.* at 448.

¹⁰ *United States v. Russell*, 411 U.S. 423, 429 (1973).

¹¹ *Sorrells*, 287 U.S. at 459.

¹² *Id.*

¹³ Compare *Hampton v. United States*, 425 U.S. 484, 488 (1976) (plurality opinion) and *United States v. Russell*, 411 U.S. 423, 428-30 (1973) (majority opinion) with *Hampton v. United States*, 425 U.S. 484, 496-97 (1976) (Brennan, J., dissenting) and *United States v. Russell*, 411 U.S. 423, 436-39 (1973) (Douglas, J., dissenting) and *id.* at 439-45 (Stewart, J., dissenting).

opinion.¹⁴ Thus, the question of entrapment concerns whether a government agent "actually implant[ed] the criminal design in the mind of the defendant."¹⁵ The entrapment inquiry focuses upon the defendant's predisposition to commit the crime,¹⁶ and a finding of predisposition will preclude a successful entrapment defense.¹⁷ The Supreme Court continues to hold that entrapment is a statutory defense focusing on the defendant's predisposition¹⁸ and not a constitutional doctrine forbidding improper and overzealous law enforcement practices.¹⁹

Even though the Supreme Court consistently has endorsed the same basis for the entrapment defense, focusing on the defendant's predisposition, confusion has arisen from the lower federal courts applying the entrapment defense inconsistently.²⁰ One area of confusion concerns whether a defendant's right to have the issue of entrapment submitted to the jury²¹ is affected by the presence or absence of his admission or denial of the crime charged.²² Because the issue has never been addressed by the Supreme Court,²³ the circuit courts have been free to take varying positions.

It is often difficult to discern a sense of direction within or among the circuits in resolving this issue. Nevertheless, this note will attempt to identify four distinct positions taken by the circuit courts. At one extreme, some courts require the defendant to admit affirmatively the crime charged before asserting

¹⁴ See *Hampton v. United States*, 425 U.S. 484, 488 (1976).

¹⁵ *United States v. Russell*, 411 U.S. 423, 436 (1973).

¹⁶ *Id.* at 433.

¹⁷ *Id.* at 436.

The Court, however, has suggested a modification of the majority opinion in which the defendant's predisposition would be irrelevant. In *United States v. Russell*, 411 U.S. 423 (1973), the Court noted the possibility that the conduct of a government agent might be "so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction" *Id.* at 431-32. This modification was rejected in the plurality opinion in *Hampton v. United States*, 425 U.S. 484, 489-90 (1976) (opinion by Rehnquist, J., joined by Burger, C.J., and White, J.). This position, however, was left open in a concurring opinion, *Id.* at 492-95 (Powell, J., concurring, joined by Blackmun, J.), and endorsed in a dissenting opinion, *Id.* at 497-99 (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.).

¹⁸ *Hampton*, 425 U.S. at 488; *Russell*, 411 U.S. at 433.

¹⁹ *Russell*, 411 U.S. at 433.

²⁰ See Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 43-71; Milkell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 247-52 (1942).

²¹ Throughout this note, it will be assumed that this issue only arises when there is sufficient evidence in the record indicating entrapment. In the absence of such evidence, the issue should not be submitted to the jury irrespective of the defendant's denial or admission. See, e.g., *United States v. Hill*, 626 F.2d 1301, 1303 (5th Cir. 1980); *United States v. Licursi*, 525 F.2d 1164, 1169 n.5 (2d Cir. 1975); *United States v. Alford*, 373 F.2d 508, 509 (2d Cir. 1967); *Crisp v. United States*, 262 F.2d 68, 69 (4th Cir. 1958).

²² Perhaps this issue would not arise if the Court adopted the minority's "objective" view. Thus, if the entrapment defense only concerned the nature of the government's actions and whether they were improper, the presence or nature of the defendant's testimony would not be relevant.

²³ *United States v. Valencia*, 645 F.2d 1158, 1172 (2d Cir. 1980).

that he was entrapped. Other courts take a slightly different view. Although they do not require a defendant claiming entrapment to admit the crime, they do insist that he refrain from denying the crime. At the other extreme, a third group of courts has allowed a defendant to deny all aspects of the crime and still utilize an entrapment defense. Finally, at least one circuit court allows the defendant claiming entrapment to introduce testimony that is not too inconsistent with the entrapment defense. This note will examine the origin of and the reasoning behind each of these four positions. It will be shown that the various approaches of the circuit courts address concerns such as maintaining the purpose of a criminal trial as a search for the truth and providing adequate protection to a criminal defendant. A search for truth might be hindered by permitting a defendant to testify inconsistently with a defense he advances. In addition, restricting a defendant's testimony so that he may argue entrapment might unduly withdraw protections that should be accorded a criminal defendant. It will be argued, however, that none of the four circuit court positions provides the proper balance between those concerns. Following a review of the four positions, therefore, a new rule will be proposed that seeks to achieve a better balance.

I. THE APPROACHES OF THE UNITED STATES COURTS OF APPEALS

A. *Admitting the crime as a prerequisite to the entrapment defense* (*"defendant must admit all" rule*)

Several courts have asserted that a defendant is not entitled to raise an entrapment defense unless he admits²⁴ commission of the crime charged. These courts reason that because entrapment can occur only when a crime has been committed, the defendant must admit the crime before he should be permitted to raise an entrapment defense. Although currently only the Third and Seventh circuits endorse the "defendant must admit all" rule, at one time, the Ninth and Tenth circuits did also.²⁵

The Tenth Circuit originally endorsed the "defendant must admit all"

²⁴ These courts have not defined what will be sufficient as an admission of the crime. See, e.g., *United States v. Shoup*, 608 F.2d 950 (3d Cir. 1979); *United States v. Johnston*, 426 F.2d 112 (7th Cir. 1970); *Martinez v. United States*, 373 F.2d 810 (10th Cir. 1967); *Ortega v. United States*, 348 F.2d 874 (9th Cir. 1965). Thus, it is unclear whether an affidavit will suffice. One court has held that defense counsel's opening and closing arguments claiming that the defendant had admitted the crime were not sufficient where the defendant's testimony indicated otherwise. *United States v. Hendricks*, 456 F.2d 167, 169 (5th Cir. 1972). In cases where the defendant has testified, it is appropriate that the question of whether the defendant has admitted the crime should be answered on the basis of his testimony.

²⁵ See *United States v. Shoup*, 608 F.2d 950, 964 (3d Cir. 1979); *United States v. Johnston*, 426 F.2d 112, 114 (7th Cir. 1970); *Demma v. United States*, 523 F.2d 981, 982 (9th Cir. 1975) (overruling *Eastman v. United States*, 212 F.2d 320, 322 (9th Cir. 1954)); *United States v. Worth*, 505 F.2d 1206, 1209 (10th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975) (limiting *Martinez v. United States*, 373 F.2d 810, 811-12 (10th Cir. 1967)).

rule in *Martinez v. United States*.²⁶ In *Martinez*, the defendant was convicted of illegal possession of marijuana despite the protestations of the defendant that he had been entrapped.²⁷ At trial, the defendant was permitted to have the jury instructed on entrapment and the sole question on appeal was whether the trial court's instructions were adequate.²⁸ In the course of its decision, the Tenth Circuit commented on the availability of the entrapment defense.²⁹ The court described the defense as an affirmative defense requiring the defendant to confess the crime before he may avoid it.³⁰ The court stated that the entrapment defense could not be applicable to a case until the defendant admitted committing the crime charged.³¹

Similarly, the Ninth Circuit at one time purported to embrace the "defendant must admit all" rule.³² Support for the rule came from the case of *Eastman v. United States*.³³ In that case, the defendants denied the crimes of importing, knowingly concealing, and facilitating the transportation of opium.³⁴ They also argued that they were entrapped.³⁵ Nevertheless, the trial judge refused to instruct the jury on entrapment.³⁶ Upon their conviction,³⁷ the defendants claimed that it was error for the district judge to have refused to instruct the jury on entrapment.³⁸ The Ninth Circuit, however, affirmed the decision of the court below.³⁹ The Ninth Circuit characterized the defendant's position — denying the crime and at the same time claiming entrapment — as inconsistent and noted that unless a crime has been committed, there can be no entrapment.⁴⁰ The court observed that if the defendant denied the crime, instructing the jury on entrapment could result only in confusion.⁴¹

²⁶ 373 F.2d 810 (10th Cir. 1967). In *United States v. Worth*, 505 F.2d 1206, 1209 (10th Cir. 1974), cert. denied, 420 U.S. 964 (1975), the Tenth Circuit limited *Martinez* by holding that a defendant need not admit the crime in order to rely on entrapment, he must only refrain from denying the crime.

²⁷ *Martinez*, 373 F.2d at 811.

²⁸ *Id.* The Tenth Circuit upheld the adequacy of the instructions. *Id.* at 813.

²⁹ *Id.* at 811-12.

³⁰ *Id.* at 811.

³¹ *Id.* at 811-12. This statement, along with the court's acknowledgment that the issue of entrapment was properly submitted, *id.* at 812, implies that the defendant admitted the crime. The court never stated so explicitly.

³² In *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*), however, the Ninth Circuit overruled its line of cases adopting the "defendant must admit all" rule. *Id.* at 982. See text and notes at notes 98-122 *infra*.

³³ 212 F.2d 320 (9th Cir. 1954).

³⁴ *Id.* at 322. The court noted that the defendants "have maintained throughout that they did not commit a crime." *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 321.

³⁸ *Id.* at 322.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

The reasoning of *Eastman* was extended in the case of *Ortega v. United States*.⁴² There, the defendant was convicted of concealing and selling heroin.⁴³ The defendant had denied sale, possession, or delivery of any narcotics.⁴⁴ The defendant requested the trial judge to instruct the jury on entrapment and the trial judge refused.⁴⁵ The Ninth Circuit upheld the trial court's refusal to submit an entrapment instruction to the jury.⁴⁶ The court noted that entrapment could not exist without commission of a crime, and concluded that in order for a defendant to use the entrapment defense, he must admit committing the crime.⁴⁷ Thus, although *Eastman* found it inconsistent for a defendant to claim entrapment and simultaneously to deny the crime, *Ortega* went further and stated that a defendant must affirmatively admit the crime in order to pursue an entrapment defense.

The courts embracing the "defendant must admit all" rule are correct in noting that the nature of the entrapment defense dictates that the fact finder first must determine that a crime was committed before considering whether the defendant was lured into committing a crime he was not predisposed to commit. They supply, however, no rationale as to why the defendant must make the fact finder's determination that the defendant committed the crime charged a foregone conclusion by requiring the defendant to admit the crime. The courts appear to be reacting to the inconsistency between a defendant's active denial of criminal involvement and his desire to claim entrapment as to acts he denied. It is important to note, however, that inconsistency arises only between a claim of entrapment and the *denial* of the crime, *not* between an entrapment claim and the absence of an admission to the crime. Nevertheless, two circuits, the Third and Seventh, continue to require, or claim to require, a defendant to admit to the crime before he may assert entrapment.⁴⁸ Both these circuits have failed to give the issue more than cursory consideration, relying ultimately on Ninth Circuit precedent.⁴⁹ Other courts that at one time indicated that they would follow the rule either have repudiated it totally⁵⁰ or have modified their position to preclude the entrapment defense only from

⁴² 348 F.2d 874 (9th Cir. 1965).

⁴³ *Id.* at 875.

⁴⁴ *Id.* at 876.

⁴⁵ *Id.* at 875 n.1.

⁴⁶ *Id.* at 876.

⁴⁷ *Id.*

⁴⁸ *United States v. Shoup*, 608 F.2d 950, 964 (3d Cir. 1979); *United States v. Levin*, 606 F.2d 47, 48 (3d Cir. 1979) (*per curiam*); *United States v. Watson*, 489 F.2d 504, 507 (3d Cir. 1973); *United States v. Roviato*, 379 F.2d 911, 914 (7th Cir. 1967).

⁴⁹ *See, e.g.*, *United States v. Watson*, 489 F.2d 504, 507 (3d Cir. 1973) (citing *United States v. Hendricks*, 456 F.2d 167 (9th Cir. 1972)); *United States v. Roviato*, 379 F.2d 911, 914 (7th Cir. 1967) (citing *Ortega v. United States*, 348 F.2d 874, 876 (9th Cir. 1965)).

⁵⁰ *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*). *See* text at notes 95-119 *infra*.

defendants who actually deny the crime and not from defendants who merely refrain from admitting the crime.⁵¹

B. *Absence of a denial of the crime as prerequisite to the entrapment defense*
(*"defendant may not deny" rule*)

The position that a defendant will not be precluded from asserting entrapment provided he does not deny the crime is gaining acceptance among the circuits.⁵² This position is more liberal than the "defendant must admit all" rule, discussed above, which allows only a defendant who admitted the crime to rely on entrapment.⁵³ The "defendant may not deny" rule does not require an admission, but permits a defendant who refrains from denying the crime charged to assert an entrapment defense. The courts embracing this rule reason that it is an affirmative denial of the crime, not a failure to admit the crime, that is inconsistent with a claim of entrapment.⁵⁴ Thus, in determining whether to allow a defendant to rely on the entrapment defense, courts accepting the "defendant may not deny" rule focus on whether the defendant has refrained from denying the crime and not whether he has admitted the crime.

Courts have not addressed the question of what will constitute a denial. Where the defendant has testified, it is proper that his testimony should be the basis on which the question is decided. It seems unlikely that when a defendant testifies a court will construe the actions of defense counsel to operate as a denial. Where a defendant does not testify, one court has raised the question whether using alibi witnesses will operate as a denial.⁵⁵ Indeed, that same court held that for a defendant not taking the stand to testify, defense counsel's summary asserting that the defendant had nothing to do with the crime and defense counsel's examination of other witnesses seeking to show that same assertion were not sufficient to preclude an entrapment defense.⁵⁶

A recent case adopting the "defendant may not deny" rule is *United States v. Annese*.⁵⁷ In that First Circuit case, the defendant⁵⁸ was charged with manufacturing narcotics and conspiring to manufacture narcotics.⁵⁹ During the course of the trial, the district court was informed that the defendant was

⁵¹ *United States v. Valencia*, 645 F.2d 1158 (2d Cir. 1980), *United States v. Annese*, 631 F.2d 1041 (1st Cir. 1980); *United States v. Worth*, 505 F.2d 1206 (10th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); *United States v. Groessel*, 440 F.2d 602 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971). See text at notes 57-72, 162-70 *infra*.

⁵² See note 51 *supra*.

⁵³ See text and notes at notes 24-51 *supra*.

⁵⁴ See, e.g., *United States v. Annese*, 631 F.2d 1041, 1046-47 (1st Cir. 1980); *United States v. Groessel*, 440 F.2d 602, 605 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971).

⁵⁵ *United States v. Valencia*, 645 F.2d 1158, 1172 (2d Cir. 1980).

⁵⁶ *Id.* at 5679.

⁵⁷ 631 F.2d 1041 (1st Cir. 1980).

⁵⁸ Reference is made to defendant Nicholas Tavano.

⁵⁹ *Annese*, 631 F.2d at 1042.

not going to take the stand but intended to rely on the entrapment defense.⁶⁰ In considering the availability of the entrapment defense, the trial court first noted that the law of the First Circuit precluded a defendant who took the stand and denied the crime from relying on entrapment.⁶¹ The court then stated that it found no First Circuit case that squarely ruled on whether a defendant who does not take the stand may claim entrapment.⁶² Relying on a footnote in a prior First Circuit case, however, the district judge ruled that the defendant must take the stand, and presumably admit the crime, in order to be able to claim entrapment.⁶³ Faced with the court's ruling, the defendant decided to take the stand.⁶⁴ During his testimony and cross examination he admitted a prior conviction.⁶⁵ Upon conviction, the defendant appealed the district court's ruling.⁶⁶

The First Circuit reversed.⁶⁷ That court observed that all of the First Circuit cases holding that the defendant must admit the crime before claiming entrapment involved defendants who had taken the stand.⁶⁸ The court agreed with these cases that it would be impermissibly inconsistent for a defendant to take the stand and deny involvement in any criminal acts as to which he sought to claim entrapment.⁶⁹ The court found, however, that where there was evidence of governmental inducement, the defendant may remain silent and rely on entrapment.⁷⁰ Thus, the jury may determine whether the government has proved its case beyond a reasonable doubt, and, if so, then consider whether the defendant was entrapped.⁷¹ The court noted that although a defendant's effort to show entrapment may be hampered by his failure to testify, he had the right to make that choice.⁷²

The principal rationale behind the "defendant may not deny" rule is the "inconsistency theory," which argues that it is logically inconsistent for a

⁶⁰ *Id.* at 1045.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* (relying on *United States v. Caron*, 588 F.2d 851, 852, n.4 (1st Cir. 1978)). The defendant, by taking the stand and being subject to cross-examination, would have to either admit the crime or deny the crime. The settled law of the Second Circuit was that a defendant could not deny the crime and claim entrapment. *See id.* at 1046. Thus, the defendant under the district judge's ruling presumably must admit the crime in order to assert entrapment.

⁶⁴ *Id.* at 1047.

⁶⁵ *Id.* Although apparently the defendant admitted the crime, see note 63 *supra*, it is not clear that this admission would be very prejudicial to the defendant as his "chief defense" was entrapment. *Id.* at 1043. By taking the stand, the defendant was forced to admit to a prior conviction. *Id.* at 1047. The defendant's admission to a prior conviction, however, is clearly prejudicial. *See id.* at 1047.

⁶⁶ *Id.* at 1042.

⁶⁷ *Id.* at 1047.

⁶⁸ *Id.* at 1046.

⁶⁹ *Id.* at 1047.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* Without elaboration, the court noted that its holding avoided any fifth amendment questions. *Id.*

defendant to claim that he was entrapped into a crime that he denies committing.⁷³ Just the existence of that inconsistency, however, would not justify the "defendant may not deny" rule. There must be a reason why that inconsistency is undesirable. The most persuasive reason why such inconsistency should not be permitted is the possibility that it may serve only to confuse the jury unjustifiably.⁷⁴

Whether the "defendant may not deny" rule is justified in its own right, it is clearly preferable to the "defendant must admit all" rule. First, the "inconsistency theory" is well served by the "defendant may not deny" rule. It is unnecessary to resort to the more restrictive "defendant must admit all" rule to avoid any inconsistency. So long as the defendant does not deny the crime, no inconsistency may arise. Second, the "defendant may not deny" rule has the advantage of putting the government to its proof, thereby avoiding any possible claim that the defendant is required to waive his right against self incrimination in order to assert entrapment.⁷⁵ Under the "defendant must admit all" rule, if a defendant wishes to urge entrapment, then the government is relieved of its burden of proof as to any physical acts committed and, apparently, as to any required mental element of the substantive crime.⁷⁶ Under the "defendant may not deny" rule, the government still has the burden of proving all the elements of the crime beyond a reasonable doubt. This burden of proof is an important guarantee in our criminal justice system.⁷⁷ Thus, under the "defendant may not deny" rule, there is no relief of the government's burden of proof and no constitutional problem with the presumption of innocence.⁷⁸

Although the "defendant may not deny" rule avoids any relief of burden of proof problems, there is a related drawback. The defendant must make a tactical choice between either denying the crime, and thus making the government's substantive case more difficult, or refraining from testifying, and thereby preserving his right to argue entrapment. Requiring such a tactical choice is, however, by no means unique to entrapment in the criminal justice system. Criminal defendants frequently are faced with such decisions. For example, a defendant may not complain if his testimony opens the door to cross-

⁷³ See, e.g., *United States v. Brooks*, 611 F.2d 614, 618 (5th Cir. 1980); *United States v. Demma*, 523 F.2d 981, 984 (9th Cir. 1975) (*en banc*).

⁷⁴ See *Eastman v. United States*, 212 F.2d 320, 322 (9th Cir. 1954).

⁷⁵ A form of this argument was used in *Demma*, 523 F.2d at 983.

⁷⁶ Many decisions do not appear to differentiate between a denial of any physical or mental element of a crime. See, e.g., *United States v. Shoup*, 608 F.2d 950, 964 (3d Cir. 1979) (the defendant must admit "that there were present the elements of the crime with which he is charged. [footnote omitted]"); *United States v. Roviato*, 379 F.2d 911, 914 (7th Cir. 1967) (the defendant must admit to criminal acts).

⁷⁷ See *Mullaney v. Wilbur*, 421 U.S. 684, 699-701 (1975); *In re Winship*, 397 U.S. 358, 362-64 (1970).

⁷⁸ See the discussion of *Demma* and its first two rationales at text at notes 108-18 *infra*.

examination,⁷⁹ including impeachment through evidence of prior crimes,⁸⁰ or even impeachment by illegally obtained evidence.⁸¹

The "defendant may not deny" rule addresses the same crucial concerns as the "defendant must admit all" rule with fewer objectionable results. It has a stronger logical basis and forces the government to prove that which it should have to prove — guilt beyond a reasonable doubt — without unwilling help from the defendant. Thus, the "defendant may not deny" rule is an improvement over the "defendant must admit all" rule.

C. *The alternative defense theory ("defendant may deny all" rule)*

Three circuits have taken the position that a defendant may both deny committing the crime, and alternatively assert that he was entrapped.⁸² One court justified this position by stating that there was no inconsistency in those two defenses.⁸³ A stronger rationale supporting the "defendant may deny all" rule stresses that the defendant is entitled to require the government to prove its entire case.⁸⁴ As noted in the previous section, if the defendant must admit the crime to plead entrapment, then the government is relieved of the burden of proving the substantive crime. Similarly, if the defendant must forego an entrapment defense in order to deny commission of the substantive crime, the government is freed from its burden of persuasion with respect to entrapment. Thus, some courts have concluded that requiring the defendant to choose between alternative defenses is contrary to the requirement that the government prove every element of the crime.

One such court, the District of Columbia Circuit, explained its reasoning for supporting the "defendant may deny all" rule in the case of *Hansford v. United States*.⁸⁵ In *Hansford*, the defendant was convicted of illegal sale of narcotics.⁸⁶ During the trial, the defendant took the stand and denied making the alleged sale.⁸⁷ Despite this denial, the trial court permitted the defendant to rely on an entrapment defense.⁸⁸

⁷⁹ *Brown v. United States*, 356 U.S. 148, 154-55 (1958).

⁸⁰ *Spencer v. Texas*, 385 U.S. 554, 560-61 (1967).

⁸¹ *Harris v. New York*, 401 U.S. 222, 224-26 (1971); *Walder v. United States*, 347 U.S. 62, 64-66 (1954). See *Groot, The Serpent Beguiled Me and I (Without Scienter) Did Eat — Denial of Crime and the Entrapment Defense*, 1973 U. ILL. L.F. 254, 272.

⁸² See *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975) (*en banc*); *Hansford v. United States*, 303 F.2d 219, 221 (D.C. Cir. 1962) (*en banc*); *Crisp v. United States*, 262 F.2d 68, 70 (4th Cir. 1958).

⁸³ *Hansford v. United States*, 303 F.2d 219, 221 (D.C. Cir. 1962) (*en banc*). See text at notes 85-90 *infra*.

⁸⁴ *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975) (*en banc*). See text at notes 98-122 *infra*.

⁸⁵ 303 F.2d 219, 221 (D.C. Cir. 1962) (*en banc*).

⁸⁶ *Id.* at 220.

⁸⁷ *Id.*

⁸⁸ *Id.* at 221.

On appeal the District of Columbia Circuit held that the submission of both defenses of denial and entrapment was proper.⁸⁹ The court reasoned that "[t]he defenses were alternative but not inconsistent. It was consistent with the defendant's denial of the transaction to urge that if the jury believed [that the transaction] did occur the government's evidence as to how it occurred indicated entrapment."⁹⁰

The alternative defense rationale of *Hansford* was obscured somewhat by the subsequent District of Columbia Circuit case of *United States v. Neuman*.⁹¹ The issue before the court in that case was "whether the defense of entrapment was properly raised over [defendants'] objection," thereby allowing the government to introduce evidence regarding the criminal predisposition of the defendant.⁹² In *Neuman*, the trial court ruled that questioning of certain witnesses by the defense had the effect of implicitly raising the entrapment defense.⁹³ The defendant was convicted and he appealed.⁹⁴ On appeal, the circuit court recognized that *Hansford* established the rule permitting denial of the crime and a claim of entrapment.⁹⁵ In considering whether entrapment could be raised implicitly by the defendants, the court noted that "a plea of entrapment admits commission of the act charged"⁹⁶

The court's language in *Neuman* is confusing in light of the court's language in *Hansford*. Irrespective of whether the simultaneous assertion of the two defenses should be permitted, it is difficult to conceive how a plea that admits the crime can be consistent with a denial of the crime. Consequently, while acknowledging the "defendant may deny all" rule, the court in *Neuman* seems to have undermined the rationale of that rule as articulated in *Hansford*.⁹⁷

Stronger support for the "defendant may deny all" rule was supplied by the Ninth Circuit case of *United States v. Demma*.⁹⁸ *Demma*, decided *en banc*, held that a defendant may deny any or all elements of the crime charged and still be able to claim entrapment.⁹⁹ In so holding, *Demma* overruled the prior Ninth Circuit rule, which originated in *Eastman v. United States*.¹⁰⁰ In *Eastman*, the

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 436 F.2d 285 (D.C. Cir. 1970) (*per curiam*), *cert. denied*, 401 U.S. 974 (1971).

⁹² *Id.* at 286. Defense counsel asked questions of witnesses suggestive of an entrapment defense. *Id.* at 287. The court held that in such a situation, the judge should require the attorney either to plead entrapment (thus allowing the government to present evidence on the defendant's predisposition) or to abandon such suggestive questioning. *Id.*

⁹³ *Id.* at 286.

⁹⁴ *Id.*

⁹⁵ *Id.* at 286 n.1.

⁹⁶ *Id.* at 286 (footnote omitted).

⁹⁷ Indeed, a case from another circuit criticized the reasoning in *Hansford*. In *Ortega v. United States*, 348 F.2d 874 (9th Cir. 1975), the court stated that "[p]erhaps it is a matter of semantics, but we believe the defense of entrapment (i.e., 'I only did it because the government agent induced me to do it.') is inconsistent with the defense 'I didn't do it.'" *Id.* at 875 (original emphasis).

⁹⁸ 523 F.2d 981 (9th Cir. 1975) (*en banc*).

⁹⁹ *Id.* at 985.

¹⁰⁰ 212 F.2d 320 (9th Cir. 1954).

court had held that it was impermissibly inconsistent for a defendant to deny the crime and claim entrapment simultaneously.¹⁰¹ Subsequent Ninth Circuit cases extended the holding in *Eastman* to require a defendant to admit the crime charged in order to assert entrapment.¹⁰² The *Demma* court treated the "Eastman rule" as being the "defendant must admit all" rule.¹⁰³

In *Demma*, the defendants were charged with conspiracy to import and distribute heroin.¹⁰⁴ Each defendant admitted that he agreed to import and distribute, but they all denied any criminal intent, arguing that they believed they were working for the government.¹⁰⁵ At trial, the district court refused to permit the defendants to rely on entrapment because they had not admitted the crime.¹⁰⁶

The Ninth Circuit reversed,¹⁰⁷ however, and justified its decision on three grounds. The court first asserted that in certain situations the *Eastman* rule conflicted with Supreme Court authority.¹⁰⁸ The court noted that the *Eastman* rule required a defendant to admit both the physical acts of a crime and any necessary mental element in order to claim entrapment.¹⁰⁹ The *Demma* court claimed that requiring concession of a mental element was contrary to the Supreme Court's opinion in *Sorrells v. United States*.¹¹⁰ The court stated that the decision in *Sorrells* dictates that "whenever the element of non-entrapment is put in issue," the government bears the burden of proving beyond a reasonable doubt that the acts of the crime charged were non-entrapped acts.¹¹¹ The *Demma* court observed that this requirement of *Sorrells* was violated by the *Eastman* rule whenever a defendant wishing to claim entrapment was charged with a crime that involved a mental element which he was unwilling to concede.¹¹² By requiring a defendant to forego an entrapment defense in order that he might deny a mental element, the *Demma* court reasoned that the government was relieved of the burden of proof as to non-entrapment.¹¹³ The court concluded, therefore, that the *Eastman* rule was incompatible with *Sorrells*.¹¹⁴ This conflict with *Sorrells* was one reason why the court rejected *Eastman*.¹¹⁵

¹⁰¹ *Id.* at 322. See text at notes 33-40 *supra*.

¹⁰² See, e.g., *Ortega v. United States*, 348 F.2d 874, 876 (9th Cir. 1965). See text at notes 42-47 *supra*.

¹⁰³ See *Demma*, 523 F.2d at 984.

¹⁰⁴ *Id.* at 982.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Demma*, 523 F.2d at 982. Although the *Demma* court refers to *Eastman* as being in conflict with *Sorrells v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958); and *United States v. Russell*, 411 U.S. 423 (1973), its discussion of the last two cases is limited to only passing references.

¹⁰⁹ *Demma*, 523 F.2d at 982.

¹¹⁰ 287 U.S. 435 (1932).

¹¹¹ *Demma*, 523 F.2d at 983.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 982.

¹¹⁵ *Id.*

As a second reason for discarding the *Eastman* rule, the court stated that the basis of the rule, the "inconsistency theory," would not support its application where the defendant does not deny the crime.¹¹⁶ The "inconsistency theory" provides that because a claim of entrapment applies only when a crime has been committed, it is inconsistent for a defendant to deny the crime and to claim entrapment simultaneously.¹¹⁷ The *Demma* court found, however, no inconsistency where a defendant refrains from testifying and argues that the government has not met its burden of proving that the defendant committed the crime, or, if this burden is satisfied, that the government has failed to show adequately that the defendant was not entrapped.¹¹⁸ Thus, the court determined that it was permissible for a defendant to claim entrapment provided he has not denied the crime.

The third basis for the *Demma* court's rejection of the *Eastman* rule was that the "inconsistency theory" was "seriously infirm."¹¹⁹ The court noted that inconsistent defenses generally may be asserted in criminal trials and that there is no justification for an exception with regard to entrapment.¹²⁰ A rule permitting inconsistent defenses, the court said, is supported by "the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental protection."¹²¹ Thus, the court concluded that even where the defendant denies that he committed the acts with which he is charged, the entrapment defense should not be precluded merely because it is inconsistent with denial.¹²²

The *Demma* court devoted a considerable portion of its opinion to justifying its decision to overrule *Eastman*. Much of its analysis, however, does not support the sweeping new rule that the court adopted. While the first two of its arguments provide reasons to discard the *Eastman* rule, they do not provide support for the "defendant may deny all" rule, adopted in *Demma*. First, even the Ninth Circuit conceded that its *Sorrells* argument, rather than supporting the rule adopted, militated only against a rule requiring a defendant's admission of a mental element.¹²³ It did not establish the impropriety of a rule that requires the defendant to admit physical elements of the crime. Indeed, the *Sorrells* argument would support a rule that required a defendant claiming entrapment to admit any physical acts and to refrain from denying any mental element. Moreover, the court's second argument is similarly limited. While the court showed that the inconsistency theory does not necessitate a rule requiring

¹¹⁶ *Id.* at 984.

¹¹⁷ *Id.* at 982.

¹¹⁸ *Id.* at 984.

¹¹⁹ *Id.* at 985.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See text at notes 109-12 *supra*.

that the defendant admit the crime, the court did not demonstrate that the theory permits the defendant to deny the crime.¹²⁴ Thus, the "inconsistency theory" is at odds with the *Demma* court's broad rule permitting even a defendant who actively denies the crime to assert an entrapment defense.

It is only the court's third argument that supports its rule that the entrapment defense should be available even to a defendant who denies the crime. This argument asserts that modern criminal jurisprudence dictates that a defendant in a criminal case should be provided with every reasonable protection.¹²⁵ Consequently, it suggests a balancing process. On one side of the balance is the concern that our system of justice must provide sufficient protection to criminal defendants by allowing them to plead alternative defenses. On the other side are concerns that allowing inconsistent defenses will confuse the jury¹²⁶ and subvert the search for truth.¹²⁷ By favoring a strong protection of criminal defendants, the "defendant may deny all" rule implicitly discounts the second set of concerns as speculative or minimal. These concerns are, however, of great importance to the justice system. By permitting a defendant to claim that he was entrapped into those physical acts which he asserts he did not do, the "defendant may not deny" rule grants the defendant a license to commit perjury. For example, a defendant could not be telling the truth if he claimed that he would not have given an agent narcotics except for the importuning of the agent and also claimed that he never engaged in any transaction with the agent. In addition, the defendant is permitted to obscure the truth by confusing the jury. Although adequate protection must be accorded to criminal defendants, the above concerns should not be ignored.

D. Permitting the entrapment defense provided there is no testimony too inconsistent with that defense ("testimony not too inconsistent" rule)

An alternative approach has evolved in the Fifth Circuit. The current approach of the Fifth Circuit is to allow a defendant to assert entrapment provided that his testimony is "not too inconsistent" with that defense.¹²⁸ This test attempts, in effect, to balance the various policy factors surrounding this issue on a case by case basis and extends the "defendant may not deny" rule. This approach is best illustrated by a review of important Fifth Circuit cases. In its earliest cases, the Fifth Circuit declared that the defense of entrapment was predicated on an assumption that the crime charged was committed.¹²⁹

¹²⁴ See text at note 116 *supra*.

¹²⁵ *Demma*, 523 F.2d at 985.

¹²⁶ See *Eastman v. United States*, 212 F.2d 320, 322 (9th Cir. 1954).

¹²⁷ See *Sears v. United States*, 343 F.2d 139, 143 (5th Cir. 1965); *Henderson v. United States*, 237 F.2d 169, 172 (5th Cir. 1956).

¹²⁸ See, e.g., *United States v. Groessel*, 440 F.2d 602, 605 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971); *Sears v. United States*, 343 F.2d 139, 143 (5th Cir. 1965); *Henderson v. United States*, 237 F.2d 169, 172-73 (5th Cir. 1956).

¹²⁹ See, e.g., *Hamilton v. United States*, 221 F.2d 611, 614 (5th Cir. 1955).

Therefore, the Fifth Circuit originally addressed the inconsistent entrapment defense issue by stating that the defense of entrapment is "not available where . . . the defendant denies the very acts upon which the prosecution and the defense are necessarily predicated."¹³⁰

The first thorough reconsideration of this rule of law occurred in the case of *Henderson v. United States*.¹³¹ In *Henderson*, the defendant was charged with conspiracy to distill non-taxpaid whiskey.¹³² At the trial, the defendant relied on two defenses. First, he claimed that he was entrapped into the overt acts with which he was charged.¹³³ Second, he denied that he was a party to any conspiracy.¹³⁴ The trial judge refused to instruct the jury on entrapment because he believed that the defendant's denial of the conspiracy precluded an assertion of entrapment.¹³⁵ The defendant was convicted and appealed.¹³⁶ In considering the case on appeal, the Fifth Circuit reversed the ruling of the trial court.¹³⁷ The court reasoned that "[t]he common goal of all trials . . . is to arrive at the truth, and it would seem that inconsistent defenses should be permitted or not permitted according to whether they might help or hinder a search for the truth. Perhaps that may depend upon the degree of inconsistency."¹³⁸ The court noted that proof of entrapment may not be so repugnant to proof of the defendant's innocence that proof of one necessarily disproves the other.¹³⁹ The court found the defenses in the case at bar to be sufficiently consistent to allow the defendant to argue both of them.¹⁴⁰ The court allowed the defendant to claim entrapment as to the overt acts of conspiracy and still deny that he was a party to any conspiracy.¹⁴¹

The next important case in the Fifth Circuit arose in circumstances similar to those of *Henderson*. In *Sears v. United States*,¹⁴² the defendant also was indicted for conspiracy in regard to an illegal still.¹⁴³ The defendant, a sheriff, was charged with agreeing to furnish "protection"¹⁴⁴ for the still in exchange for a

¹³⁰ *Rodriguez v. United States*, 227 F.2d 912, 914 (5th Cir. 1955). This statement from *Rodriguez* is either dictum or an alternate holding since the court found insufficient evidence to raise entrapment. *Id.* The Fifth Circuit, however, in *Marko v. United States*, 314 F.2d 595, 597-98 (5th Cir. 1963), held in accord with the *Rodriguez* decision and quoted the above language.

¹³¹ 237 F.2d 169 (5th Cir. 1956).

¹³² *Id.* at 170.

¹³³ *Id.* at 173.

¹³⁴ *Id.*

¹³⁵ *Id.* at 171.

¹³⁶ *Id.* at 170.

¹³⁷ *Id.* at 173.

¹³⁸ *Id.* at 172.

¹³⁹ *Id.* at 173.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² 343 F.2d 139 (5th Cir. 1965).

¹⁴³ *Id.* at 140.

¹⁴⁴ The "protection" referred to was warning the informant of any law enforcement investigations. *Id.* at 141.

bribe.¹⁴⁵ At trial, certain testimony by government witnesses suggested that the defendant may have been entrapped. For example, government agents testified that they had hired an informant with the understanding that he would be paid only if a conviction resulted.¹⁴⁶ The informant testified that it was he who initiated discussion about the bribe and that the defendant was reluctant at first to accept it.¹⁴⁷ When the defendant took the stand, however, he did not claim he had been entrapped. Instead, he denied ever accepting money from the informant and denied any knowledge of or participation in the alleged conspiracy.¹⁴⁸ Nevertheless, at the end of the trial, the defendant requested an instruction on entrapment based on the testimony of the prosecution witnesses.¹⁴⁹ The district court refused to instruct the jury on entrapment.¹⁵⁰

The Fifth Circuit reversed.¹⁵¹ It stated that a defendant is entitled to have the jury instruction adjusted to the evidence.¹⁵² The *Sears* court reasoned that where the government's case presents substantial evidence of entrapment, the defendant may insist that the jury be "instructed that if they find he committed the acts charged, they must further consider whether he was entrapped into them."¹⁵³ The court added that by making the government establish its whole case, the defendant should not be precluded from a possibly valid defense.¹⁵⁴ Thus, by allowing the defendant to claim entrapment if the government's case introduces the issue, the *Sears* decision argues that a defendant should be able to put the government to its proof.¹⁵⁵

Although the cases arose in factually similar circumstances, *Sears* and *Henderson* are directed at two different situations. *Henderson* controls when a defendant charged with conspiracy admits overt acts¹⁵⁶ and claims entrapment as to them, but denies being a party to any conspiracy.¹⁵⁷ In such a case, *Henderson* holds that the defendant may claim entrapment with respect to the overt acts.¹⁵⁸ In *Sears*, the defendant denied the overt acts¹⁵⁹ but was entitled to

¹⁴⁵ *Id.* at 140-41.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 141.

¹⁴⁸ *Id.* at 143.

¹⁴⁹ *Id.* at 142.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 143.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 143-44.

¹⁵⁶ Two subsequent cases have stated that *Henderson* applied when the overt acts admitted by the defendant are culpable acts and not merely innocent ones. *United States v. O'Leary*, 529 F.2d 1202, 1203 (5th Cir. 1976) (*per curiam*); *United States v. Newcomb*, 488 F.2d 190, 192 (5th Cir.) (*per curiam*), *cert. denied*, 417 U.S. 931 (1974).

¹⁵⁷ *Henderson*, 237 F.2d at 173.

¹⁵⁸ *Id.*

¹⁵⁹ *Sears*, 343 F.2d at 143 (defendant's "primary defenses [were] that he never committed any of the acts charged.").

have an entrapment instruction given to the jury since it was the government's own evidence that introduced the issue of entrapment.¹⁶⁰ Thus, the court in *Sears* determined that it was not impermissibly inconsistent for the defendant to rely on the evidence of entrapment introduced by the government.¹⁶¹

Until 1971, the Fifth Circuit had not ruled directly on whether a defendant who refrains from denying the acts charged is entitled to assert entrapment.¹⁶² Any possible question as to the court's position on the matter was resolved in *United States v. Groessel*.¹⁶³ In *Groessel*, the defendant was indicted for conspiracy to transport stolen vehicles in foreign commerce.¹⁶⁴ Sale of the vehicles was to be made to a government agent.¹⁶⁵ The defendant did not testify and the trial court instructed the jury on entrapment.¹⁶⁶ The defendant was convicted and appealed to the Fifth Circuit.¹⁶⁷ He claimed that, among other errors, the trial judge's jury instructions on entrapment were incorrect and that because the evidence of entrapment was so strong the judge should have found entrapment as a matter of law.¹⁶⁸ The government countered that the defendant was not entitled to raise entrapment since he did not admit the crime.¹⁶⁹ The Fifth Circuit held that because the defendant did not take the stand and deny the crime charged, the defense of entrapment was available to him.¹⁷⁰

The latest major development in the Fifth Circuit came in the case of *United States v. Greenfield*.¹⁷¹ In *Greenfield*, the defendant, a physician, was charged with ten counts of distributing a controlled substance because he had written ten prescriptions over a five month period to a government investigator.¹⁷² The defendant testified that he gave the prescriptions because he believed there was

¹⁶⁰ *Id.*

¹⁶¹ *Id.* It does not seem to be of any significance that *Sears* arose from a conspiracy charge. Nevertheless, some subsequent courts found the importance of *Sears* related to the conspiracy charge. *United States v. Pickle*, 424 F.2d 528, 528 (5th Cir. 1970); *McCarty v. United States*, 379 F.2d 285, 287 (5th Cir.), *cert. denied*, 389 U.S. 929 (1967); *Beatty v. United States*, 377 F.2d 181, 186 n.9 (5th Cir.), *rev'd on other grounds*, 389 U.S. 45 (1967). Several other courts, however, have noted that *Sears* derives its importance from the court's determination that the government's case injected a substantial amount of entrapment evidence. *United States v. Greenfield*, 554 F.2d 179, 182 (5th Cir. 1977), *cert. denied*, 439 U.S. 860 (1978); *United States v. Morrow*, 537 F.2d 120, 138-39 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); *United States v. O'Leary*, 529 F.2d 1202, 1203 (5th Cir. 1976) (*per curiam*); *United States v. Newcomb*, 488 F.2d 190, 191-92 (5th Cir.) (*per curiam*), *cert. denied*, 417 U.S. 931 (1974).

¹⁶² The assumption that there is sufficient evidence to warrant submission of the entrapment issue to the jury is continued.

¹⁶³ 440 F.2d 602 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971).

¹⁶⁴ *Id.* at 604.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 605.

¹⁶⁷ *Id.* at 604.

¹⁶⁸ *Id.* at 605.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ 554 F.2d 179 (5th Cir. 1977), *cert. denied*, 439 U.S. 860 (1978).

¹⁷² *Id.* at 180-81.

a legitimate medical reason for them.¹⁷³ The trial court had withheld an entrapment instruction because it determined that the defendant had denied the crime.¹⁷⁴ The Fifth Circuit reversed.¹⁷⁵

In its opinion, the circuit court stated first that "[t]he rationale for the ['defendant may not deny'] rule appears to be that to deny the very acts upon which the prosecution is predicated and at the same time plead the defense of entrapment, which assumes that the acts charged were committed, is too inconsistent."¹⁷⁶ The court noted, however, that two exceptions to this rule were carved out by *Sears* and *Henderson*.¹⁷⁷ To determine the scope of these exceptions, the court quoted language from *Henderson* and *Sears* that indicated that the decisions in those cases were dictated by two concerns: (1) the ascertainment of truth and (2) a judgment that reliance on entrapment would not be too inconsistent with the defendant's other defenses.¹⁷⁸

The *Greenfield* court then applied those policy concerns to the case at bar. The *Greenfield* court emphasized the uniqueness of the facts in the case.¹⁷⁹ The court observed that the defendant admitted to the *physical acts* alleged to constitute the crime and that the only issue was the defendant's intent.¹⁸⁰ The court held that the defendant may deny this mental element by claiming that he wrote the prescriptions thinking there to be a legitimate medical purpose while arguing in the alternative that "to the extent that he may have prescribed without a legitimate medical purpose, he was not predisposed to do so" and, therefore, was entrapped.¹⁸¹

Because no subsequent court has based a decision on *Greenfield*, its significance is not yet known.¹⁸² By emphasizing the specific facts in *Greenfield*,

¹⁷³ *Id.* at 181.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* The court limited its holding to the fact that under the circumstances, the alternative defenses of entrapment and lack of intent were not so inconsistent as to preclude raising both of them. *Id.* at 183. The court, however, left the decision of whether to allow both defenses at the retrial to the trial court after evaluating the evidence presented there. *Id.* at 181.

¹⁷⁶ *Id.* at 182. The court then mentioned the criticism in *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*). *Greenfield*, 554 F.2d at 182.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* at 183.

¹⁸⁰ *Id.* at 182-83.

¹⁸¹ *Id.* at 183.

¹⁸² A recent Fifth Circuit case, *United States v. Hill*, 626 F.2d 1301 (5th Cir. 1980), cited *Greenfield*, even though there was insufficient evidence to warrant consideration of the defendant's entrapment defense. *Id.* at 1303 & n.2. In a footnote, the *Hill* court commented on the "disarray" in the circuit's law with respect to the propriety of simultaneous defenses of entrapment and lack of knowledge or intent. *Id.* at 1303 n.2. The court read the *Greenfield* case as "allowing submission of entrapment as [an] alternative to [the] defense of lack of criminal intent." *Id.*

Even though the effect of *Greenfield* may be undetermined, the opinion of two subsequent Fifth Circuit panels is very definite. In *United States v. Daniels*, 572 F.2d 535 (5th Cir. 1978), the court was able to treat the case at bar under the rule of *Sears* permitting a defendant to argue entrapment even though denying the crime because the government's own evidence raised the

the Fifth Circuit seems to have avoided a general rule that a defendant may deny any mental element of a crime and still assert entrapment. Whether an alternative rule may be discerned from *Greenfield* is not clear. The decision in *Greenfield* may rest on a conclusion that the evidence supporting a denial of the crime¹⁸³ was the same, or virtually the same, evidence that supported entrapment.¹⁸⁴ Alternatively, the court may have determined that it was not too inconsistent to argue that the acts alleged and admitted did not constitute a crime under the statute involved but that such acts were the result of entrapment.¹⁸⁵ Either of these interpretations would fit under the "testimony not too inconsistent" rule. In fact, the second interpretation was the reasoning used in the two First Circuit cases of *United States v. Caron* and *United States v. Rodrigues*.¹⁸⁶ Those cases, in applying the "defendant may not deny" rule, held that it was permissible for a defendant to urge entrapment as to the acts charged which he claims do not constitute a crime.¹⁸⁷

Although the Fifth Circuit cases may seem like an entangled web of confusing precedent, there is a unifying thread. "[S]ince the common goal of all trials is the ascertainment of truth, inconsistent defenses should be permitted or not permitted according to whether they might help or hinder the search for truth."¹⁸⁸ Thus, the "testimony not too inconsistent" rule has a defined objective, the ascertainment of truth.

The "testimony not too inconsistent" rule is superior to both the "defendant must admit all" and "defendant may not deny" rules in advancing an appropriate objective while ensuring that the government prove its case. The

issue of entrapment. *Id.* at 542. Nonetheless, the court earlier stated that the inconsistency theory supporting the Fifth Circuit's general position "justifiably has been attacked by this and other courts." *Id.* The latest criticism came in the case of *United States v. Brooks*, 611 F.2d 615 (5th Cir. 1980). Although entrapment was not an issue on appeal, the court noted that "[t]he continued cogency of [the Fifth Circuit rule based on the inconsistency theory] has been debated, . . . but as a panel we are bound by the law of the circuit." *Id.* at 618. Thus, panels in the Fifth Circuit may be presaging change in the rule.

¹⁸³ Such evidence would be that the government agent led the defendant to believe there was a legitimate medical purpose for the prescriptions. . .

¹⁸⁴ Such evidence would be that the government agent so importuned the defendant that the defendant gave the prescriptions when he was not predisposed.

¹⁸⁵ See *United States v. Rodrigues*, 433 F.2d 760, 761, (1st Cir. 1970).

It is possible that the *Greenfield* decision implicitly undermines the Fifth Circuit rule. The court stated that it does "not believe it is impermissibly inconsistent . . . to argue that to the extent that the jury may find culpability on [the defendant's] part, he was entrapped." *Greenfield*, 554 F.2d at 183. Although the *Greenfield* court was addressing only the question of a mental element, the reasoning is similar to that in *Hansford v. United States*, 303 F.2d 219, 221 (D.C. Cir. 1962) (*en banc*), where the District of Columbia Circuit validated inconsistent entrapment claims. See text at notes 85-90 *supra*.

¹⁸⁶ See *United States v. Caron*, 588 F.2d 851, 852 (1st Cir. 1978); *United States v. Rodrigues*, 433 F.2d 760-61 (1st Cir. 1970). By admitting facts sufficient to maintain his conviction, the defendant is entitled to claim entrapment even if he claims that the acts charged do not constitute a crime.

¹⁸⁷ *Caron*, 588 F.2d at 852; *Rodrigues*, 433 F.2d at 761.

¹⁸⁸ *Sears*, 343 F.2d at 143.

"defendant must admit all" rule provides no rationale as to why a defendant must admit the crime before he may rely on entrapment, and by requiring a defendant relying on an entrapment defense to admit all elements of the substantive crime, that rule relieves the government of its burden of proof. As for the "defendant may not deny" rule, although it correctly acknowledges the logical inconsistency of a defendant claiming entrapment as to a crime he has denied, that rule also may operate to ease the burden of the government somewhat. The rule forces a defendant wishing to rely on entrapment either to refrain from taking the stand, thus presumably making the government's case easier, or to take the stand and, assuming an effective cross examination, admit the crime. Thus, the "defendant may not deny" rule may provide inadequate protection for a criminal defendant or hinder the search for truth by preventing the fact finder from hearing the whole story.

The "testimony not too inconsistent" rule and the "defendant may deny all" rule are similar in that both rules seek to advance a defined objective in a logical and effective way. The latter rule, however, in advancing its objective of providing adequate protection of a criminal defendant ignores the objective of the former of advancing the search for truth. The "defendant may deny all" rule, which allows a defendant to claim entrapment as to crimes he has denied, sanctions a defendant's perjury and obfuscation of truth. Thus, the "testimony not too inconsistent" rule is the best of the four rules discussed because it provides the most equitable balance. The rule, however, may not adequately advance the truth seeking process in one situation. The "testimony not too inconsistent" rule would bar a defendant from asserting entrapment where he provides testimony which acts both to deny the crime and establish entrapment. Therefore, to rely on entrapment, the defendant would have to forego providing such testimony. Conversely, to provide that testimony, the defendant could not rely on entrapment. Thus, the jury would either not have evidence it should consider or have a viable defense withdrawn from its consideration. In either event, the truth seeking process would be hindered under the "testimony not too inconsistent" rule.

II. A PROPOSAL: PRESENCE OF A SUFFICIENT LOGICAL BASIS FOR THE ENTRAPMENT DEFENSE AS A PREREQUISITE TO THAT DEFENSE

As shown above, each of the four rules discussed presents some problems in addressing the issue of how the nature of the defendant's testimony must relate to the crime in order for the defendant to be permitted to argue entrapment. Therefore, this note will propose a rule that addresses the issue more satisfactorily. Because the "testimony not too inconsistent" rule is the most preferable of the four rules discussed, the proposed rule is a refinement of that rule. The proposed rule would extend the Fifth Circuit approach by incorporating a general rule that a defendant may deny a mental element of a crime

and still assert entrapment.¹⁸⁹ The rationale of the rule is that a defendant is entitled to raise the entrapment defense provided that the trial record supplies a sufficient logical basis for it. This basis may exist in three situations: (1) where the defendant has admitted the crime or merely refrained from denying the crime, (2) where the defendant does not deny the requisite physical acts but does deny a mental element of the crime charged, (3) where the defendant has denied the physical acts but the government's case has introduced substantial evidence of entrapment. The proposed modification covers all three of these situations.

The proposed rule would incorporate the concept of permitting a defendant to argue entrapment provided he does not deny the physical acts and in spite of his denial of any mental element. In addition, the proposed rule adopts the holding in *Sears*¹⁹⁰ that the defendant is entitled to assert entrapment whenever the government's case introduces substantial evidence of entrapment.

The proposed rule reconciles several important concerns. First, the defendant is never required to admit any crime. Thus, any fifth amendment question

¹⁸⁹ In fact, two Sixth Circuit cases may already support a rule allowing a defendant denying a mental element to claim entrapment. *Scriber v. United States*, 4 F.2d 97 (6th Cir. 1925), an early Sixth Circuit case, suggests this position in dicta. The *Scriber* case involved a defendant charged with accepting a bribe to permit illegal liquor importation. *Id.* at 97. The defendant was arrested after accepting money, but before the importation occurred. *Id.* In defense, he claimed that he intended to seize the liquor and have those who offered the bribe prosecuted. *Id.* at 97-98. The trial court refused to instruct the jury on entrapment believing that entrapment would be inconsistent with this defense. *Id.* at 98. Although the Sixth Circuit need not have considered the issue because of the defendant's predisposition, *id.*, it disagreed. "In a proper case, it would seem that defendant should have the benefit of this defense, even though such inconsistency exists." *Id.*

The question of denying a mental element arose again in the Sixth Circuit in the case of *United States v. Baker*, 373 F.2d 28 (6th Cir. 1967). In *Baker*, the defendant admitted giving a box containing some pills to a government agent, but sought to interpose two defenses: 1) that he did not know the pills were morphine, and 2) that the agent entrapped him. *Id.* at 29. The court held that it did "not think that in this Circuit the arguable inconsistency between defendant's first and second defenses at trial rules out submission of both to the jury," *id.* at 30, and reversed for a new trial, *id.* at 31.

The Sixth Circuit case of *United States v. Shameia*, 464 F.2d 629 (6th Cir.), *cert. denied*, 409 U.S. 1076 (1972), did not find *Baker* controlling. *Id.* at 630. In *Shameia*, the defendant denied any transaction with the government agents and denied ever having participated in any similar illegal transactions. *Id.* at 629-30. The *Shameia* court distinguished *Baker* since in *Baker* the defendant had admitted delivering the box containing morphine, whereas *Shameia* denied all. *Id.* at 630-31. The court held "that the defendant may not absolutely deny every act necessary to constitute the offense and then claim entrapment on the part of the Government agents." *Id.* at 631.

The subsequent Sixth Circuit case of *United States v. Mitchell*, 514 F.2d 758 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975), presents substantial analytical problems. In *Mitchell*, the defendant was convicted of endeavoring to impede a witness from testifying. *Id.* at 760. The evidence indicated that the defendant had discussed killing the witness with a co-indictee and that the co-indictee, by then a government informer, paid the defendant money to locate the witness. *Id.* The decision in *Mitchell* is unclear, but the defendant apparently denied the motive required for the crime. *Id.* at 760-61. The court held that "[u]nder these circumstances the district judge properly precluded [defendant] from relying on the defense of entrapment." *Id.* at 761. The *Mitchell* decision, however, virtually ignores Sixth Circuit precedent.

¹⁹⁰ 343 F.2d 139, 143 (5th Cir. 1965).

of forcing a defendant to incriminate himself before he may invoke an existing valid defense is avoided and the guarantee that the government must prove all elements of a charged crime is maintained. Second, the truth seeking process is advanced because the defendant may not deny the physical acts into which he seeks to claim he was entrapped. To allow the defendant to deny such acts would provide him with an unwarranted opportunity to confuse the jury. A defendant cannot be telling the truth if he says that he was entrapped into committing acts that he claims he did not commit. A criminal defendant should not have a license to lie. Recent Supreme Court cases have emphasized the truth seeking nature of criminal trials and have stressed that a trial should not condone even a defendant's untruth.¹⁹¹

Finally, a rule permitting a defendant wishing to argue entrapment to deny any mental element will also aid in the truth seeking process. As in the case of *Greenfield*,¹⁹² there may be situations where evidence that appears to be a denial of the requisite mental state may well be evidence of entrapment.¹⁹³ In such cases, the defendant should be allowed to assert both defenses. A defendant should not be required to discern where one defense ends and the other begins. Indeed, the rule of *Henderson*,¹⁹⁴ that a defendant may claim entrapment as to overt acts and deny the existence of any conspiracy, can be thought of as an example of the proposed rule.¹⁹⁵

In discussing the availability of the entrapment defense, courts have noted that in some cases the record will not contain enough evidence indicating entrapment to warrant submission of that issue to the jury without the testimony of the defendant.¹⁹⁶ In such a situation, no matter which of the rules discussed in this note is employed, a defendant must testify to introduce some modicum of evidence of entrapment as a prerequisite to relying on the entrapment defense. By testifying, the defendant opens himself to the rigors of cross examination and impeachment. In this situation, the implementation of the rules

¹⁹¹ See, e.g., *Harris v. New York*, 401 U.S. 222, 224-25 (1971) (illegally obtained confession, inadmissible in the government's case in chief, is permitted to impeach the defendant; privilege to testify does not include right to commit perjury); *Williams v. Florida*, 399 U.S. 78, 82-83 (1970) (defendant may be required to give notice of alibi defense and disclose his alibi witnesses; such a requirement enhances the search for truth); *Walder v. United States*, 347 U.S. 62, 65 (1954) (impeachment use of illegally obtained real evidence is permissible; the defendant may not resort to perjurious testimony).

¹⁹² 554 F.2d 179 (5th Cir. 1977), cert. denied, 439 U.S. 860 (1978). See text at notes 171-75 *supra*.

¹⁹³ Consider, for example, possession of drugs with intent to distribute, or a defendant who alleges that he believed that he was arranging importation of illegal drugs to aid a government investigation. In both of these situations, an entrapment defense may be furthered by the denial of a mental element.

¹⁹⁴ 237 F.2d 169 (5th Cir. 1956). See text at notes 138-41 *supra*.

¹⁹⁵ Whether someone has engaged in a conspiracy or merely has discussed a subject may well be a situation where a claim of entrapment and a denial of the crime merge. A defendant may claim that he never intended to carry out any of the acts discussed and that he never would have discussed them if not for the importuning of the government agent.

¹⁹⁶ See, e.g., *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975) (*en banc*); *United States v. Worth*, 505 F.2d 1206, 1209 (10th Cir. 1974), cert. denied, 420 U.S. 964 (1975).

discussed differs only in respect to what the defendant must admit in order to be permitted to argue entrapment. Assuming that the defendant's testimony provides sufficient evidence of entrapment and that the government pursues vigorous-cross examination, the rules discussed have the following impact on the defendant's testimony. Under the "defendant must admit all" rule, the defendant must, of course, admit every element of the crime. The "defendant may deny all" rule leaves the defendant free to testify as he wishes. The "defendant may not deny" and "testimony not too inconsistent" rules would require the defendant to admit to the crime. Under the proposed rule, however, the defendant is required to admit only the physical acts of the crime.

This result of the proposed rule is proper. Because it is assumed that the prosecution will vigorously cross examine the defendant, a defendant who does not admit the physical acts must deny them. Where, aside from the defendant's testimony, there is insufficient evidence of entrapment, a defendant who has denied the physical acts has undermined the only logical basis for an entrapment defense. Under such circumstances, permitting the defendant to argue entrapment would serve to condone the defendant's perjury and confuse the jury. In situations where the government's case provides significant evidence of entrapment so as to warrant the jury considering the issue, a defendant's denial will not remove the logical basis of the entrapment defense established by the government's case. Thus, a rule that would allow a defendant to argue entrapment only where he refrains from denying any physical act of the charged crime or where the government's own case introduces substantial evidence of entrapment is preferable to other rules adopted by the federal courts.

CONCLUSION

The approaches of the circuits in determining whether a defendant's testimony can preclude the assertion of an entrapment defense may be divided into four positions. One position requires the defendant to admit to the crime before he may assert entrapment with regard to that crime. Another approach allows the entrapment defense to a defendant who refrains from denying the crime. A third position is that the defendant's testimony cannot preclude the defense; he may deny all. The final approach is that of the Fifth Circuit which allows a defendant to urge entrapment provided that his testimony is not too inconsistent with that defense. None of these approaches, however, draws the appropriate balance between the concerns in a trial.

The rule proposed in this note extends the Fifth Circuit approach to allow a defendant to deny any mental element required for the crime charged while preserving his ability to claim entrapment. The proposed rule retains the Fifth Circuit's prohibition of an entrapment defense to a defendant who denies any physical acts of the charged crime, as well as that circuit's principle that the entrapment defense is available where the government's case introduces the ele-

ment of entrapment. The proposed rule answers many of the criticisms leveled at the circuits' various positions, provides a logical and reasoned approach, and should be adopted.

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