In the

Supreme Court of the United States

CHARLES HAMPTON,
Petitioner,
vs.
UNITED STATES

No. 74-5822

Washington, D. C.
December 1, 1975

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CHARLES HAMPTON, Petitioner,	:	
v.	:	No. 74-5822
UNITED STATES	:	

Washington, D. C.

Monday, December 1, 1975

The above-entitled matter came on for argument at 10:06 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DAVID A. LANG, ESQ., 4625 Lindell Boulevard, St. Louis, Missouri 63108
Attorney for Petitioner, Appointed by this Court, pro hac vice

KEITH A. JONES, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530
Attorney for Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Number 74-5822, Hampton against the United States.

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

ORAL ARGUMENT OF DAVID A. LANG, ESQ.

MR. LANG: Thank you.

Mr. Chief Justice and may it Please the Court:

My name is David Lang and I am counsel for the Petitioner in this case, Charles Hampton, Junior.

This case is before this Court o writ of certiorari to the United States Court of Appeals for the Eighth Circuit. That court affirmed a jury verdict finding the Defendant guilty of two counts of distributing heroin in violation of federal law.

The facts of this case are as follows:

Petitioner Charles Hampton was initially charged with a two-count indictment with violation of Section 84191 of Title 21 of the United States Code, to wit, knowingly and intentionally distributing approximately three grams of heroin.

At the trial, the Government introduced testimony of five witnesses in the case in chief and three witnesses in rebuttal.

Only three of the Government's witnesses'

testimony is presently before this Court.

Hampton likewise also introduced the testimony of five witnesses, including himself, and only his testimony appears in the record.

Basically, without -- I think the facts are fairly well set-out in the brief, but just to give some background on them, basically, the Government's first witness was a Jule Hutton, who was a special employee of the Drug Enforcement Administration.

He testified that he had been involved in some 80 or 90 drug cases in Wichita, Kansas, Lawrence, Kansas and the St. Louis area. He had just come into St. Louis and his job was to make contact with persons who were involved in drug traffic and set up sales with agents of the Drug Enforcement Administration.

He testified that in this instance he was approached by the Defendant, Hampton, who initiated the scheme for selling drugs and basically there were two sales that occurred.

One occurred on February the 25th, 1974.

The other occurred on February the 26th, the following day.

The first sale took place and at that sale a second sale was set up. On the date of the following sale, February the 26th, the sale was consumated and two persons

who purchased the drugs then identified themselves as being federal narcotics agents and placed both the Defendant and Jule Hutton, the informant, under arrest at that particular time.

That was basically the story that was given by Hutton.

Now, the contradiction came in with respect to Hampton's testimony. His testimony was basically that all of the drug transactions were initiated, not by himself, but by Hutton, the Government's informant. He further testified that at no time did any of the substances which he sells were -- or, rather, that all the substances which he sold had been supplied to him by Hutton, that he had no independent source of supply of these drugs.

The question basically was a question of credibility between the two witnesses.

At the trial we moved for a special jury instruction on the defense of entrapment. This was based upon the so-called "Government conduct" theory of entrapment and the focus of that theory is that one does not focus, of course, upon the predisposition of the defendant but rather upon the extent of the Governmental participation in crime.

The District Court refused to give the requested instruction on the ground that this Court's

opinion in United States versus Russell precluded any entrapment defense based upon any principal other than predisposition.

The Court of Appeals affirmed that decision on the grounds that it felt it was also precluded. There was one dissenting opinion.

Therefore, the basic issue in this case is whether the due process clause of the Fifth Amendment forbids the conviction of an accused for selling contraband if the contraband was supplied to him by an agent acting in behalf of the United States Government.

Previous opinions of this Court, starting with Sorrells and culminating with the Russell decision in 1973, we believe, do not reach this issue.

We believe this issue was not reached in Russell, that Russell was distinguishable and that this is a totally different situation.

QUESTION: Mr. Lang, you are basing your entire case on due process, I take it.

MR. LANG: That is correct, your Honor.

QUESTION: Not on any entrapment defense, as such.

MR. LANG: That is correct, your Honor. There have been a number of cases in which this precise issue has been raised, both in state court cases and federal

cases.

Prior to this Court's decision in Russell, every court that had passed on the issue of contraband being supplied to the Defendant, and that was the subject of the offense, had ruled that that constituted entrapment as a matter of law.

Now, a careful analysis of those cases, I believe, the courts used various languages. Some courts used the term entrapment. Some cases, the courts didn't specify what exactly, what doctrine they were purporting to utilize in those cases.

I think these cases can best be analyzed if they are viewed as due process cases and --

QUESTION: I understand that no specific entrapment instruction was requested of Judge Meredith.

MR. LANG: This was Judge Nangle. We did not request the traditional predisposition entrapment instruction. That is correct, your Honor.

We only requested this so-called "Government Conduct" theory of entrapment -- or whatever one wants to term it. The reason for that in this particular instance was that the offense was knowingly intentionally distributing heroin and so the issue of scienter was already before the jury.

If they believed that this Defendant never knew

MR. LANG: Yes.

QUESTION: Would that not be the next step, providing the money in marked money to buy was just as much of a taint in the transaction and the Government's role as providing the contraband to sell?

MR. LANG: No, your Honor and I'll answer that by approaching it this way. I'd like to approach it by stating it this way, all right?

When the Government supplies contraband to a defendant, it is necessarily assuming that this man has some criminal propensity that he is going to commit an offense involving the contraband in the future.

That is an implicit presumption. That is the only presumption that can justify supplying the contraband.

If the man is not going to sell contraband, then the Government has no right to test him or to aid him under the traditional doctrine so there is a finding, there is a necessary relied-upon presumption when the contraband is supplied that he was going to sell it, anyway, he was going to get his own source of the contraband and sell it.

QUESTION: Well, when they supplied the money, is there not just as realistic a notion that he is familiar with the ways of the drug traffic and that he is going to use the money in the way that he agreed to use it, that is,

that he agreed to buy some narcotics?

MR. LANG: Well, no, your Honor, I am saying that there is a distinct difference between contraband.First of all, because an item has been labeled contraband by Congress, there should be a presumption -- there should be a presumption that that item is not generally available. That is why it is contraband.

Indeed, Congress is trying to keep it off the streets.

If we take a hypothetical, for example, let's say someone wants to make a time bomb and let's assume that a necessary element in the time bomb is a clock or some type of time-keeping device.

If the Government provided a clock, I would have no problems with that. It is necessary but we can assume that the Defendant can go out and purchase a clock anyway. It doesn't have to be supplied.

I am saying we can't necessarily as a matter of logic make that inference when the contraband is supplied. It doesn't necessarily follow that contraband is available just because one has a predisposition to want to engage in a contraband crime, that he will be able to get contraband.

There was no evidence in this case that the defendant had any sort of heroin other than the Government's.

That was never brought at trial what his source

of supply was.

QUESTION: What about his testimony that showed predisposition?

MR. LANG: Well, I am saying, your Honor, certainly at some point when the crime was committed, there is always predisposition. We are talking about a consummated criminal act.

When the act was consummated, certainly his predisposition was one element or one cause of that criminal act and another element was inducement by the Government. Another element that caused the consummated act was supplying the contraband.

All of these things caused, factually, the consummated criminal act.

Now, I am saying that it would be begging the question if we look at the fact of the sale of the contraband as saying he was predisposed.

Yes, assuming that he was predisposed, it does not necessarily follow that he could have gotten the contraband from any other source. It does not follow as a matter of logic.

If he could not obtain the contraband despite predisposition, he may have been deterred from engaging in that particular criminal activity. That is a distinct possibility.

The fact that it is contraband means that it is difficult or ought to be difficult to obtain. It is not as available as many other substances.

In the Russell case, the substance involved was propanone , which was an essential ingredient to making Speed, which was a drug that was involved there in that particular case.

Now, in that particular case there are some factual distinctions there.

First of all, it was clear in that case that the Defendant had a source of propanone both before and after it was supplied by the Government.

Secondly, that was a crime involving manufacture of Speed and manufactuing involves some type of affirmative action on the part of the person engaging in the crime.

You just don't take the substance, assuming it is indispensable, that doesn't create a crime in and of itself. You have to do something actively to be guilty of manufacturing.

QUESTION: Well, the Russell case was akin to to your hypothetical case of the time bomb and the furnishing by the Government of the clock.

MR. LANG: That is correct, your Honor.

But in that instance, as I say, with the clock there is no problem because everyone knows you can go out

and buy a clock. In the Russell case there was no problem because we know both before and after the sale the Defendant had his own source of the propanone so that I have no problem drawing the inference that he could have gotten it on his own. I have no problem that the Government supplied it. It was inconsequential.

But that is not the case here. We are talking about the presumption that the Government is relying on and that is the presumption that this man was going to obtain contraband because he was predisposed to engage in this type of offense.

I am saying it does not follow as a matter of logic that just because one is predisposed, if the contraband is unavailable that you would therefore engage in that crime.

QUESTION: Mr. Lang?

MR. LANG: Yes, your Honor.

QUESTION: Assume a case in which the evidence is undisputed, that the Defendant had been engaged in selling heroin, say, for months or years but the particular batch of heroin that he was being prosecuted for having sold had been supplied by Government agents.

Would your position be different?

MR. LANG: My position in that case would not be different, your Honor, because the Defendant is on

charge for the sale of -- we are not charging the man or holding him responsible for his past criminal conduct.

The crime which would be before the Court in that instance is the one that he engaged in and in that case, whenever the supply -- whenever the subject of the offense was supplied by the Government, I would say that regardless of what he had done in the past, regardless of predisposition, that in that case we cannot allow his prosecution to stand, or he cannot be prosecuted.

QUESTION: Are you advocating a per se rule regardless of all other facts and circumstances if and only if the contraband that is involved in the particular prosecution was supplied by the Government?

MR. LANG: That is right, your Honor. That is a very narrow standard.

Indeed, we have to set some outer limits on the Government's conduct. I think it is necessary to an extent to set some outer limits on what type of law enforcement activities were permissible in this society.

Back in -- to set out another hypothetical that comes to mind, let's assume we have a situation where a defendant is engaged in making a bomb . He is going to blow up some federal buildings.

Now, he is a member of some type of revolutionary group and his group is infiltrated by an agent of

the Government and this man is a -- the Defendant is a demolitions expert and he gets into the building and plants the bomb and has a change of heart. He decides that maybe innocent people will be hurt and doesn't want to go ahead and do it and the Government agent pulls out a pistol and tells him, well, you know, for the cause, you must do this and he goes ahead and fuses the bomb and he is subsequently charged with some type of crime arising out of that incident.

Now, if we just focus on the fact that he was predisposed in the past, there would be room for a jury to make that factual finding.

I am saying that as a matter of policy we might want to have some situations where we don't want those types of cases going to the jury and that is --

QUESTION: Your hypothetical, however, is quite a long way off from the case we have here. Your hypothetical is one where he is compelled, coerced.

MR. LANG: Well, your Honor, I am saying that -- that is, I agree with you, that the hypothetical may be quite more often what is in reality but I am saying that the only thing that -- the thing that most closely approximates it is Government-supplied contraband and from what I have seen, that is the greatest extent to which the Government is involved in crimes, actually supplying the

contraband. I don't think that that is therefore a difference.

We are going to talk about drawing some limits.

QUESTION: Well, in your hypothetical, though, the Defendant would surely have the defense of duress available to him.

MR. LANG: He would have duress but he should also have -- he would also have the defense of Government conduct, the Government conduct.

I am saying it might be, in that particular instance, that he would not have engaged -- we still have the fact that he was refused bond. That is a given fact.

Just like we have in the case before us the fact that the drugs were sold. They were sold. But I am saying that we have no problem with hypotheticals.

We are saying that we don't know for a fact that he did it because of coercion or because there was predisposition.

I am saying it is too great a danger -- we can't say it is too great a danger to allow that type of case to go to the jury.

I am saying the same thing is true when we are talking about this contraband offense when the contraband has been supplied by the Government. It is just too great.

QUESTION: Mr. Lang, assuming that the

Government gives a known pusher contraband, heroin and the known pusher shoves it to your man, would you still have the same defense?

MR. LANG: Yes, your Honor, I would have the same conclusion. Any time that the person --

QUESTION: Well, suppose the Government just leaves the package of heroin on the doorsill and the pusher picks it up. Would the Government then be guilty?

MR. LANG: Yes, your Honor, they would be.

I would say so because what the Government is doing is manufacturing crime.

What interest does the Government have in -- if the Government's interest is in keeping heroin off the streets, what interest does it have --

QUESTION: Well, in my first case, the Government was not manufacturing crime because I said this was a known pusher.

MR. LANG: Well, I understand it was a known pusher but then why -- the question comes up as to why is it necessary for the Government to supply him with the heroin if he is a known pusher? Why don't they just wait until he gets his own heroin? That is where we have to look at the problem.

If the man is a known pusher and he has his own source, why can't the Government just wait until he comes

up with his own source? I don't see the necessity for the Government intervening in that case.

QUESTION: Well, I suppose one reason why the Government might not want to wait is that if they don't know his source and can't apprehend him in other ways, it might be a year or two afterwards that they were ever able to convict him.

MR. LANG: Well, that is a possibility, your Honor and I would not argue that. However, when they do convict him for that particular crime, we still get back to the question of whether or not he would have sold the heroin without their intervention.

In other words, I am still saying I think that our system of justice says that we have to give a man the benefit of the doubt in this instance.

We are talking about, in effect, if we look at -- remember that we are talking about causal relations. If we thought about it in tort terms or causal relation in criminal terms, we have several acts which contribute to the consummated criminal act, which is the subject of the offense.

We have several things which can contribute to it. One thing is the criminal propensity of the Defendant. Another thing is the inducement for the Government agents.

Another thing is the supply of the contraband.

Under tort law and criminal law, there are instances wherein we make acts superceding -- in the terminology that is used there -- superceding independent intervening causes and so forth and relieve liability despite factual causation.

QUESTION: But under no conceivable tort theory that I have ever heard of would your man in this case be freed on the ground of superceding cause.

MR. LANG: Well, I am saying that -- I am only making the analogy insofar as saying that what we are talking about is the fact that we have several causes which contribute to the consummated act.

I am saying as a matter of logic, we don't know that the Defendant would have been able to complete this crime but for the supply of the contraband and we have to use a more exacting standard because we are talking about a man's liberty in this case. We are talking about the criminal justice system and I think the standards that we set out from the presumption cases that we cited -- I think that standard is that there must be -- the presumed -- the ultimate fact must follow logically from the proven fact and must exist beyond reasonable doubt.

I think if we apply that standard here, it can't certainly be said beyond a reasonable doubt that assuming that Hampton was disposed to commit the offense,

that he would have committed it had the Government not supplied the contraband.

QUESTION: Incidently, Mr. Lang, was your instruction -- proposed instruction -- framed on the actual instruction of Bueno in the Fifth Circuit?

MR. LANG: Yes, it was, I believe, your Honor.

The second aspect of due process, your Honor, that we urge this Court to adopt, deals with the question of the fundamental fairness of the Government's conduct by supplying the contraband in this case and in this instance we believe that it is fundamentally unfair for the Government to provide the contraband.

The Government has a legitimate interest in -- the Government's interest is only in apprehending those engaged in criminal activity by the mere offer of a neutral opportunity.

That is the standard that this Court has adopted in Sorrells and Sherman. There is no governmental interest in intervening in the contraband trade based upon anything other than opportunity and if the Government supplies contraband, it is indeed not acting within the bounds of its legitimate interest.

What we have here in that situation is that the Government is bringing about a conviction by a method of law enforcement that offends the general sense of justice.

We have the evidence which has been supplied by the Government on the one hand and then they obtain a conviction based upon that contraband. This gives one the impression of a sham trial. It encourages law enforcement officials to participate in crimes.

It permits overzealous law enforcement officers to selectively set up defendants for prosecution and indeed, this is just what happened as alleging in this case.

I believe that these evils result in an affront to our basic notions of justice in this society and I believe that applying the standard from the Rochin case, "Shocking to the conscience of this Court," I believe that this type of conduct should have shocked the conscience of this Court and this Court should hold that it is fundamentally unfair to allow prosecution in this instance.

I would like to at this time reserve my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Lang.

Mr. Jones.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.

MR. JONES: Mr. Chief Justice and may it Please the Court:

At issue in this case, as Mr. Lang stated, is whether there is a per se denial of due process to

convict a defendant for the sale of narcotics that he procured from an informant or a Government agent.

There is conflict among the courts of appeals on this issue. The United States Court of Appeals for the Fifth Circuit has held that where an informant or a Government agent supplies a defendant with narcotics for the sale of which the defendant is subsequently arrested and indicted, the defendant is immune from prosecution for that offense without regard to any of the surrounding circumstances including the fact that defendant may have been predisposed to deal in the kinds of narcotics which he was arrested for selling.

The Court of Appeals below, the Eighth Circuit, rejected the per se test and held that the Petitioner in this case was properly convicted notwithstanding the fact that he might have procured his heroin here from a Government informant.

Because of the importance of this issue to the administration of our narcotics laws, the United States acquiesced in the granting of the petition.

At the outset, I would like to briefly recapitulate the relevant facts in this case and I think there are four of them.

First, the Petitioner did make two sales of heroin to Government undercover agents.

Second, it has now been established that the Petitioner knew at the time he was making the sales that the substance was heroin.

Third, it is unquestioned that the Petitioner was introduced to the Government undercover agents by an informant who described them as potential narcotics buyers and,

Fourth, it was also established by Petitioner's counsel and the Court of Appeals, that Petitioner was at all relevant times predisposed to deal in heroin.

Some of the remaining facts are still controverted. In particular, Petitioner testified at trial that it was the informant who originated the scheme of selling heroin, whereas the informant testified to the contrary, that the scheme originated with Petitioner.

The Petitioner also testified that he obtained his heroin from the informant. The informant denied this and testified that he had no knowledge concerning the Petitioner's source of heroin.

QUESTION: Well, what do you think is really important, material to the basic question in this case, Mr. Jones? Isn't the question only whether or not the instruction set out on page 9 of Petitioner's brief was required?

MR. JONES: That is correct and I'd like to

read that instruction just for the benefit of the Court so we will know exactly what we are talking about here.

The Petitioner requested instruction at trial as follows, and I will quote:

"If you find that the Defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.

"Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged --" and I'll end the quote there.

Under this instruction, if the jury had concluded that Petitioner had, in fact, obtained the heroin that he sold from the government informant, then it would have been required to acquit Petitioner and this would have been true no mater what other kinds of findings the jury might have made.

For example, if the jury had concluded that Petitioner was an established heroin dealer with many sources of supply of heroin who had originated the scheme of selling heroin and had, in fact, demanded heroin from the informant as a sign of good faith or as a means of

involving the informant in a criminal transaction, nevertheless the jury would have been required to acquit the Petitioner if it found that, in fact, the informant did comply with the demand, did furnish the contraband in question.

QUESTION: Indeed, there was no dispute about the fact, was there?

MR. JONES: Pardon?

QUESTION: There was no dispute that the informer did furnish it.

MR. JONES: Oh, no, that was disputed. The informant denied that he furnished the heroin, so that the matter is in dispute and the jury made no finding on that point.

QUESTION: Well, that really is not important. This -- it was a fact in dispute.

MR. JONES: I was only responding to Mr. Justice Marshall's question.

QUESTION: Well, but you originally spent quite a few minutes talking about the dispute and the facts. That has nothing to do with the basic issue in this case, does it?

MR. JONES: That is correct. I only wanted to point out to the Court that what is involved here is a disputed matter and if the Court decided that the

instruction should have been given, of course the proper relief would be a new trial --

QUESTION: Well, certainly.

MR. JONES: -- because that question is in dispute.

Now, I would like first to describe the relationship that the Petitioner's proposed due process defense bears to the standard defense of entrapment and then I will elaborate at greater length upon the reasons for rejecting that or any similar defense.

The availability of the traditional defense of entrapment turns upon the question of predisposition.

That is, it turns upon the question of whether Defendant, at the time of the alleged entrapment, was predisposed to commit the kind of offense which he did, in fact, commit.

Now, the Petitioner here has conceded that he was predisposed to commit the heroin offense with which he was charged and he has not attempted to assert the traditional defense of entrapment in this case.

But the defense that he does assert bears a strong resemblance to an entrapment defense.

The proper scope and correct formulation of the defense of entrapment has been much mooted by the members of this Court over the years and in United States against

Russell, three members of the present Court expressed the view that the defense of entrapment should turn, not upon the subjective factor of the defendant's predisposition but rather upon the objective consideration of the particular law enforcement conduct.

The entrapment test propounded by the minority in Russell was whether the government's conduct -- and I quote here -- "Whether the government's conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it."

Now, we think it is fairly clear that that test would not avail Petitioner in this case, either. What he seeks is recognition of an absolute defense based up the presence of a single alleged fact, the provision of heroin by an informant.

QUESTION: That has been the rule in the circuits, hasn't it?

MR. JONES: That has been the rule in the Fifth Circuit.

QUESTION: I was just reading Judge Roney's opinion for a unanimous court in the Bueno case in 1971.

MR. JONES: That was the rule in the Fifth Circuit, yes, Mr. Justice Stewart.

QUESTION: And --

MR. JONES: It also now may be the rule in the

Third Circuit.

QUESTION: And in some of the state courts.

MR. JONES: It is clearly not the rule in the Seventh Circuit or the Eighth Circuit.

QUESTION: Well, it is clearly not in the Eighth. That is this case.

MR. JONES: It is not in the Seventh, either. The McGrath decision applied Russell in the context of -- in a similar context to preclude an absolute defense.

We feel that informant's offer to supply heroin to an individual is simply not the kind of offer, not the kind of law enforcement activity that is likely to induce an otherwise law-abiding individual to enter the narcotics trade.

I mean, it is simply not the kind of objective law enforcement conduct that is likely to turn an innocent individual into the path of crime.

This kind of offer, this kind of law enforcement conduct, may prove useful in apprehending criminals but it poses little or no risk by itself of trapping unwary innocents.

We therefore think that under either view of the proper scope of the entrapment tests, Petitioner was not entrapped and indeed, the Petitioner seems to concede as much in this case because he has repeatedly characterized

this as not an entrapment case but this concession, this acknowledgement that this is not a case of entrapment creates for Petitioner what appears to be an insoluble paradox.

The due process test that he advocates is analagous to the test advocated by the minority in Russell in that each of those tests focuses on the conduct of the government agents.

But whereas the minority test in Russell entailed an evaluation of the governmental conduct in its entirety, the test proposed by Petitioner focuses exclusively on a single aspect of that conduct, the furnishing of narcotics.

His contention is that an informant's supply of narcotics to a suspect for controlled resale to government agents is somehow shocking and offensive per se but as I have just indicated, that kind of law enforcement conduct, standing alone, carries so little risk of inveigling an innocent and law-abiding individual into crime that it does not even constitute entrapment.

Almost by definition, therefore, the governmental furnishing of narcotics is not shocking and offensive in any sense that pertains to the essential concerns underlying the entrapment doctrine.

It is not shocking and offensive, that is, in

any sense that pertains to the values underlying the traditional defense of entrapment.

The paradox is that those are exactly the values and concerns educed by Petitioner here. Those are the only concerns he raises.

The only kind of complaint that he makes about the governmental conduct here is that it is the kind of conduct -- and I quote here from this Court's Sherman decision -- "That plays on the weaknesses of an innocent party and beguiles him into commiting crimes which he otherwise would not have committed.

This is not a kind of case like Rochin against California where other kinds of due process values are involved. In that case, the value was the protection of the citizenry against governmental brutality.

Nothing of that kind is involved here.

Petitioner's only claim is that he was unfairly assisted in his own criminal activities and that is a claim that smacks solely and simply of entrapment, dressed in this case in due process clothing, simply to conceal Petitioner's own criminal predisposition.

Now, these considerations suggest to us that an allegation of governmental furnishing of narcotics is merely one factor to be considered in connection with the standard defense of entrapment.

Such an allegation should not be treated as giving rise to a separate and preclusive due process defense.

Now, we would, of course, concede that in some hypothetical circumstances the governmental furnishing of narcotics could be part of a course of law enforcement conduct that, considered in its entirety, might entail the entrapment of an innocent individual but our point here is that an allegation of such governmental furnishing by itself in essence raises only a partial claim of entrapment and that such a claim must be rejected if the other requisites of an entrapment defense are lacking.

Those requisites are lacking here and we think that that disposes of Petitioner's case.

With this much said, however, I would now turn to a closer analysis of Petitioner's specific contention that somehow the governmental provision of narcotics to a suspect for controlled resale is shocking to the universal sense of justice, shocking to the conscience of the Court.

Of necessity, the application of a due process test such as this depends in large measure upon the individual subjective judgments of the members of the court but we believe that to the extent that analysis and experience may be brought to bear in making these

judgments that the governmental conduct alleged here cannot be viewed as so outrageous -- and I quote here from the majority opinion in Russell -- "Cannot be viewed as so outrageous that due process principles will absolutely bar the government from invoking judicial processes to obtain a conviction."

Our submission on this point is twofold.

First, as an analytical matter, we see no constitutionally significant difference between the providing of narcotics alleged by Petitioner here and the furnishing of other indispensable means of committing crime, such as the phenyl-two propanone that was supplied to the defendants in United States against Russell.

Second, as a matter of law enforcement experience, we are concerned that the adoption of a per se due process rule of the kind advocated by Petitioner could seriously hamper enforcement of the narcotics laws.

I will discuss these two points in turn.

First, as an analytical matter, the only distinction between the heroin allegedly supplied the Petitioner here and the phenyl-two propanone supplied in Russell is that heroin is contraband, whereas phenyl-two propanone is not.

That is the only distinction we see and that is the only distinction that the Petitioner has suggested.

QUESTION: Well, that is the distinction that the criminal law makes too, isn't it?

MR. JONES: That is the distinction the federal law makes.

QUESTION: Selling phenyl-two propanone would not have been a criminal offense.

MR. JONES: Our submission here, however, Mr. Justice Stewart, is that it is a distinction which in this context has no constitutional force and I --

QUESTION: Well, the whole point is that what is criminal is the selling the contraband. It is not criminal to sell an alarm clock.

MR. JONES: Well, once again, the distinction between contraband and alarm clock or the distinction between contraband and phenyl-two propanone is that one is illegal and the other is legal but regrettably -- regrettably, there is no distinction between the two as to the relative obtainability of the two substances.

That, it seems to us, is the crux of Petitioner's submission. He claims that one substance is obtainable and the other is not. But that is simply not the case.

Phenyl-two propanone was difficult to obtain but it was obtainable and the same may be said of heroin.

Indeed, it is very likely true that heroin is more readily obtainable, more easily obtained by persons

familiar with our narcotics trade, such as Petitioner, than is phenyl-two propanone.

Petitioner by his own admission in this case has testified that he had had no difficulty in obtaining heroin in the past. He was an acknowledged heroin addict and he had had contact with heroin in the four months preceding his trial.

We quote on page four of our brief Petitioner's admission that, 'The heroin I have seen since I have been back, since I have been out of the penitentiary, has been brown. Before that it was usually white, a white, powdery, flour-like substance.'

So that heroin was obtainable by him. He had familiarity with it.

Since the distinction between the heroin here and lawful substances that may also be indispensable elements in crime does not bear upon obtainability, we think it has no constitutional force here.

Heroin was otherwise obtainable by Petitioner and he, by his own admission, was predisposed to commit heroin offenses. He was willing to commit such offenses and he was able to do so.

The governmental conduct alledged here was therefore, nothing more than the simple provision of the opportunities and facilities for the commission of a

particular crime of a type of which the Petitioner was willing and able to commit, and that is the kind of governmental law enforcement conduct that has long been sanctioned by this Court.

As to the law enforcement experience and the wisdom that it can provide in this case, we do feel, as I have suggested earlier, that adoption of a per se rule might seriously hamper enforcement of the narcotics laws and this is so for two different kinds of reasons.

First, governmental furnishing of contraband may in some circumstances be necessary for effective law enforcement.

Now, this obviously is not a wholly happy state of affairs, but neither is the fact of substantial narcotics trade in the country and the fact that governmental furnishing of narcotics sometimes is necessary to catch narcotics criminals is a fact and it is one that we think must be squarely faced.

This Court inasmuch recognized that fact in Russell. The Court observed that the infiltration of drug rings and a limited participation in their unlawful activities is one of the only practical means of detecting narcotics criminals.

We think that that consideration does play some part here. As we indicate in our brief, this is not a

common law enforcement practice.

That is, it is not common for the government qua-government to provide narcotics but we think that when it does occur, it is not shocking and offensive per se.

But secondly, we are, perhaps, more concerned that a due process rule of the kind urged by Petitioner would lead to acquittals in circumstances where the government's conduct qua-government was completely innocent.

In some cases, for example, a narcotics courier may become an informant and may reveal to the government the identity of the individuals to whom he makes deliveries.

Under the rule adopted in the Fifth Circuit and under the instruction offered by Petitioner here, the government would be barred from prosecuting those individuals. That is a result which seems to us manifestly improper. The government has done absolutely nothing at all offensive or in any way unfair in circumstances such as that.

We see absolutely no reason to bar the prosecution of such narcotics criminals.

QUESTION: Mr. Jones, you'd have no opposition to an instruction that said, "Consider the whole matter," et cetera, et cetera, et cetera?

MR. JONES: Well --

QUESTION: Which you mentioned some time ago.

MR. JONES: Yes, Mr. Justice Marshall. What I suggested was that the governmental furnishing of narcotics was a factor to be considered in connection with an entrapment offense but that a no due process rule focusing exclusively upon that fact should be adopted.

QUESTION: But if it was broad enough, you would not have an objection?

MR. JONES: Well, we might then get embroiled in a discussion of the proper contours of the entrapment defense, that is correct.

QUESTION: I was thinking about one where, New York, where they have the Sullivan Law for possession of a weapon and an undercover police officer sold the guy a weapon and then arrested him.

MR. JONES: There might be circumstances --

QUESTION: You know there are certain kinds of things that would be a little --

MR. JONES: Unsavory.

One kind of situation in which governmental furnishing of contraband might well be offensive is, for example, where the Congress had outlawed the possession of a particular kind of military weapon and such weapons were not in private possession and the government, through undercover agents, offered to furnish a defendant such a

weapon. I think that his possession in such a case might well not be subject to prosecution.

But I would make one more point which bears upon why we think that a rule like this is inadvisable.

In many situations, the government simply has no knowledge whatsoever of where the defendant obtained the narcotics or the other contraband that he was accused of selling. In such cases the government will have no affirmative evidence with which to rebut a claim that the supplier was an informant.

But, more than that, there may well be situations in which the supplier was, in fact, an informant but was acting without the knowledge or sanction of the government.

That is, it may well be the case sometimes that an individual involved in the drug trade will also be doubling as an informant and sometimes tip off the government as to the activities of some of his associates.

We feel that the fact that the defendant obtained narcotics from an informant who was acting illegally without the knowledge or approval of the government plainly does not warrant a due process defense that would bar prosecution and conviction.

In short, we think that the ordinary rules of entrapment amply protect the unwary innocent in circumstances such as that and that no additional

protection should be afforded the unwary criminal.

The due process rule advocated by Petitioner here would do just that. It would afford addition protection to the unwary criminal and we think that this Court should reject that per se due process rule and affirm the judgment below.

QUESTION: Mr. Jones, in the argot of the trade, is there an established difference between an undercover agent for the government and an informer?

MR. JONES: I am not an expert in the argot of the trade but as I have been using the terms here I have been thinking of a government agent as an employee of the government and an informant as a person who may from time to time cooperate with the government, sometimes for pay, sometimes not.

The distinction tends to break down in a middle grey area because the informant here, for example, did receive a per diem. He was not paid for specific information but simply paid $25 a day, I think it was, for his activities but he was not an agent of the government because he was not subject to the control of the government.

He just provided information when and if he had it.

QUESTION: Well, he could be subject to the control if he was being paid by the government. He could

have been told it was part of his duty to supply contraband to people and then turn them in for the sale of that contraband.

MR. JONES: Of course, we have --

QUESTION: The government has control over this situation and certainly instructions could be framed to exonerate the government from any rule as proposed by the Petitioner in the event that it was not a deliberate, conscious act on the part of the government or its agent.

Many, many undercover agents are full-time police officers.

MR. JONES: That is correct. Some are full-time police officers and some are not. The fact is that the government does not have complete control over the activities of many of its informants, whereas the government agents are people who are subject to the day to day control and that is the distinction that I meant to be implicit in my use of those terms.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jones.

Do you have anything further, Mr. Lang?

MR. LANG: Yes, I do, your Honor.

REBUTTAL ARGUMENT OF DAVID A. LANG, ESQ.

MR. LANG: On this last issue that was brought up, the distinction between informer and an agent, let's

make it clear that the person involved for the government in this case was an agent. He is an agent provocateur. His job is to go out and find people who might be interested in drug trafficking and get them to makes sales of heroin. That is what his job is.

QUESTION: Did he get paid on a piecework basis?

MR. LANG: He got paid per diem.

QUESTION: Per diem.

MR. LANG: Right. Now, an informant is particularly one who we think of as a stool pigeon. This is somebody who is already himself engaged in criminal activity and for whatever reason, he decides that he is going to inform the government about it.

It might be because he has another case which is hanging over his head and he decides it might be his way out if he informs on his friends.

That is what an informant does. This man involved here is not an informant. He is an agent acting on behalf of the government, actively going out and seeking persons to engage in the drug traffic. He is an agent provocateur and as an agent provocateur, I see no real distinction between him and the normal government agent. That is what their job is, too, and the government certainly can exercise controls over both of these types of persons.

Secondly, Mr. Jones mentioned that we might have a situation where one is acting -- one might be engaged in criminal enterprises, let's say involving drugs and he decides that he does want to be an informant in the sense of the word that I have used it, he wants to turn state's evidence for his benefit.

Well, I am saying, certainly, in that instance there would be no bar of prosecution to the defendant who is charged because of the government has not supplied any contraband there. We are not going to suddenly say this was a supply of contraband because a person has changed his status so those cases just would not be effected at all by the standard that we are urging.

All right, now, another thing that was mentioned here has to do with the question of indispensable means versus contraband and Mr. Jones used the term indispensable means and said that that was what was involved in the Hampton case here, that the indispensable means were provided to this crime.

Well, I don't think that indispensable means is the correct terminology. I think there is a distinction between providing something such as a clock in the hypothetical I gave or the propenone in the Russell case which were necessary in contraband per se.

In the Russell case the offense was

manufacturing Speed and in that particular instance, yes, it was necessary to have propenone to do that but it also requires some further affirmative action on the part of the defendant. He had to take that ingredient that was given and mix it up.

There was the evidence of a real predisposition such as I have no problem inferring that he would have done it anyway and also we have, as I indicated before, the fact that he did have his own propenone both before and after.

Here we don't have that. If I can go back to my original argument, my chief argument involving statutory presumptions, the proven fact in this case is that Hampton sold heroin and yes, it is true that from that one can logically infer that he was predisposed to sell heroin.

I have no problems with that. Fine.

Assuming that he was predisposed, does it follow as a matter of logic or rationality that despite his predisposition he would have sold heroin had the government not supplied it?

I say we don't know that. I say we certainly don't know that beyond a reasonable doubt and I say that we can't say that beyond a reasonable doubt.

The due process clause forbids conviction of any defendant in these circumstances.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:57 o'clock a.m., the case was submitted.]