In the

Supreme Court of the United States

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UNITED STATES,)
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Appellant,)
)
v.) No. 71-1585
)
RICHARD RUSSELL,)
)
Appellee,)

Washington, D. C.
February 27, 1973

Pages 1 thru 46

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UNITED STATES, :
Appellant, :
v. : No. 71-1585
RICHARD RUSSELL, :
Appellee. :
- - - - - - - - - - - - x

Washington, D. C.

Tuesday, February 27, 1973.

The above-entitled matter came on for argument at 10:35 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PHILIP A. LACOVARA, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C., 20530; for the Appellant.

THOMAS H. S. BRUCKER, ESQ., Second Floor, Hoge Building, Seattle, Washington, 98104; for the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 71-1585, United States against Russell.

Mr. Lacovara, you may proceed whenever you are ready.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

ON BEHALF OF THE APPELLANT

MR. LACOVARA: Mr. Chief Justice, and may it please the Court:

This case, United States against Russell, involves a very important issue in the criminal justice system.

Basically, rather a new defense to criminal liability is to be created that will focus exclusively on the nature of the conduct of an investigative agent in uncovering and detecting the criminal enterprise.

The Court of Appeals for the 9th Circuit, from which this case comes, has held that such a defense should be created.

The facts are basically simple and there are very few, and probably no relevant controversies about the facts.

On December 7, 1969, an undercover agent for the Bureau of Narcotics and Dangerous Drugs, accompanied by an informant, went to the home of the respondent, Richard Russell, and there met with Mr. Russell and two other co-defendants in this case, John Connolly and Patrick Connolly.

The agent, in his testimony set forth on page 4 of the Appendix, explained what happened when he went to

Mr. Russell's home.

I told Richard Russell, and John and Pat Connolly that I represented an organization interested in controlling the manufacture of methamphetamine, that is the dangerous drug involved here, and that I represented the organization in the Northwest area, and I wanted to meet with the people who were manufacturing the methamphetamine, and I wanted to obtain methamphetamine from them.

The agent later explained that the terms of his business proposition to these people, whom he said he understood to be manufacturing methamphetamine, was that he would supply one of the chemical ingredients in the manufacture of the drug, Phenyl-2-Propanone, in return for half of the output, and he would like to buy the rest of the output for cash.

Without any attempt to disabuse him of his understanding that they were currently manufacturing methamphetamine or to express any reluctance whatsoever to the business proposition the undercover agent put, Patrick Connolly said, "We've been manufacturing methamphetamine since at least May of 1969 and have manufactured about 3 pounds of it."

I might say, for purposes of illustration, that I have been told by the Bureau of Narcotics that the average medically recommended dose of methamphetamine is 5 milligrams, according to the U.S. Pharmacopoeia. The average illicit dose, on the street, is 10 milligrams.

Which means that each gram of methamphetamine will produce approximately 100 illicit doses.

Q How many grams in a pound?

MR. LACOVARA: Four hundred and fifty-three grams in a pound.

As we will see, Mr. Justice Stewart, the amount of methamphetamine involved in this case would be enough for approximately 3500 illicit doses and, perhaps, 7,000 licit doses.

Q Is this the drug that's commonly known as "speed"?

MR. LACOVARA: Yes, sir.

Methamphetamine is "speed." It is a stimulant drug.

The prosecution in this case arises under the Food, Drug and Cosmetic Act. That Act has now been superseded by the 1970 Comprehensive Drug Abuse and Control Act.

Speed remains a controlled drug under the new statute as well.

The agent, however, insisted that he would not provide any of this important ingredient unless and until the three-man partnership whom he confronted provided him with both a sample of the methamphetamine they had already manufactured, and also showed him the laboratory.

Patrick Connolly, then, with the agent, left Mr. Russell's house, brought the agent to his own home, where he showed him some items of laboratory equipment.

Before they left Russell's house, John Connolly gave the agent a sample which he said had come from the last batch that had been manufactured.

I emphasize that at no time did Richard Russell, in whose presence this all occurred, attempt to dissociate himself from the enterprise.

Pursuant to the arrangement, the agent returned to Russell's house the next day, December 8th, but was told by Russell that Russell and Patrick Connolly had been unable to get the other chemicals necessary to manufacture the methamphetamine because they had arrived too late at the chemical supply store on the afternoon of the 8th.

The respondent's brief indicates that the record shows that Russell and Patrick Connolly had tried to get Phenyl-2-Propanone and it had been refused to them.

I believe the record, on pages 17 and 18, shows that they were going to get the other chemicals and simply arrived too late to get them.

In any event, they said they would get the chemicals the following day, December 9th, and when the agent returned to Mr. Russell's home, the home of the respondent, on the afternoon of December 9th, waited for Mr. Russell and Mr. Connolly.

The group then set out for Patrick Connolly's home where the laboratory was located, and after Patrick Connolly and Richard Russell began the chemical process, by adding a variety

of other chemicals to a flask, the agent, then, upon their request, provided them with a bottle of 100 grams of Phenyl-2-Propanone.

The reaction process took about two hours, according to the agent's testimony, from about 7:30 until 9:30.

After that, began the separate phase, the drying and crystallization phase, which was done on a hotplate with a ladies home hairdryer.

At about 12:40, one-fourth of the methamphetamine had been dried, that is after the beaker, or flask, had been chemically treated.

Mr. Connolly poured the liquid into four separate flasks and each flask was then dried on a pyrex baking dish, separately.

So, at 12:40, the first transfer actually took place, and that was approximately 10 grams, or enough for about 1,000 doses, illicit doses.

Agent Shapiro, the undercover agent, left the Connolly home, left Mr. Connolly and Russell there, and unbeknownst to them, secured the methamphetamine that he had been given in his office in Seattle.

He returned the next morning at about 8:00 o'clock. The respondent and Pat Connolly were still there drying the rest of the speed.

After Russell succeeded in scraping off the remainder,

or the crystalline form of the drug, into three more bags of methamphetamine, Patrick Connolly said to the agent, "You may have the rest of the batch," and Russell, according to the testimony, interjected, "After I get my half."

So the agent was given one of the remaining three bags. Richard Russell, the respondent, took the other two bags.

The agent offered to buy the two bags for cash and Russell said that he had already made arrangements to sell one of those bags for cash.

In the course of the drive back to the respondent's home, Russell agreed to sell the remaining bag, the fourth bag, to the undercover agent for cash, and at his home the agent paid him \$60 and purchased approximately 9½ grams of methamphetamine.

Q Was it the same agent all the way through, Shapiro?

MR. LACOVARA: Same agent all the way through.

Q Only one government agent?

MR. LACOVARA: Only one agent involved in the actual transaction, yes, sir.

About three weeks later, Agent Shapiro contacted Patrick Connolly again at Connolly's home which is where the laboratory was located, asked him if he was still interested in the business arrangement, and Connolly replied that he was still interested but in the interim he had obtained two more

bottles of Phenyl-2-Propanone, which was the commodity the agent was willing to supply, and that he wouldn't be finished with those for a few days.

A few days later, armed with a search warrant and an arrest warrant, Agent Shapiro and other Federal agents raided Mr. Connolly's home laboratory and seized over 100 items that were admitted at the trial. Included were chemical supply company catalogs, a variety of chemicals, laboratory equipment, and three bottles of Phenyl-2-Propanone. One was the 100 gram bottle that the agent had supplied and which he was able to identify. A second empty bottle was a 500 gram bottle, labeled P-2-P, which chemical analyssis had showed actually contained the drug. And, the third bottle, the 100-gram bottle, of P-2-P was still half full.

Mr. Connolly was indicted on five counts involving violations of the Food, Drug and Cosmetic Act.

Mr. Russell was charged with three violations: manufacturing, processing and compounding, was one count, delivering the controlled drug at the time the first transfer had taken place, and the third count, selling a controlled drug, at the time that the agent purchased the final bag from him.

Now, the defense at the trial was entrapment. That was the only defense.

Respondent, however, did not testify.

Patrick Connolly did. The jury found him guilty, however, on all counts.

Mr. Connolly, in his testimony, admitted having told the agent that they had manufactured at least three pounds of speed before the agent appeared on the scene. He also acknowledged that he had told the agent that he, Patrick, handled the chemical reaction phase of the business, that his brother John normally did the drying and crystallization phase, and that Richard Russell, the respondent here, took care of the sales in return for 50% of the profits.

The case was submitted to the jury under standard entrapment instructions.

Q Did Shapiro do anything when this was being made, other than to furnish it? Do I understand he did nothing else?

MR. LACOVARA: No, sir. He was asked, on cross-examination, what he had done. He said he may have picked up some pieces of aluminum foil, aluminum being one of the ingredients, after they had fallen to the floor and put them in the flask, but he said he did not provide any other assistance, and he did not advise or instruct the men how to go about completing the reaction, or in any other way. He did not assist in the crystallization either.

So, his only participation -- and I believe this is agreed -- was to supply the 100 grams of Phenyl-2-Propanone.

The jury, under the standard entrapment instructions,

which focus on whether there is a reasonable doubt that the defendant may have been predisposed to commit the crime before the undercover agent appeared on the scene, and the jury returned verdicts of guilty on all counts against both of the defendants who appeared for trial.

Q Are the instructions that were actually given by the trial judge the ones that appear on page 17?

MR. LACOVARA: Yes, sir. They are on page 17.

Q Seventeen and carrying over onto page 18.

MR. LACOVARA: Yes. The first two paragraphs were contained both in the defendant's proposed instructions and in the Government's proposed instructions. They are the standard Mathis and Devitt --

Q The first two paragraphs don't say anything. Now, this is the entrapment instruction and it is quite simple. The defendants assert they were victims of entrapment as to the crime charged --

Are you talking about those?

MR. LACOVARA: No, the first three paragraphs, beginning, "Where a person has no previous intent...", and, "On the other hand, where a person already has the willingness and the readiness to break the law, the mere fact that the government agent provides what appears to be a favorable opportunity is not entrapment."

Q Those are agreed-upon instructions by the parties?

MR. LACOVARA: Yes, sir.

The objection on the part of the defense at the trial, as I read the record, anyway, is that the judge did not sufficiently define that the Government had the burden of showing propensity beyond a reasonable doubt.

Q We don't seem to have that here in the Appendix, do we?

MR. LACOVARA: The objections?

Q Or any offered instructions, any --

MR. LACOVARA: That's not on the Appendix. It is in the record, however. And the case as it comes to this Court does not rest on the instructions.

Q Well, except that they were erroneous, the Court of Appeals held.

MR. LACOVARA: No, no, sir.

The Court of Appeals held that the instructions correctly stated the traditional law of entrapment.

Q Yes.

MR. LACOVARA: And, I'll come now to the holding of the Court of Appeals.

Q The Court of Appeals added another layer of doctrine as an independent doctrine.

MR. LACOVARA: Exactly.

The Court of Appeals --

Q Before you go on with that, may I ask you a factual

-- about a factual matter? Do I understand correctly, from what you said, that on the second day, or on the later day, when the agent -- the undercover agent -- came back, he stood by and witnessed the activity of making this drug from ingredients which the respondent here had secured from an independent source?

MR. LACOVARA: Yes, sir.

Q And on that day, he was witnessing illegal activity in which he had no participation of any kind?

MR. LACOVARA: That's right.

I should also point out that the Food, Drug and Cosmetic Act specifically provides that Federal and State agents are not covered by the normal prohibitions against possession or dispensing or even manufacturing controlled drugs. So, nothing that the agent did was in any way illegal. And the only thing he did was deliver one of the ingredients in the manufacture of the drug.

Q But that was in the first batch, not in the second batch.

MR. LACOVARA: Well, it was all manufactured from the same ingredient.

As I say, the process took a series of hours. He arrived on the evening of the 9th and the chemical reaction began at that time.

Shortly after midnight, 12:40 a.m., on the 10th, he

got the first quarter of the batch, which had been dried, and he left and brought that to his office.

He came back the following morning and Russell and Pat Connolly were still working on the remainder of the methamphetamine, and at that point the agent was given a second bag and purchased the third bag. And the record shows that the respondent wound up with the fourth bag.

Q But some of this was made from this one essential ingredient which the respondent had obtained on his own from some other source?

MR. LACOVARA: Well, no, there was delivered to the agent before he provided them with any Phenyl-2-Propanone, a sample which one of the partnership said had come from the last batch they had manufactured.

Then, after the batch had been manufactured with the ingredient that the agent supplied, the agent returned to Connolly's home about three or four weeks later to renew the business arrangement and was told that they had since come upon a new source of Phenyl-2-Propanone and didn't need any of his at that time.

But all of the methamphetamine involved in this prosecution comes from a chemical reaction which included the Phenyl-2-Propanone that the agent provided.

That's the posture in which the case is before the Court.

Q As I understand this respondent, Richard Russell, was indicted under three counts only, all having to do with activities on December 10, 1969.

MR. LACOVARA: That's right.

Q And that, concededly, those activities all had to do with the batch, so-called, that was manufactured from the chemical provided by Mr. Shapiro.

MR. LACOVARA: That's right. No question about that.

The evidence of the subsequent availability of Phenyl-2-Propanone was admitted at the trial because it showed, among other things, the availability of this ingredient from other sources.

It was received without objection, I believe.

Q Mr. Lacovara, did the respondent tender any instruction in the District Court on the factual issue of whether or not this Phenyl-2-Propanone was or was not available from sources other than the Government agent?

MR. LACOVARA: No, sir.

The basic argument in the instructions was over who had the burden of proving propensity or lack of propensity to commit the crime.

After the trial, in a memorandum for a new trial, the respondent's counsel argued as a matter of law that the delivery of an ingredient in the manufacture of the methamphetamine constituted entrapment as a matter of law.

That was the position ultimately upheld by the 9th Circuit in this case.

So the case comes to this Court, Mr. Justice Stewart, on a holding as a matter of law, on what are essentially undisputed facts:

The 9th Circuit saying that the standard entrapment standards would not be met in this case because Mr. Russell's predisposition amply shown by the record had been virtually conceded, and in the opinion which is set forth in the Appendix to the petition, the dissenting judge, Judge Trask, actually quotes the portion of respondent's brief in the Court of Appeals conceding that the jury could find under the standard entrapment defense that he was predisposed to the offense.

Q Judge Healey's opinion for the majority of the Court of Appeals sets out by talking about two theories of law and then ends up by saying we are not going to give a label to it and, in any event, we are reversing --

MR. LACOVARA: His two theories, in a nutshell, are these.

First of all, he focuses, generally, on some of the statements made in the separate opinions of the minority in the Sorrells and Sherman cases which are, of course, the two leading entrapment cases.

In those opinions, Justices Roberts and Frankfurter

said that the entrapment defense really ought to focus not on the subjective guilt or innocence of the defendant, or on its predisposition to commit the crime, but, rather, ought to focus only on the nature of the officer's conduct. And if that conduct is intolerable then there ought to be a bar to the prosecution.

I will show in a few moments that that rationale is not applicable to this kind of case anyway.

But, the 9th Circuit said, under one of two theories, the defendant is entitled, as a matter of law, to dismissal of the indictment.

First, they said it is intolerable government conduct to supply contraband to a defendant and then prosecute him for possession of the contraband.

The court said, by some process of extension, that even though the Phenyl-2-Propanone was not contraband, is not and was not a regulated chemical, nevertheless, without the delivery of that the contraband couldn't have been made, and, therefore, what happened here was intolerable.

That, the court said, was a kind of extension of the traditional entrapment doctrine.

Alternatively, the 9th Circuit, Judge Eli's opinion, said there is a separate kind of due process defense that ought to be recognized where the Government engages in too much of the continuing criminal enterprise. When the Government .

becomes enmeshed in the enterprise for reasons similar to the reasons that support the entrapment defense, the Government ought to be precluded from prosecuting.

Here, the court said, because the undercover agent had supplied one of the ingredients and had been present during the manufacture, that precluded the Government from prosecuting.

Q The latter theory was a constitutional theory and the first theory was a non-constitutional theory.

MR. LACOVARA: Yes.

Q Because entrapment -- there is nothing about entrapment so far, either in Sorrells or Sherman, in either the Court opinion or the concurring opinion, that was based on the Constitution.

MR. LACOVARA: That's right.

I'd like to approach now Sorrells and Sherman to say why, under either of the views presented in those cases, the indictment in this case ought to be reinstated.

Both parties to the case have rather extensively quoted from all of the opinions in those two cases, and I won't take the time of the Court to read extensively from them except to say that the difference in philosophy is basic.

Chief Justice Hughes' opinion in Sorrells and Chief Justice Warren's opinion in Sherman say basically what we are talking about is a defense to criminal liability.

The basic issue, in terms of normal criminal law

standards of culpability is: did the intent which with the defendant did the physical acts that are in apparent violation of the statute arise on his own or was that criminal design manufactured by the Government?

In an analogy to standard insanity or duress or mistake concepts, the man is just not criminally liable or culpable if the Government manufactured the criminal intent.

And the Court in both of those cases said this is consistent with what we would understand the Congressional intent to be.

And, both Chief Justices said Congress didn't want its criminal statutes enforced against people who did not intend to violate them until the Government came along.

The separate opinions of Justice Roberts and Justice Frankfurter put a wholly different cast on it and said the focus ought to be on whether the conduct of the investigators is tolerable or not, irrespective of normal guilt or innocence under criminal law principles.

But, even those separate opinions -- and this is basic -- state what is called the objective test rather than the subjective test, and it is not the kind of visceral, or subjective, test that the Court of Appeals applied here, terming the conduct intolerable, repugnant or excessive or over-zealous.

The standard stated by Justice Frankfurter, and we quote the language on page 19 of our main brief, is this:

"This test," he says, "shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit the crime."

This has been proposed in the Model Penal Code and the proposed Federal Code and the introduction Senate 1, in the 93rd Congress, which is the official Senate bill, McClellan's -- Senator McClellan's bill revamping the whole Federal Criminal Code.

The test would be an objective one. Is it likely that the conduct that the agent engaged in might seduce an innocent person into committing a crime?

If it is that kind of conduct, we don't care, under this test, whether the defendant actually had a criminal design. We just won't allow the Government to engage in that kind of conduct.

If, however, it is conduct that would not likely ensnare the innocent as well as the guilty, looking only at the agent's conduct, then there is to be no defense.

That's the objective standard.

Now, in this case, of course, applying that standard, there can be no question but that, objectively considered, an offer to someone to supply an ingredient in the manufacture of an illegal drug is not likely to tempt or to seduce the ordinary law-abiding citizen about whom Justice Frankfurter

was speaking as well, into committing the crime.

These statements by Justice Roberts and Justice Frankfurter came up in the context of cases where it might be thought that a normal, law-abiding citizen might have fallen from grace because of the overbearing of the Government agent.

In Sorrells, it was a request to get some liquor, during Prohibition, for an old Army buddy, and it might have been thought that normal social behavior might ultimately cause a person -- a normally law-abiding person -- to yield and supply a pint of liquor.

In Sherman, of course, the undercover informant tempted another former narcotics addict who was undergoing treatment with him to get him heroin for his personal use, saying that he couldn't suffer the pain of withdrawal, and finally, the prospective defendant yielded.

Those are poles apart from the kind of conduct here which presents no risk in the Frankfurter formulation or the formulation of the Model Penal Code, the proposed Federal Code or S-1, create no risk that the Government conduct will ensnare the otherwise innocent or tempt the normally law-abiding citizen, as in the proposed Federal Code.

Q It is a little hard to square the language in Sorrells, either the Court's language or the concurring opinion's language, with the facts in Sorrells that I, frankly, had never known until I read the American Civil Liberties Union

Amicus brief in this case. Sorrells was a professional bootlegger, apparently, wasn't he?

MR. LACOVARA: There was some indication in the record that he was a rum-runner. But all the Court held in Sorrells was that if the jury had credited the defense testimony, which was that he didn't deal in liquor, and had a good reputation in the community, they might have entertained a reasonable doubt, which is the current standard, about whether he had the predisposition.

So, in Sorrells, all that happened was the case was sent back for a new trial because the trial court had held that it would not even submit the entrapment question to the jury.

All the Court held was that,under one view of the evidence, there might have been entrapment.

Q Justice Hughes talks about an industrious man, innocent man, with no previous record of any kind.

MR. LACOVARA: I'll have to leave to the Court the analysis. The theory is what we are concerned about here.

Q Well, if the jury believes the defendant's version of the facts in that case, that would be what Chief Justice Hughes was talking about, would it not?

MR. LACOVARA: Yes. That's exactly right, but the judge refused to let the jury consider that. He had not given any entrapment instructions.

Q Everything Hughes said was prefaced by the -- and if -- it was either --

MR. LACOVARA: Right. He said, and we quote this language, "The record in this case would permit the jury to infer that the man was otherwise industrious." That's the language you are referring to, but he wasn't taking that as proven.

We have raised in our brief the question of whether the creation of this new kind of defense is even an appropriate exercise of judicial power, because, to the best of our knowledge, neither under the Due Process Clause nor under what is called the Court's supervisory power over the administration of criminal justice, has the Court ever asserted or exercised the power to create a new defense to criminal liability.

Chief Justice Hughes, in the Sorrells opinion, specifically rejects this proposition, saying the courts have no power once a valid statute, applicable according to its construction, is involved and the Executive chooses to prosecute, Courts have no power to create a new defense to exonerate the defendant, which would be the effect of the holding in this case.

We have argued at some length in our brief that whether you regard this as an extension of the entrapment case or as a proposal to establish a new due process defense, there is no basis for doing it.

First of all, the technique here, giving one of the ingredients to be used in the manufacture of the drug, fits within the traditional law enforcement technique which has been reaffirmed by this Court as recently as in Osborne v. United States, in 385 U.S., and that is it is not unlawful entrapment to provide the opportunity or facility for commission of a crime if the criminal intent, which is the underlying premise of criminal prosecution, inheres in the defendant before the agent appears on the scene.

Similarly, there is no inherent unfairness here in this kind of activity, we believe. I think we have shown in our brief that there are countervailing reasons, from law enforcement purposes, for infiltrating criminal groups, not only drug groups, but organized crime, smuggling and espionage groups.

But nothing that was done here violated any specific provision of the Constitution.

The Court in Hoffa, Osborne and Lewis has specifically rejected Fourth, Fifth and Sixth Amendment challenges to undercover operations. And, in Hoffa specifically rejected the notion that this violates Fifth Amendment due process as inherently unfair.

We, therefore, request that the judgment below should be reversed and the indictment reinstated.

Q Mr. Lacovara, how much of a concession do you mean to

be making in your brief, on page 32, where you say that, "It may be that due process precludes criminal conviction for engaging in conduct that would not have been possible without the participation and assistance of a government agent who supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels."

MR. LACOVARA: Yes. That's what I would call a minimal concession, Mr. Justice.

What we are talking about there is if the only thing that translated a fantasy into a crime is the appearance of the government agent, well then it might be said that there couldn't have been a crime but for the government agent.

For example, if some people at a college smoker decided they would like to loot Fort Knox and there was an undercover agent present and he stimulated the scheme and because of his official position got the keys to the vault and had all the guards taken away and had the searchlights turned off and the men walked in -- what I --

Q I suppose if a government agent and his friend were together and the friend said, "Gee, if I had a gun I'd kill that man," and the agent handed him a gun and said, "Here, go ahead," that would be an example of your concession, wouldn't it?

MR. LACOVARA: There are practical constraints on the

occasions in which undercover agents become involved in schemes. They don't apply to violent crimes.

Even the proposed formulations would not allow even an entrapment defense where bodily injury is threatened.

To illustrate, Mr. Justice, if I may, what I would call our basic theory is that if the Government provides a fungible commodity there is no entrapment as a matter of law.

That would be Phenyl-2-Propanone here because it could be obtained from other sources. It was difficult to obtain.

It would even apply to heroin or to counterfeit bills because if the agent isn't there infilitrating the scheme, monitoring it by his presence and participation,it is very probable, under the realities of the criminal world, that the heroin or the counterfeit bills or the P-2-P, in this case, or the gun in your case, would have come from someone else. And it is legitimate law enforcement objective to stay right close to the transaction, including cooperating with the scheme to the extent necessary, in order to track it all the way to the conclusion,to find out all the participants and then nip it before it goes any further.

Q In this case, on the second occasion, he had gotten the material some place else.

MR. LACOVARA: Yes, sir.

Patrick Connolly had, apparently, 600-gram jars of

P-2-P.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Brucker.

ORAL ARGUMENT OF THOMAS H. S. BRUCKER, ESQ.,

ON BEHALF OF THE APPELLEE

MR. BRUCKER: Mr. Chief Justice, and may it please the Court:

I would like to address myself briefly, if I might, as to what I think this case is all about.

I would then like to emphasize some matters in the factual aspects of this case which I feel are very important.

And then, I would like to proceed on to what I feel is the law -- the applicable law -- that should be applied in this case.

I think what this case is all about, first of all, can be summarized in the phrase "entrapment as a matter of law." And the analysis must focus on what law? What are we talking about?

Many courts use that phrase, and I think it is going to be helpful to us if this Court will tell us what law we are talking about.

Now, we have suggested in our brief three possible laws which this Court can use.

First of all, is the Due Process Clause.

Now, this would come from statements that were

contained in Sorrells, Sherman and Raley v. Ohio.

Q In the majority, or dissenting or --

MR. BRUCKER: In the majority opinion. The majority opinion in Sorrells, we have quoted in our brief, Mr. Justice Roberts makes a suggestion that it has been -- excuse me, Mr. Justice Hughes makes a suggestion that it has been -- the activities of the law enforcement officer are such that due process considerations apply.

Mr. Chief Justice Warren clearly makes that statement in the Sherman case, where he says that when the intolerable activities then become so bad that they rise to the level of due process considerations, just as the Fourth Amendment search and seizure or the Fifth Amendment coerced confession.

Q Would you suggest there is nothing new in the Court of Appeals approach to this problem here?

MR. BRUCKER: I am suggesting there is nothing new in the Court of Appeals. That is correct, Your Honor.

What I am saying, in this case, that this is the way that courts have analyzed these cases but they have not really articulated the basic problem that they are talking about, and that is the reaction to over-zealous law enforcement activities.

This type of case has been considered by the courts of the Fifth Circuit, the Seventh Circuit, the Ninth Circuit, three District Courts, the highest courts of the State of

Illinois, of Arizona, the Appellate Court of New Mexico, and they have all agreed with our view, I believe.

That's why I am saying there is nothing new.

This is the articulation. This is what we are talking about: entrapment as a matter of law. What law?

Q Is the entrapment concept, as applied by this Court, applicable to State convictions?

MR. BRUCKER: No. But most of the States -- to my knowledge, all the States --

Q Oh, yes, but your answer is that so far the entrapment defense has not been constitutionalized so as to be applicable to the States.

MR. BRUCKER: That is correct.

Q So there is something new in the Ninth Circuit approach, because its approach would be applicable to the States on a habeas --

MR. BRUCKER: Well, not necessarily. Yes, in the future, it certainly would be, yes, but not as far as opening.

As the Government says in its reply brief, about opening up the gates --

Q Well, no, but it would be applicable --

MR. BRUCKER: That is correct. That's right.

Because what I am saying here is the Government has gone far further.

Q But the entrapment, the trans--

-- however it's been spoken about in our past cases, has not been constitutionalized to the extent that it is applicable to the States.

MR. BRUCKER: That is correct. But there is one suggestion, of course, in Mr. Justice Frankfurter's separate opinion in Sherman, where he does suggest an Equal Protection argument, where there was treating classes of individuals differently whether or not they have predisposition. He questioned whether that was equal protection. But, certainly, the holdings have not risen to that level.

Q By the same token, Congress could repeal the entrapment defense. They could provide, with respect to any particular criminal statute, that there should be no entrapment defense allowed, if that's a charge under this statute, couldn't it?

MR. BRUCKER: Yes, it could.

Q Under the existing law.

MR. BRUCKER: Yes.

Q It couldn't do away with the defense as, whatever the defense is, as envisaged by the 9th Circuit?

MR. BRUCKER: That is correct.

Q To the extent that it depends upon due process.

MR. BRUCKER: Yes. It could do certainly --

What I am suggesting is that this is for purposes of

analysis, that this is really what we are talking about, because the level of Government activity has gone too far.

Q What particular act went too far in this case?

MR. BRUCKER: The providing of Phenyl-2-Propanone --

Q Which he could have obtained any place else.

MR. BRUCKER: No, Your Honor, absolutely not.

Q Well, doesn't the record show he did --

MR. BRUCKER: Absolutely not.

Q Doesn't the record show that on the second occasion he did obtain it from some place else?

MR. BRUCKER: No.

Q Well, what was in that extra bottle?

MR. BRUCKER: There was no laboratory analysis of that extra bottle, first of all, despite what the Government says. The record is clear about that.

The second bottle was obtained in a search on January 10, 1970.

Richard Russell, my client, the respondent in this case, had nothing to do with that. This was in Connolly's --

Q I said it was obtained.

MR. BRUCKER: It was obtained by somebody else.

Q But it was obtainable. You said it wasn't obtainable.

MR. BRUCKER: No. I misunderstood, Your Honor.

I am saying two things. One, we don't know -- although I am not pressing this -- we don't know that it was,

in fact, Phenyl-2-Propanone. It was not analyzed by the Government agent who testified at this trial.

Q Is there anything in the record to show that there was no way for them to obtain this except through the Government agent?

MR. BRUCKER: No.

Q Of course not.

MR. BRUCKER: What it shows is that the Government agent --

Q Facilitated it.

MR. BRUCKER: They had dried up the supply.

Q And they facilitated it.

Suppose the agent gave the paper for counterfeit money. Would that be entrapment?

MR. BRUCKER: Yes, that's what McGrath held.

Q That would be counterfeiting?

MR. BRUCKER: Certainly.

Q And the reason is you can't obtain that paper any place else except from the Government.

MR. BRUCKER: But that doesn't prevent, that doesn't prevent counterfeit bills from being --

Q Easily determined to be counterfeit bills, unless they have the right paper.

MR. BRUCKER: Well, from that point of view, if you have the right weight of paper, and that type of thing, the

only way that can come is from the Government.

Q Well, is all of the "speed" in this country that we read about outside of this record, is that all obtained from the Government?

MR. BRUCKER: No, Your Honor.

Q So it is obtainable, isn't it?

MR. BRUCKER: "Speed" is, yes.

Q No, I mean this ingredient is obtainable.

MR. BRUCKER: Well, Propanone is not necessary for all types of manufacture of "speed," Your Honor. It was just in this particular type of manufacture.

Q Well, does the record show that this man had been manufacturing it before?

MR. BRUCKER: No.

Q Where did he get that "speed" tablet that he gave Shapiro on the first trip?

MR. BRUCKER: He did not give it to Shapiro.

Q Who did he give it to?

MR. BRUCKER: Mr. Russell did not give it to anybody. It was Patrick Connolly. There were many people in this room where Agent Shapiro came in. There were the two Connolly brothers, there was Richard Russell, there was the Government informant, there was another man, and there were two girls.

Q There was "speed" there in this room and it was there before the Government furnished anything.

MR. BRUCKER: Yes. But Richard Russell had nothing -- the only thing Richard Russell had to do with that --

Q Is it your position that Richard Russell wouldn't have gotten involved if the agent hadn't talked to him?

MR. BRUCKER: It is my firm argument that there is no evidence that the crime for which he was convicted would have gone ahead without Shapiro giving Phenyl-2-Propanone.

Q It looked like quite a production line there, with four, five, six people involved.

MR. BRUCKER: Your Honor, this is on Whidbey Island, which is north of Seattle, and it was a home and these people are not particularly organized. People come and go. This is the common way of life for an awful lot of people.

Q I am speaking of a production line for the production of "speed."

MR. BRUCKER: Oh, no, Your Honor. As the record reflects, this was in the kitchen and in the --

Q Like a homemade still.

MR. BRUCKER: That's right, sure.

Q Yes, well, it is a production line, nevertheless, and did produce.

MR. BRUCKER: Yes, it did.

Q Before the agent's appearance, during the agent's participation and at times after he had left.

MR. BRUCKER: That's not to suggest that Richard

Russell had anything to do with that.

Q In your view, he is just living there?

MR. BRUCKER: No, Your Honor. This was not his house. This was Patrick Connolly's house which was 15 miles away from Richard Russell's house.

Unless I get the point across to this Court that Richard Russell did not do the act, both before and after, we are going to have to get to the predisposition argument.

Q What you are doing in that, if I may suggest it, Mr. Brucker, you are arguing the sufficiency of the evidence.

MR. BRUCKER: Absolutely. I am. Yes.

Q That's a different question from the legal question, you would agree, wouldn't you?

MR. BRUCKER: I've suggested three grounds on which the Court of Appeals could be affirmed, one of which is to accept their due process consideration, the second of which is to state that under Sorrells and Sherman the activities of the Government arise to creative activity and manufacturing, and the third ground is that under the supervisory power of this Court to adopt the separate opinion in Sherman and Sorrells.

But I do believe there is a grave question as to the sufficiency of the evidence to carry the issue of entrapment to the jury.

The important facts that I think this Court must pay attention to are four.

One, I believe, first of all, is that the proposal to supply the Propanone came from Shapiro.

Now, Shapiro is the only agent that testified, but there were four or five surveilling agents outside the house at all times. This just wasn't a one-man operation. That same day they determined where the laboratory was.

But, I think it is important that the offer to supply came from the Government agent. This is not a situation like United States v. Lopez, where the defendant made an unsolicited offer to the IRS agent for a bribe. And I think there is no dispute on that point.

The second aspect that I think is important in the factual record of this matter is the critical aspect of the chemical involved.

This was a catalyst, the Propanone, and it was impossible to produce "speed" without it.

You could have all the laboratory, all the flasks, all the spoons, all the bottles, everything else, and without Phenyl-2-Propanone, you get nothing.

As the record reflects here, "And you can have everything else and if you don't have the Propanone you cannot manufacture methamphetamine." Answer: "No. Without the Phenyl-2-Propanone, you could not get the reaction to get methamphetamine."

"Absent the Propanone, you put everything else in

there described by Mr. Shapiro, what would you get?"

And this was a chemist testifying --

"Not a great deal of any kind of product, you see, because the product depends upon the reaction of Phenyl-2-Propanone. That is the whole idea. The other things that are in there are simply for solvents or for the generation of hydrogen for condensation."

So this is not -- as the Government would attempt to characterize this -- it's just an isolated drug which they just happened to provide. It is the absolute heart of the manufacture of "speed" in this case.

And it is perfectly clear that the "speed" -- that the chemical provided by the Government was used to manufacture the "speed."

Q Isn't that true, though, with lots of chemical formulas that may have four or five ingredients, that absent any one of them, you wouldn't get the end product?

MR. BRUCKER: Not from the -- that may well be, but I don't think that that is true in this case just from the testimony of the chemist.

The one critical item is the Phenyl-2-Propanone, and the others apparently, as he said, are simply for solvents.

But you don't get "speed" unless you have Phenyl-2-Propanone.

Q Suppose it was bicarbonate of soda that they needed to

complete this process and they didn't have any in the house that day and the stores were closed and the agent had supplied one for them, said he had some at home and went home and got it and brought it back. What would you think the situation would be there?

MR. BRUCKER: I find that's a different case, Your Honor.

Q Different case factually from this?

This substance was obtainable from other sources, as Justice Marshall has pointed out.

MR. BRUCKER: But the Government at least concedes it was difficult to obtain. I mean that's --

Q When the stores are closed, it is difficult to get bicarbonate of soda, unless you borrow some from a neighbor.

MR. BRUCKER: That may be, although, to me, there is a vast distinction between something which is available in every drug store and a chemical which you can only get by having a license, in the first place, and, two, which agents of the Bureau of Dangerous Drugs have gone around to the drug supply houses and say, "Please, don't sell it at all, even with a license."

So I think that is a complete different --

What the Government agents have done is to dry up the supply, make it difficult to obtain, knowing it is a very critical item and then say, "Here."

Q In other words, when the man goes around to five or six places and can't get any, then his appetite is whetted. He is in an extreme situation.

MR. BRUCKER: No. But the other side of that coin might also be true, Your Honor, and that is if you can't get it perhaps he wouldn't even have completed the manufacturing at all.

Q Of course, it also follows that you wouldn't want it for something else, would you?

MR. BRUCKER: No.

Q You would only want it to make an illegal drug.

MR. BRUCKER: That's correct.

Q And so the Government makes it difficult. Suppose the Government froze it up and only had it available at one address, and had that all under surveillance? Would that be entrapment?

MR. BRUCKER: There is a difference because the Government is not, in fact -- the agent is not, in fact, providing -- but I don't see a meaningful distinction between that, because what they've made it only then from one source, and you always have the --

Q I think your position is that if the Government makes it possible in any way for them to get it, they can't prosecute.

MR. BRUCKER: That's not true, Your Honor. I am not taking that position at all. I am saying what the facts of this

case show that what the Government is doing is promoting crime.

Q Promoting?

MR. BRUCKER: Absolutely, Your Honor.

Because what they are doing in this case is to provide something that, without which -- for all the record shows --

Q Did they promote this first batch before Shapiro got there?

MR. BRUCKER: No, Your Honor, but what did Richard Russell have to do --

Q Did the Government promote that?

MR. BRUCKER: No.

Q Was that a crime?

MR. BRUCKER: Not for which Richard Russell is charged and which --

Q Was somebody guilty of that crime, whoever made that "speed"? Russell or somebody?

MR. BRUCKER: Somebody, yes. I would agree with that.

Q The Government didn't promote that, did it?

MR. BRUCKER: No.

But that's not the charge for which Richard Russell is here before this Court and what he was convicted of.

Q The Government persuaded Russell to go in the "speed"

business.

MR. BRUCKER: For all, Your Honor --

Q For all intents and purposes, that's your position.

MR. BRUCKER: Yes, because there is no evidence --

Q At least I understand your position.

MR. BRUCKER: Your Honor, Richard Russell had never been convicted of any crime before. There was no evidence that he had ever been involved in the manufacturing, there was not even the evidence as to the involvement of Russell to the extent of Mr. Sorrells.

The record -- the opinion of this Court in Sorrells states that the Government produced three witnesses that showed that Mr. Sorrells was a rum-runner, but there is absolutely nothing in this record that shows that Richard Russell was anything other than a law-abiding citizen. There just isn't any.

I would also like to say this. In the reply brief -- I suggested in my brief that the Government show where there was such evidence in the record, and in the reply brief they declined to do that, and also make an error, stating that it was Richard Russell who made statements about having the "speed," and that was corrected this morning, because that did not happen.

Q Which is to say that there is a factual error in the Government brief?

MR. BRUCKER: Yes, it is, Your Honor.

Mr. Lacovara spoke accurately this morning on page 4 of the reply brief in the second paragraph, about ten lines from the bottom, talking about he, meaning Richard Russell, -- but that, obviously, was one of the Connolly brothers.

And Mr. Lacovara so argued this morning.

Q As I recall Mr. Lacovara's argument, Mr. Brucker, he referred to some exchange where Richard Russell said, "After I get my half."

MR. BRUCKER: Yes, that was on the 10th of December 1969, that was after Shapiro had provided the chemical and the drug was produced.

Q In the light of that, do you still say there is nothing in the record that shows he was anything other than a law-abiding citizen?

MR. BRUCKER: Oh, I am talking about prior to -- prior record. Oh, absolutely.

Q Contrasted with Sorrells?

MR. BRUCKER: That's correct. Right. Right. He clearly committed the acts in this case. No question about that.

What I am basically saying, and what I basically argue to this Court, is that this Court has not heretofore had the opportunity to consider a case that, on the facts, where the Government has provided the indispensable ingredient,

the contraband, I am going to assume, now, that Richard Russell has all kinds of predisposition, that he was involved before and after, although I don't think the record supports it, I am going to assume that now.

But no case that this Court has been called upon to decide has gone to the extent where the Government intrudes itself to this extent in the investigation and prosecution of crimes.

The history of entrapment has been basically set out in our brief. The first Federal case was as recent as 1915, and the defense of entrapment has been basically caused by the growth of the statutory crimes where there is clandestine operations and it is hard to find out what is going on.

By the time, in 1932, when Sorrells was decided, Mr. Justice Roberts characterized the entrapment defenses as an amazing total.

All the circuits had agreed that the entrapment defense was available, and then this Court agreed.

What I am suggesting is that we have a parallel situation today. This different factual situation where the Government intrudes into the criminal process to the extent that he has, has been considered by many courts -- lower courts -- every single one of them has found that the Government activity is intolerable and has reversed the convictions. Every single one of them, without dissent, except in my case, in

the 9th Circuit here.

McGrath, Bueno, 5th Circuit, 7th Circuit, District Court cases, Southern District of New York, California, highest court of Illinois, highest court of Arizona, they have considered problems where the Government has intruded to this extent, and they have all found them bad.

And that's why I am saying that we have a different case that has not been considered by this Court.

Q Have these been based on a constitutional foundation?

MR. BRUCKER: No, they have not, Your Honor, but they have -- except this case --

Q With the exception of this case, have the others?

MR. BRUCKER: No.

But what I am saying is that they -- that the courts below have tortured their reasoning, tortured their opinions, because they are outraged by what the Government does, but can't find a handle on which to articulate what the basis is, what law they are talking about as to why it is bad.

They are talking about enlarging the holding of Sorrells and Sherman. They talked about that really -- because this Court has invited review of this, what really now is the law is the separate opinion in Sherman and Sorrells, but nobody -- they are unanimous in reversing but they are not unanimous in their reasoning.

And we all look to this Court for its reasoning, but

I am saying that this type of thing had never been considered before.

It is all right for the Government to provide a substitute crime. That's what entrapment is, providing a substitute crime. But it is not all right for the Government to go further. There is no legitimate State interest in the government going further and providing the one means by which that crime could be committed.

And that is what this case is all about. Without Shapiro providing that Phenyl-2-Propanone, the evidence does not support the fact that this crime would be committed. And I've -- you've got to look at that problem in deciding this case.

The evils to be countenanced are set forth in my brief. Mr. Justice Frankfurter has articulated them in the separate opinion of Sherman.

I don't like to go with slogans, but I would only suggest to the Court that if this type of activity is upheld it would be the ends justifying the means, which is really not sactioned in our system.

And, for those reasons, I ask that the opinion of the Court of Appeals be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Brucker.

Mr. Brucker, you appeared here at our request and by appointment to the Court and we thank you for your assistance

to, not only your client, but to the Court.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:35 o'clock, a.m., the oral arguments in the above-entitled case were concluded.)