TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
FREDERICK MATHEWS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-6109
	)	
UNITED STATES.	)	

Pages: 1 through 49

Place: Washington, D.C.

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FREDERICK MATHEWS, :

Petitioner, :

V. : No. 86-6109

UNITED STATES :

Washington, D.C.

Wednesday, December 2, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

FRANKLYN M. GIMBEL, ESQ., Milwaukee, Wisconsin, appointed by this Court; on behalf of the Petitioner.

CHARLES A. ROTHFELD, ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: Mr. Gimbel, we'll wait just a minute until the crowd clears.

MR. GIMBEL: Yes.

CHIEF JUSTICE REHNQUIST: You may proceed whenever you're ready, Mr. Gimbel.

ORAL ARGUMENT OF FRANKLYN M. GIMBEL

ON BEHALF OF PETITIONER

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

This Court has held for more than fifty years that a person accused of a crime may assert entrapment as a defense to such charge. In Russell, the entrapment defense was characterized as a judicially fashioned rule to enforce limitations upon the Executive branch of Government in the execution of Federal laws under our Constitution. The Sorrells case of course which was the case that was decided 55 years ago, defined entrapment in the following terms:

"The defense is available not in the view that the accused, though guilty, may go free, but that the government cannot be permitted to contend that if government officials are the instigators of the conduct, the person is guilty." The essence of the position that we are asserting here today is that while this Court in the four significant cases in which it

has addressed the issue of entrapment, Sorrells, Sherman, Russell and Hampton,has dealt various with the prerequisites for the establishment of entrapment as a method by which non-guilt can be established by a person who is the object of government ploy.

This Court has not to date dealt with the ground rules by which that issue can get to a person's jury. Consequently, what has developed is a scenario where we have essentially three different predicates for a person who asserts an entrapment defense to get to his or her jury. If a person is accused of a crime, for example, in Milwaukee, Wisconsin -- as is the case here -- that person must first admit that he or she committed all of the elements of the offense with which he or she is charged, and also that he or she intended to violate the law.

If the same person were accused of the same crime in the District of Columbia, that person would have to admit that he or she participated in the acts which are forbidden by the criminal statute, but not that such conduct was intended to violate the law.

In San Francisco or Phoenix, a person who is accused of the same crime need not admit to any misconduct, need not admit to in fact having participated in the acts which constitute a violation of the underlying accusation.

And so --

QUESTION: What is your point? Maybe that's why the case is here.

MR. GIMBEL: That's very good, Justice Blackmun. That is why the case is here, but in the government's response to our brief, it seems as though they are suggesting this is an inappropriate case to be a vehicle for addressing the dichotomy of views on how a case gets to the jury, because they argue essentially that there is not a sufficient factual basis for this case to have presented the issue of entrapment appropriately.

And I would hope that that would not be used by the Court to sidestep in fact the need to send out a signal to the courts throughout this country as to what in fact is the predicate for a person who asserts that their conduct was not the product of predisposition but rather was as a consequence of the intent which was implanted within their mind by government conduct.

Now what rings clearly as essentially the competition in the views of what entrapment is or should be in this Court's cases is, on the one hand, the majority views of Sorrells, Sherman, Russell, and Hampton, that entrapment is in fact a method by which a person who shows inducement can be found not guilty of the offense.

Whereas, the alternative view that has been at least articulated by the concurring opinions in Sorrells and Sherman,

and by the dissenting opinions in Hampton and in Russell, is that entrapment should be viewed in the sense of a confession of illegal conduct by an accused individual and the avoidance of the sanctions of that illegal conduct by essentially a forgiveness of the conduct as a matter of public policy in that the government conduct should essentially be a bar to prosecution.

Now, in Sorrells, the Court very clearly rejected the notion that entrapment, if asserted as a defense, should be asserted as in essence a plea in bar to the extent that that has any meaning in today's jurisprudence. And if essentially that point of view is viewed as against the decision in this case in the Seventh Circuit, I maintain and urge you to consider that essentially what the Seventh Circuit and other circuits in the country which follow that rule have done is to say to people accused of crime in this country that if you wish to have a jury consider that issue, you must first assume that you have committed all of the elements including intent, and make this confession that was spelled out in Justice Robert's concurring opinion in Sorrells, in Justice Frankfurter's concurring opinion in Sherman, and in the dissenting opinions in Russell and in Hampton.

And so I suggest to the Court that if this Court were tempted, as the government urges it to be, to adopt as standard for telling trial courts throughout this country that if an

entrapment issue arises during the course of a case, it must arise in an environment where there is an admission of all of the elements of the offense, including intent. And then there is the posture of the court or the jury forgiving the conduct because it is less egregious than the government conduct which brought it about.

I don't think then for example that this Court could both maintain as precedent on the issue of entrapment the dictates of Sorrells, Sherman, Russell, and Hampton, and adopt the point of view that is expressed in the Seventh Circuit in the Mathews case as the precondition to having the issue considered by a jury.

QUESTION: Why not?

MR. GIMBEL: Because there is a request that there be a confession by the accused, Mr. Chief Justice.

QUESTION: Why is that inconsistent with our cases on entrapment?

MR. GIMBEL: Because you have said in your cases on entrapment that that is not the rule that is to be applied. In Sorrells, there was the contrast between the majority opinion of Justice Hughes and the minority opinion of --

QUESTION: Yes, but we take the majority opinion of the Chief Justice.

MR. GIMBEL: Absolutely, yes. And I say that what was not adopted by the majority was the notion of confession.

If you look again at the very basic definition that grows out of Sorrells that is essentially stating the proposition of what entrapment is, it says it is not the view that the accused, though guilty, may go free but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are instigators of the conduct.

QUESTION: Yes, but I don't see that lays down much substantive law. Certainly, entrapment is an affirmative defense. It's created by the courts for that situation where these opinions describe it. And it seems to me it's quite natural to have it very narrowly tailored since it isn't the absence of a statutory element at all. And I for one would think there is a considerable danger of jury confusion if you could just introduce it without a very substantial requirement of a showing such as the Seventh Circuit said.

MR. GIMBEL: Well, I respectfully disagree. I think that juries in this country have been given a great amount of credit for being able to diligently follow the instructions of courts. As is legion, there have been frequent occasions where there have been mid-trial errors and curative instructions and appellate courts have found that traditionally that jurors will follow the instructions of the judge and they will not be dissuaded from their purpose of finding the truth by reason of the fact that during the course of the trial, some incident occurred that was inappropriate.

QUESTION: Yes, but you agree that the courts of appeals are split on this question.

MR. GIMBEL: I do.,

QUESTION: And I for one don't see any strong requirement in our precedents, one way or the other. So isn't one reason that we should now think about how easily administered is this judicially created defense going to be?

MR. GIMBEL: I think that it will be more easily judicially administered if this Court adopts as its standard, as a minimum, the positions that have been asserted and now constitute the law in the District of Columbia, in the Fifth Circuit or in the Ninth Circuit, than following in the Seventh Circuit. Because the Seventh Circuit view essentially, not only in my view, intrudes into the area that's not been recognized by majority opinion in the landmark cases on this issue as the confession avoidance. But additionally, there is the conflict between the requirement that an accused essentially admit to his or her criminal misconduct and his or her Fifth Amendment rights.

In other words, the essence of the requirement in the Seventh Circuit is that no person accused of crime can consider asserting entrapment as a defense, but for the fact that he or she does in essence incriminate himself of the offense by admitting every aspect of the offense.

And while this Court has essentially not yet dealt

with the entrapment defense as rising to the level of giving birth to a Constitutional basis in the entrapment defense, it has said, and in the Russell case, that doesn't mean that some day there might not be a fact situation which will in and of its own essence suggest that there is such an outrageous abuse of those due process fundamentals incorporated in the Fifth Amendment, that it won't view entrapment as having constitutional overtones that have to be addressed by this Court.

QUESTION: Well, certainly to date, the Court hasn't determined that the Constitution requires the courts to recognize entrapment as a defense.

MR. GIMBEL: That is correct, Justice O'Connor.

QUESTION: May I ask you about a minor procedural point. The government seems to take the position that what we review here is the District Court's denial of the motion for mistrial, rather than the denial of the motion in limine.

Do you have a position on that?

MR. GIMBEL: It's one of those six of one, half a dozen of the others. I think that my colleague, Mr. Kaufman, who assisted me in this and tried the case, was so persuaded that this was an appropriate case for the presentation of the issue of entrapment to the jury that he used every procedural device possible to try to revisit the subject with the trial judge and get the trial judge to find that this case should be

considered outside the mold of the Seventh Circuit prohibition.

And so he started with the motion in limine and he ended with the motion for mistrial, but the essence of all of those trial procedures is essentially that the trial judge made an unequivocal decision that declined to submit the issue of entrapment to the jury on the ground of the Seventh Circuit rule against having that issue considered by a jury where there's not first this admission of culpability. And while the government urged as an alternative consideration for the Court to sidestep giving the issue to the jury, a factual insufficiency, the Judge said that he would not address that as he had already resolved the issue on the first step, although he made a parenthetical side comment that he thought that the evidentiary base was somewhat shaky.

QUESTION: If entrapment is properly raised as a defense in a case, do you take the position that the government is required to disprove it beyond a reasonable doubt?

MR. GIMBEL: It is my view, Justice O'Connor, that the courts have spoken on this issue, particularly in D.C., the Fifth and Ninth Circuit, have essentially said this: It is appropriate for an accused to produce evidence that there was in fact inducement. And in fact, in the Berkeley case which extensively discusses the burdens of proof -- that's a decision that came out of the D.C. Circuit and which was affirmed and followed in the recent case, Kelly case, the court said, it is

appropriate to place on the defendant -- and I'm using the language of that case -- the ultimate burden of showing government inducement of the crime, and thus the possibility -- and that's the word of the Court -- of entrapment.

We do not think that the defendant should bear the burden of proving inducement by a preponderance of the evidence, his burden in requiring the prosecution to prove predisposition beyond a reasonable doubt is met by convincing the jury that there is some -- and that's another word of the Court -- some evidence of government inducement as the term is defined.

And then it alludes to how that term is defined.

QUESTION: And what's your position on the burden of proof?

MR. GIMBEL: My position is that once there has been the surface of inducement by the government of the criminal activities of the accused, that then another element of proof that the government must bear is to prove beyond a reasonable doubt that the accused was in fact predisposed.

QUESTION: Why shouldn't we just treat the whole thing as an affirmative defense right down the line? Since it's judicially created, it isn't an element of the statute at all.

MR. GIMBEL: It would appear to me that by doing that, Mr. Chief Justice, you would be inviting the government

to have no constrictions on their use of deception, decoy, undercover activities, sting and what have you.

QUESTION: No. If we say it's an affirmative defense, all we're saying is it's an element which the defendant bears the burden of proof on, like self-defense in many States. Now, there's nothing wrong with self-defense as a defense. But many States require the defendant to bear the burden of proof.

MR. GIMBEL: In the State of Wisconsin, if you raise the issue of self-defense, then the prosecution has the obligation to show beyond a reasonable doubt that self-defense in fact was not the basis upon which the action took.

QUESTION: Well, there are fifty different States, and I dare say they have many different rules. But why shouldn't the defendant be required to bear the burden of proof? This has nothing to do -- all the elements of the Statute have been satisfied. And in Sorrells and Sherman and the other cases, the Court has said, well, it just isn't right, even though all the other elements are proved, for the Government to be able to get a conviction on this case if there's this entrapment and the other thing.

But nothing you've said thus far seems to be a very good reason why it shouldn't be an affirmative defense.

MR. GIMBEL: I don't think it would be efficient productive jurisprudence to lay upon a person accused of a

crime any more burdens that he or she might otherwise have. And I think that it is consistent with an accused due process rights under the Fifth Amendment that he or she can rely on his or her presumption of innocence, and that once they show that that innocence, if it has been intruded into as in the case of an entrapment situation, by inducement, that it is better law for there to remain an obligation on the Government power bringing the case to hold and continue to have the burden of proof beyond a reasonable doubt.

QUESTION: But it's certainly not an element of the crime that we're talking about, is it?

MR. GIMBEL: Is what an element, Justice White?

QUESTION: I mean, even if you said the Government ought to have the burden, I don't know why proving predisposition, why do you say it has to be proved beyond a reasonable doubt? It's not an element of the crime?

MR. GIMBEL: I am echoing the sentiments which I urge this Court to adopt of circuit courts which have held that predisposition should be treated in the exact same way as any other statutory element of an offense. That non-guilt is ultimately what the government has to overcome. And if entrapment or if government actions would get in the way of the conclusion that a person has violated the law, then it is incumbent upon the government to prove beyond a reasonable doubt that in fact they can satisfy either the court or jury,

that in fact guilt exists beyond a reasonable doubt.

In this case, if an element is that in fact Mr. Mathews --

QUESTION: Well, I suppose you would argue then that self-defense, that the defendant constitutionally should be relieved of any burden of proof with respect to that defense?

MR. GIMBEL: I would argue that the defendant should be relieved of burden of proof on self-defense, yes. But not raising the issue.

QUESTION: What have we held with respect to that?

MR. GIMBEL: I don't know. I don't know that that's been addressed. I can't say. But, yes, I would urge that self-defense, like predisposition in an entrapment case is a matter which should reside within the obligation of the government to prove beyond a reasonable doubt.

And I think that the logic that is included in the rationale of those cases which have held that an accused can claim that he or she did not intentionally violate the law, and yet have the issue of entrapment submitted to his or her jury is sound, and it is far more sound than the logic that antedates the rationale which brings us here today, the rule of the Seventh Circuit. That makes no sense at all, in my view, because it makes impotent the claim that the government misbehaved in a case in those jurisdictions without a great sacrifice on the part of the accused.

And I just don't think that that is a good principle for there to be in existence in our criminal jurisprudence.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gimbel.

Mr. Rothfeld, we'll hear now from you.

ORAL ARGUMENT OF CHARLES L. ROTHFELD

ON BEHALF OF RESPONDENT

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court.

Mr. Gimbel spent I think most of his time talking about the inconsistency question in this case, and I'll reach that in a little while and explain why we think he's wrong on that.

But before I do, there is a prior question in this case, one which we think is logically precedent to that issue, and one which is of considerable practical importance: that is, when is there sufficient evidence in a case to bring an entrapment defense to the jury in the first place.

Now, to appreciate our position on that point, one has to appreciate what went on in this case. This case was a run of the mill undercover operation. A government agent offered petitioner a payoff. At trial, petitioner conceded that he accepted the offer. The offer was repeated on several subsequent occasions and petitioner conceded he accepted each one. Petitioner conceded that he on at least one occasion that

he himself asked for the payoff. Petitioner conceded that he took the money without hesitation when it was finally produced by the agent.

The jury's verdict establishes conclusively that this payoff was in fact an illegal gratuity. Now, we think it is quite clear that on these facts, which are repeated in closely varying forms many times everyday in many undercover operations, petitioner has not produced sufficient evidence to bring his entrapment instruction.

QUESTION: Well, Mr. Rothfeld, we granted certiorari on the question that Mr. Gimbel argued. Now, that doesn't mean that the Government isn't entitled to argue something if you think it would preempt the others, but certainly you're not arguing the question that we granted certiorari on?

MR. ROTHFELD: No. We certainly recognize that that was the issue presented in the petition, and as I say, I will address that in a moment.

QUESTION: That is the very ground that the lower courts decided the case on.

MR. ROTHFELD: That is also correct, Justice White. The reason we advance our alternative ground for decision, it is certainly an alternative ground for affirmance. It was a ground that was advanced in the lower courts and advanced in our opposition to the petition for certiorari. And we think it is a logically precedent question to decide whether there was

QUESTION: But are you arguing that we should dismiss the writ as improvidently granted, then?

MR. ROTHFELD: Well, we also think there's an important reason to resolve, as a practical matter, the issue that we've presented, the question of when entrapment is properly in the case is a tremendously important practical question. It arises in every entrapment case, and there are a great many entrapment cases. And when an entrapment instruction goes to the jury in a case in which it is not properly there, that is not cost free. Entrapment is an extremely confusing defense.

QUESTION: I understand. But are you arguing that we should dismiss the writ as improvidently granted?

MR. ROTHFELD: No, we are not.

QUESTION: If you're saying we ought to decide another question other than the one we granted cert to review.

MR. ROTHFELD: Well, as I say, we think that it is an alternative ground for affirmance which is a --

QUESTION: The Court below never weighed the evidence, did it?

MR. ROTHFELD: No, it did not, Justice O'Connor.

QUESTION: But you want us to do that in the first instance?

MR. ROTHFELD: We're not asking the Court to make any factual determinations or sift through the record. Our

submission is that, even accepting as true, all of the evidence offered by the petitioner at trial, the Court can decide, and should decide as a matter of law, that there was insufficient evidence to entitle him to an entrapment instruction.

And as I say, that is a legal question, a purely legal question.

QUESTION: Yes, but isn't it true that he made a motion in advance of trial that raised the issue and had that motion been decided the other way, perhaps the record would have developed differently?

MR. ROTHFELD: Well, I think on that point, I agree with Mr. Gimbel's suggestion that it really doesn't make any difference in the setting of this case. The Judge went on to say that he would permit the defendant to introduce evidence relating to inducement. The defendant at no point has ever suggested, either before the Court of Appeals or this Court --

QUESTION: Did the defendant take the stand in this case?

MR. ROTHFELD: Yes, he did.

He did not suggest there was any evidence relating to the entrapment question that he would like to have introduced and was foreclosed from introducing by the in limine ruling. Indeed, since the defendant did take the stand, and he testified extensively about precisely what the government did to lead him into the crime, if in fact the government led him

into it, it's impossible to imagine what other evidence he could have offered on that point. He gave his account of what happened to him.

And as I say, it is a very important practical question, because when an entrapment instruction goes to a jury improperly, it can lead to all sorts of jury confusion because entrapment is a confusing defense, it can lead obviously in some cases to unjustified acquittals. In some cases, the focus on predisposition will lead to unjustified convictions. In every case, there is a potential for confusing the jury.

QUESTION: What's the burden of proof in entrapment. Is it an affirmative defense and entirely the burden of the defendant?

MR. ROTHFELD: Well, there's no question that it is an affirmative defense, just as insanity or any other number of affirmative defenses. And the absence of entrapment is not an element of any offense that the government is constitutionally required to prove beyond a reasonable doubt, and therefore, Congress --

QUESTION: Does the burden ever shift to the government based on the production of evidence by the defendant?

MR. ROTHFELD: The Courts of Appeals have generally, although not universally, said that there is a burden of production on the question of inducement, and to a certain

extent on the question of predisposition that lies on the defendant. That once the defendant has satisfied this burden, it shifts to the government to disprove, prove predisposition beyond a reasonable doubt.

QUESTION: Do you agree with that?

MR. ROTHFELD: We have no quarrel with that. That is the usual standard that is applied by the Federal courts where affirmative defenses are involved, except in the insanity case where Congress changed that by statute in 1984. Although again, it is clear that Congress or in the absence of congressional action, the Court can place the burden, allocate the burden however it wishes.

In order to resolve what I think is a very important legal threshold question when entrapment instruction should go to the jury, it is essential to start with a number of characteristics of the entrapment defense. Entrapment, I think, is fair to say, is a curious doctrine and its origins and rationale are somewhat obscure and have been hotly debated by the courts. But the definition of entrapment is at this point quite clear, as Mr. Gimbel suggested.

A defendant, to make out a case of entrapment must show that government action induced criminal conduct on the part of someone who was not predisposed to commit the crime, someone who is the unwary innocent described in this Court's opinions. Several things follow directly from this definition

of entrapment. First, it is quite clear that although it is often said that the entrapment defense is designed to protect innocent people against overzealous police conduct, an entrapped defendant is not an entirely nonculpable defendant and a simple example makes this clear.

If someone is induced to commit a crime by his friend or his brother-in-law or by any private party, he has no entrapment defense. No matter how powerful the inducement, so long as it falls short of duress, that person will be convicted at trial.

Now, when the government provides the inducement, there may be some reason -- and the Court has found a reason to create a defense -- but the complete lack of blameworthiness on the part of the defendant is not one of those reasons. There must be some other reason to let someone go after he has in fact committed all the elements of the offense with the requisite mental state.

A second thing follows from the definition of entrapment. The entrapment doctrine is often said to act as a prophylactic rule that prevents the police from making criminals out of otherwise law abiding people. But the status of the defendant as otherwise law abiding we think is critical. It means that the kind of government conduct that may give rise to an entrapment defense is conduct that is calculated to make a normally law abiding person commit a crime, conduct that

might be said to put the moral fiber of that person to an unfair test.

And even in those circumstances where there is this sort of coercive conduct, an entrapment defense is not necessarily made out no matter how coercive the government's action, a defendant will be convicted if he was predisposed to commit the crime, if he was the unwary criminal and not the unwary innocent described in this Court's opinions.

Now, these characteristics of entrapment tell us something very important about the defense. It is a very narrow doctrine. It comes into play only at the intersection of two independent policies, where the defendant has a relatively reduced culpability, and where the government action is overbearing. And this central fact about entrapment dictates what the defendant must show to take his entrapment claim to the jury.

First, in a formula used by Judge McGowan, among many other lower court judges, defendant must show inducement of a sort that might realistically be expected to lead a normally law abiding person to commit a crime. It's obviously not enough to satisfy this requirement that the government is the but for cause of the crime. That's going to be true in every, for example, police decoy operation. But the unlucky criminal who chooses to mug an undercover police officer clearly has not been entrapped.

By the same token, a simple criminal proposition or simple solicitation of the defendant, a simple offer of a payoff cannot be enough to raise inducement. The Court has always emphasized that the government must be free to present opportunities or the facilities for the commission of crime. And again, in Judge McGowan's observation is a general behavioral assumption that people should not have difficulty resisting criminal temptations, no matter how tempting the offer. When the offer stands alone without more, it is something we expect people to resist.

And again examples make this quite clear. If an undercover policeman approaches someone on the street and offers to buy heroin from that person or offers to sell him stolen goods, or offers him a payoff, that person if he accepts the transaction clearly has not been entrapped because that's the sort of thing we expect everyone to be able to resist without any difficulty.

For inducement to be present in a case, there must be something more than that. There must be clearly some element of coercion in the government's conduct, or some powerful appeal to sympathy. Something that explains why a normally law abiding person might have committed the crime, and something that serves to mitigate that person's involvement in the crime, something that gives us a good reason to let him off.

QUESTION: Mr. Rothfeld, can you envision a case in

which evidence of that kind might come out on cross examination, for example, of the government's witnesses, but in which the defendant never takes the stand at all, and asks at the conclusion of the case for alternative instructions. No intent, and if you do find intent, entrapment.

MR. ROTHFELD: It is certainly possible to imagine such a case, Justice O'Connor.

QUESTION: And you wouldn't deprive the defendant in those circumstances of the alternative instruction?

MR. ROTHFELD: Well, the courts of appeals have taken inconsistent positions, and as we explained in our brief, there is no need to decide that in this case because the defendant himself took the stand.

QUESTION: Well, but I'm asking you now.

MR. ROTHFELD: Well, our preferred approach -- and we understand that there is a close question as to which of the two approaches is preferable -- our preferred approach is the Seventh Circuit's approach, as I'll explain later on at the end of my argument. We think that a defendant who is seeking the special care of the entrapment defense should not be entitled to argue to the jury simultaneously that he was not guilty of the crime, because the existence of entrapment presupposes the existence of all of the elements of the offense.

As I say, we understand that when the defendant has not himself taken the stand, or introduced evidence which is

directly inconsistent with that, the inconsistency is not quite so powerful as it is in this case. But as I say, I'll explain our position on that in more detail at the tail end of my argument.

We think and my focus now is we hope the Court uses it to dispose of this case is the ground that because there was no coercion, no powerful appeal to sympathy of this sort, no overbearing government conduct, there could not have been and clearly was not inducement. And when there is no inducement, the case should not go to the jury.

There is of course a second prerequisite to the entrapment defense, that is, the existence of predisposition. Defendant who wants the benefit of the entrapment defense must have been at least persuaded to commit the crime. He could not have been waiting for an opportunity that the government happened to present to him. ANd while it may not always be easy to separate predisposed and unpredisposed defendants, certainly a defendant who jumps at a criminal opportunity, in Judge Friendly's words, who was ready and willing to commit the crime without persuasion, cannot assert that he lacked predisposition. And without at least some evidence in the case that there was a lack of predisposition, the courts are quite clear -- or at least many courts have held that entrapment should not go to the jury. And we think that's appropriate.

As I say, in making this argument, we are not asking

the Court to make any factual findings. We think that accepting the petitioner's own account of the crime, own account of what happened here, his own account of the inducement and his reaction to it, the Court can decide and should decide as a matter of law that there was no entrapment and therefore the issue should not have gone to the jury.

QUESTION: What if we don't want to go off on that ground and instead we want to decide the issue on which cert was granted?

MR. ROTHFELD: Well, if the Court were to conclude that that were the logically precedent question to decide, we certainly don't have any quarrel with that. Although we would suggest that it might be appropriate in that case for the Court to then go on and resolve what we have called the first question in the case, and conclude that although defendants may legally be entitled to present alternative arguments, this defendant with his showing was not entitled to bring his entrapment defense to the jury, and dispose of the case on that ground.

QUESTION: That could be left open to the Court below on a remand. I'm just asking whether you're going to argue the point on which we granted cert, and if so, what you propose to say about it?

MR. ROTHFELD: I will argue that. Let me simply then make one final point on our first submission, Justice O'Connor.

The reason that we think it is quite clear that the Court will not have to make factual findings and why it is an important legal principle that should be settled in this case, can be found from looking at the facts of this case, which I suggested at the outset are typical of undercover operations.

Here there was as I suggested a simple offer and acceptance, in fact a series of offers and acceptances. There was no coercion, there were no attempts at persuasion. There was nothing that could be remotely called overbearing on the part of the government. In arguing for inducement, all the petitioner himself was able to say was that the government agent told him that if he didn't take the money quickly, the agent would spend it himself so that his wife wouldn't find it.

Putting this sort of time limit on a criminal proposal we think is clearly not overbearing and is not the sort of thing that should lead anybody to commit an offense. And as I said, a defendant who cannot show inducement beyond a simple offer and acceptance is not entitled to bring his case to the jury.

While that's enough to dispose of our first argument, I should add it is quite clear that the defendant in this case was in fact predisposed to commit the crime. There was a simple offer and acceptance. He conceded a trial that he expressed in interest in the first offer. He conceded at trial that he expressed interest in all the subsequent offers. He

conceded that he took the money without hesitation. His only excuse was that he viewed the payoff as a personal loan and not an illegal gratuity but that excuse was conclusively rejected by the jury.

Now, on the second point, which we think provides an independent and equally fundamental reason for denying an entrapment instruction here, a point that Justice O'Connor has asked about and that was the focus of the Court of Appeals' opinion. The Court of Appeals noted, we think, obviously correctly, that the defendant's simultaneous attempt to say that he did not commit the crime, and to argue entrapment as an alternative ground for acquittal presented inconsistent defenses.

The defendant was trying to say, in effect, I didn't do it, but if you don't believe that, I've got another one for you; the government made me do it. It seems to us, as an initial matter, there is no doubt about the inconsistency of these defenses. The Court has specifically defined entrapment as the commission of all of the elements of the offense at the instance of the government. And the Court has made it very clear that the essence of entrapment is the implantation of a criminal disposition and a specific criminal intent in the mind of the --

QUESTION: Mr. Rothfeld, what's wrong with inconsistent defenses on the part of a defendant? For

instance, can't a defendant typically raise self-defense without having pleaded guilty to the affirmative charges or the elements of the crime?

MR. ROTHFELD: Well, I can give you two answers to that, Chief Justice Rehnquist, one empirical and one theoretical. The question arises with great frequency in entrapment cases and with great infrequency in other sorts of cases. We searched diligently and could find very little authority anywhere on whether or not inconsistent defenses outside of the entrapment context are appropriate.

And I think the reason for that is that defendants generally perceive that they will so damage their credibility if they make clearly inconsistent defenses before a jury, that they just simply don't try to do it very often. So the question really has no practical importance outside the entrapment area.

Defendants do attempt in a great many entrapment cases to raise the affirmative defense, raise alternative defenses. I think that one reason they do that is because entrapment, as the courts have noted, is quite a confusing defense.

QUESTION: Well, isn't it possible one reason is that there's really not any necessary inconsistency between saying, well, sure I did these things, but I didn't intend to commit a crime, and to the extent I did them, I did them because the

government agent talked me into it. Is there any inconsistency there?

MR. ROTHFELD: Well, if the acts were all the elements of the crime, there wouldn't be. But if the requisite mental state is an element --

QUESTION: Yes, but under the Seventh Circuit rule, they've got to admit that they intended a crime.

MR. ROTHFELD: Well, the inconsistency in that I think was in the profoundest sense that a jury cannot simultaneously believe that a defendant was entrapped and that he did not commit the crime. Commission of the crime obviously presupposes having the requisite mental state. A defendant who denies the mens rea as petitioner testified about himself at trial, could not have had obviously a criminal intent. And a defendant who lacked a criminal intent could not by definition have been entrapped.

QUESTION: But couldn't a defendant in a particular case take the position that he didn't have the necessary intent but if for some reason, the jury found that he did, he says that he was entrapped. Is that necessarily inconsistent?

MR. ROTHFELD: Well, we think that in a case such as this one, it necessarily is.

QUESTION: Well, speak not in terms of this case, then, but hypothetically.

MR. ROTHFELD: Well, as a general matter, I would say

yes, they are inconsistent. A defendant who testifies that he lacked the mental state is implicitly testifying that he was not entrapped. He's saying that there was no improper mental state at all in the case. To find that he was entrapped, the jury must find by definition that there was an improper mental state that was implanted in the defendant by the government. That's the finding the jury has to make.

QUESTION: You can convert anything into a non-contradiction if you preface the second part of it with -- but if the jury finds. I mean, even the quite incompatible defenses of self-defense and I didn't kill the person can be made to sound consistent if you say, I didn't kill him, but if the jury should find that I killed him, then I must have killed him in self-defense.

MR. ROTHFELD: Well, that's quite right, Justice Scalia. It's certainly true that the defendant was not so self-destructive as to simultaneously ask the jury to find that he didn't have the mental state and that he was entrapped into committing the crime. The inconsistency lies in the fact that his two alternative defenses cannot simultaneously be true. And he is telling the jury one thing when he testifies on the stand.

QUESTION: Well, why in this very case, this is a government official who borrowed money from somebody who presumably wanted to induce him to take official action that

would favor him. What if the defendant gets on the stand and says I didn't realize he had any business before the agency at all. I thought it was a purely personal transaction. I had no intent to commit a crime.

That's the first part of my testimony. The second part is, everything to do with this loan was induced by him. He came in, he offered me very favorable interest rates, he offered me more money than I needed, and so forth and so on, and therefore, I was persuaded to take this loan.

Maybe that's not sufficient entrapment, but why is it inconsistent to say on the one hand, I didn't have criminal intent, and, b), to the extent I did anything wrong, I was entrapped? What's inconsistent about it?

MR. ROTHFELD: Well, the two statements that you've made, I didn't have criminal intent, and the government made me a loan --

QUESTION: Because factually I didn't realize he was doing business with my agency.

MR. ROTHFELD: Those two statements are not necessarily inconsistent, but when the defendant says, I did not understand that I was doing something illegal and did not intend to do something illegal, and then asks the jury to find I was entrapped, which by definition means that I had the improper mental state and that the improper mental state was implanted in me by the government, those two propositions

cannot simultaneously be true.

Now, certainly a jury can make seriatim findings, yes, he had the right requisite mental state, and we find that the mental state was implanted by the government.

QUESTION: The defense of entrapment, as you say, presumes that every other element of the crime is satisfied.

MR. ROTHFELD: The Court indicated explicitly in Russell that every element of the crime must be committed.

QUESTION: I guess it depends on how you define entrapment. He's really saying that sure I had all these, all the elements of the crime were there but every one of them was induced by the government.

MR. ROTHFELD: Well, if he said every element of the crime was there, he would have an entrapment defense. But he's not saying that. He's saying that the crucial element of the crime, the requisite mental state was not there. And in fact in the entrapment context, the requisite mental state is the critical element because entrapment focuses peculiarly on the origin of the concededly existing improper mental state.

That's what the jury's asked to find.

QUESTION: Isn't he really saying that the element of intent was not mine, it was really the government's?

MR. ROTHFELD: Well, if he did not believe in this case that he was taking the money for an improper purpose as a gratuity rather than as a personal loan, he would not be guilty

of the crime, he would not have committed all of the elements of the offense. That was what he asserted was true.

And for him to say that the government intended for this money to be an illegal gratuity but that was not my intent, he is denying one of the elements of the offense.

QUESTION: What's wrong with the inconsistent defenses, assuming I believe that they're inconsistent. So what?

MR. ROTHFELD: I hope you do believe they're inconsistent, Justice White. And there are several things that we think are wrong with it. First of all, when a defendant has -- particularly in the entrapment setting -- when a defendant has taken the stand and has advanced his view of the case, he's obviously entitled to testify, but he's not entitled to testify untruthfully, and he can fairly be held to the story that he tells on the stand. When he tells a story that is inconsistent with his having been entrapped, we think for him to ask for acquittal on entrapment grounds is to ask for a windfall acquittal, which is not justified on his stated view of the facts.

And a defendant who is acquitted on that ground has been acquitted on the basis of something that he has implicitly testified is not true. Now, this is particularly clear in the entrapment setting. Let me take a step back. As I suggested earlier, in discussing the first aspect of this case, a

defendant who has been entrapped and wants to be acquitted on that ground is not a non-culpable defendant. He is unlike a defendant acquitted on any other affirmative defense basis, and unlike a defendant who is acquitted on insanity grounds or self-defense grounds or duress grounds. Those people have a complete justification or excuse for what they did. The entrapment defendant doesn't. And therefore the Court has emphasized entrapment is a uniquely narrow defense. We ought to have a particularly good reason to allow a defendant to make this defense.

Now, certainly when a defendant believes that there are factual grounds that exist that support his claim that he did not factually commit the crime, he's entitled to present those grounds. And when a defendant believes there are factual grounds that exist that prove that he was entrapped, he is entitled to make those arguments.

But we don't see an impropriety in saying that given the nature of the entrapment defense, he should be put to his choice.

QUESTION: Are you saying it's the same reason you don't allow inconsistent testimony in other respects why you would not allow a defendant to come in and perjure himself to say one thing and then say, but if you don't believe that, then I testify to the opposite, because it does not help the truth seeking process.

MR. ROTHFELD: That is certainly a major part of our argument.

QUESTION: Yes, but why do you presume there's false testimony. Maybe he's telling the truth when he says I thought they were entirely separate and he wasn't doing business here, but the government has some different witnesses that the jury may believe. He may have been telling the truth, and he's also telling the truth when he says, to the extent I did anything, the government agents are responsible for my conduct.

It is not necessarily true that he lied in either case.

MR. ROTHFELD: Well, the jury's conviction in the case that it believed that his account of the crime was not true.

QUESTION: Yes, but he's been convicted here, but every defendant before he gets on the stand is presumptively innocent. When you get the problem before trial, you're presuming the man is innocent.

MR. ROTHFELD: Well, that is certainly true, Justice.

QUESTION: You don't presume he's going to give you false testimony.

MR. ROTHFELD: Well, that is true. But when a defendant takes the stand and denies the commission of the crime, it is inconsistent with that denial for him to say to the jury that I was entrapped into committing this crime. And

we think that it is inappropriate to allow a defendant to present two inconsistent grounds, what Judge Gee called a smorgasbord of inconsistent defenses that a jury can pick and choose from.

And I emphasize it is certainly true that this argument depends in large part on the grounds that we want to advance in the truth seeking function of the trial but we think it is particularly powerful in the entrapment setting, because entrapment the court has emphasized for a variety of reasons is a narrow defense. Defendant is in a sense being given a special benefit that no one else whose acquitted on affirmative defense grounds receives.

QUESTION: Is it not correct that the reasons you advance for your position would apply equally to self-defense, because there's an inconsistency there too. You might well argue that you cannot plead self-defense, because that's not the true story if you really are guilty. You shouldn't be able to do it if you plead not guilty.

MR. ROTHFELD: Well, I'll give you two answers to that, three answers. To the extent that there is an inconsistency in someone who advances another affirmative defense, and a defense to an element of the offense, our argument would apply in that setting. That person is advancing two inconsistent statements before the jury and we think that is inappropriate.

However, we think that the argument that we're making has special force in the entrapment setting because of the particular nature of the entrapment is something which does not entirely excuse the defendant, we think --

QUESTION: Because it's not obvious that there's any inconsistency, whereas it is obvious in these other cases there's an inconsistency.

MR. ROTHFELD: Not at all, Justice Stevens. In many cases involving other affirmative defenses, there will not be an inconsistency in a defendant who says I'm insane and I didn't know where I was on the day of crime. And therefore, you haven't proved me guilty, but if I did it, I must have been insane. Those are not necessarily inconsistent.

QUESTION: They certainly are because if he's insane, he probably couldn't have had the intent to commit the crime.

MR. ROTHFELD: Well, he may say that he factually doesn't know where he was on the day of the crime. He may not have physically committed the act, but if he committed the act, he must have been insane because he is insane. Those are not necessarily inconsistent. A jury can find both of those things to be true.

That is not true in the entrapment setting. A jury cannot find that the defendant lacked the requisite mental state as he has testified, and that the defendant was entrapped into committing the crime, which as I say presupposes the

mental state having been implanted in his mind by the government.

QUESTION: What about self defense. Are you allowed to make a self defense claim and at the same time, deny the killing.

MR. ROTHFELD: Well, we were unable to find any authority on that point, and I think it is difficult to imagine a realistic case in which that will arise.

QUESTION: You don't ordinarily have the nicety of pleading in a criminal case. You have a not guilty plea. And the arguments as to what defense is yours come out in the arguments on jury instructions, don't they, rather than just on pleas?

MR. ROTHFELD: That's typically true. A defendant who having advanced his claim that he factually was not guilty at the close of trial we think should for that reason be foreclosed from advancing the entrapment affirmative defense. If he wants to make entrapment as an affirmative defense, he is free to do so, but he ought to choose that course of litigation strategy at the outset of the trial.

QUESTION: Of course, what makes this difficult is that we normally think that the government is put to its proof in these criminal cases, and the jury may look at circumstantial evidence to determine that the defendant had the requisite intent to commit the substantive offense, and it may

not, the defendant may believe he didn't have the intent. He may sincerely believe that. And yet, the jury, on the basis of the circumstantial evidence may find he did.

Now, is the defendant then to be deprived of an argument to the jury based on other evidence that entrapment then is appropriate for him to urge to the jury?

MR. ROTHFELD: Well, it is certainly true that the defendant generally may put the government to its proof. But entrapment of course is an affirmative defense, and the burden can be placed wherever the court finds that it's appropriate. And we think given the unique nature of entrapment as the sort of affirmative defense which avoids the defendant's guilt that he it should not be permitted to make these torts in inconsistent arguments.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rothfeld.

Mr. Gimbel, you have nine minutes remaining.

ORAL ARGUMENT OF FRANKLYN M. GIMBEL

ON BEHALF OF PETITIONER - REBUTTAL

MR. GIMBEL: Thank you, Mr. Chief Justice, may it please the Court.

I would like to address the comments of Justice Scalia, Justice Stevens, and Justice O'Connor, on what I believe to be uniquely in this case the lack of inconsistency between what Mr. Mathews did at the trial and his being in an

appropriate position to have his jury consider the entrapment defense.

In fact, while the facts are kind of immaterial to the ultimate call in this case by the Court, it is not Mr. Mathews view that the entrapment defense should be revisited and changed in this case. We're willing to settle on the fact that an accused must first show that he was induced to do something improper, and secondly that there must be a demonstration that he was not otherwise predisposed once the activities were undertaken.

But in this case, Mr. Mathews was accused of having received a gratuity, and the facts show that Mr. Mathews was a long time associate and friend of the government agent. They had a personal relationship away from their business relationship. They had in fact exchanged finances on prior occasions, prior to the time when Mr. DeShazer who was the person who put the money in Mr. Mathews' hand and who was working under the tutelage of the FBI and recording conversations between them took place.

And so Mr. Mathews was essentially confronted with this dilemma. And I think in this case, uniquely so because as Justice Stevens appropriately pointed out, the call on whether or not Mr. Mathews could get the entrapment defense submitted to his jury was made before the case began. And so, as counsel for Mr. Mathews, it would be incumbent upon his trial lawyer to

say, look, Fred, if you want to go to this jury on the issue of the fact that the government really induced you into this conduct, you can't get up on that witness stand and tell that jury that you did not intend to give him something in the nature of some official performance on your part in exchange for this loan. And Mr. Mathews had to make the call.

That would be dishonest. I did not anticipate that receiving this money was in any way connected to my position as an employee of the government and his position as a client of the government.. And there's testimony that supports that.

QUESTION: Why is it any different than the position of a defendant that's accused of murder who really believes that he didn't kill the individual, someone else pulled the trigger. On the other hand, the individual was rushing at him with a knife, and if he did kill him, it was in self-defense.

MR. GIMBEL: I don't think it's different.

QUESTION: It isn't different.

MR. GIMBEL: No.

QUESTION: And you don't think that that's contradictory testimony: number one, I didn't kill him, and number two, I killed him in self defense?

MR. GIMBEL: No. I would say it's contradictory but I don't know that the jury can't consider both issues.

QUESTION: I don't think we're arguing really about whether this is any different from any other contradictory

testimony. I think we're arguing about whether there's any reason to exclude contradictory testimony in a criminal trial. I don't see how this is any less contradictory than any other.

MR. GIMBEL: And my posture is that we should not exclude contradictory testimony. That it doesn't make any sense to exclude it because an argument can't be made that it's not contradictory in a rather global sense. And in this case, it's not so global. It's pretty narrowed down. And I think Justice Stevens came up with a hypothetical and while it didn't apply to this case, the fact that a person works for the government, another person's a client of the government in that particular agency and there's a financial transaction between them that essentially doesn't have any co-relationship to each other would be an appropriate basis for that particular individual to say, no, I didn't violate the law.

Yes, I took money, Yes, I'm an employee of the government, yes, this person's a client of the government. But all of these things were done under the inducement of the client of the government, and that's what happened here. And he said, I'm not guilty because I didn't put those two things together. As Justice O'Connor suggested, the jury can do that. They can put that together and say, well, Mr. Mathews, we don't agree with your conclusion that you're not guilty. We think you are, we think there was a relationship.

QUESTION: But there is an issue here, how far the

entrapment defense ought to reach. The defense was thought up by the courts.

MR. GIMBEL: Exactly.

QUESTION: I suppose we could say that the entrapment defense is available but only where there's an admission of all the elements of the crime.

MR. GIMBEL: You can say that. I'm hoping you won't because it doesn't make any sense. More often, it seems to me, would promote perjury.

QUESTION: It makes some sense in the terms of just how often and under what circumstances is entrapment available to a person whose committed a crime.

MR. GIMBEL: That I understand, Justice White. But what I don't understand is that essentially there is this very confined area within which a person can say I want my jury to consider government conduct in my case.

And in Mr. Mathews case what he needed to do, based on the Seventh Circuit rule, in order to get his jury to consider whether the government activity in his case was inappropriate, was to say, I did it, I was wrong in every single respect, even though he didn't believe he was.

QUESTION: Well, it would have been available if there had been the proper groundwork if he had just stayed off the stand, is that right?

MR. GIMBEL: No. Not true. In the Seventh Circuit,

you must affirmatively admit, you can't even just by your plea of not guilty get entrapment. You can in D.C. and in the Fifth Circuit, but you can't in the Seventh Circuit.

QUESTION: It isn't just government behavior that he's complaining about. If it were just that, there would be no inconsistency at all. He is saying that this idea in my mind was not there of its own, the government put it there. That's what he's saying. He is saying something about his mind that is utterly inconsistent about what his not guilty plea says. He's saying this idea to commit the crime was put there by the government.

Now, it is an inconsistency. Maybe you don't mind inconsistency in criminal trials, but the advantage of it is that it puts the defendant to the test and thereby improves the truth finding function. He has to tell the truth. Now, which is it. You say the one or the other, but don't come in and say both because it makes it harder, you get two bites at the apple and you're playing games with the jury.

MR. GIMBEL: I just can't agree with that proposition, Justice Scalia, because the truth on intent is an amorphous concept and ten people looking at the same incident, nine may view it one way, and one view it another way. That doesn't mean that the one is a liar. It's from his perspective.

And Mr. Mathews was entitled to say I did not intend

to relate this loan to some improper government conduct. And that's not inconsistent with his saying that, I did take the money, and I did have some dealings with this man, and they superimposed this intent, they juxtaposed the intent on me in the scheme of their dealings with me.

And so while I don't need to say that at least in my view, I don't need to convince you that inconsistent defenses should never be allowed, because I don't believe that, but I think in this case that the truth is something that is so elusive when it comes to intent, that Mr. Mathews was not necessarily playing a game, when he said, jury, I didn't do this to violate the law, and yet whatever I did, I did because of the creative activity of the government, and so I should have had my jury decide, first, did I do this to violate the law, and then once reaching that, did I do this because the government essentially made me do it, or induced me by their creative activity to do it.

And I think that that's what Mr. Mathews was entitled to, and I think that the Seventh Circuit rule on the subject matter is too confining and it's not good law and you ought to look elsewhere for your decision. And the elsewhere is out there in this circuit, in the Fifth Circuit in eloquently argued cases, and even beyond that in the Ninth Circuit where they say, you can go in and say anything you want but inconsistent arguments will be seen by a jury very quickly, and

you'll lose. And that's probably the truth.

And so, in conclusion, I urge you, as I know you will, to look very closely at the unfairness -- and that's what it really is -- the unfairness of the constrictions that were placed upon Mr. Mathews and anyone else similarly situated by the Seventh Circuit rule, saying essentially, that you must admit your crime.

CHIEF JUSTICE REHNQUIST: Mr. Gimbel, your time has expired.

The case is submitted.

(Whereupon, at 11:53 a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court and that this is a true and accurate transcript of the case.

Date: 12/2/87

Margaret Daly

Official Reporter

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