Approved as corrected February 9, 1984
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Bob Frey at
Chairperson

3:30 ~~a~~.m./p.m. on February 7, 1984 in room 526-S of the Capitol.

All members were present except:

Representative Douville was excused and Representative Duncan was absent.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes' Office, excused
Nedra Spingler, Secretary

Conferees appearing before the committee:

Sergeant Danny Bardezbain, Sedgwick County Sheriff's Department
Bob Clester, Kansas Sheriffs Association
Jim Clark, Kansas County and District Attorneys Association
Emil Tonkavitch, Professor, Kansas University Law School
Steve Tatum, Johnson County District Attorney's Office
Georgia Nesselrode, Victim/Witness Coordinator for the Johnson County District Attorney's Office
Valerie, a Rape Victim
Dan Love, Ford County District Attorney
Jim Rumsey, Kansas Trial Lawyers Association
Anthony Di Placido, Chief of Police, Westwood, Representing the Kansas State Chiefs of Police Association

The minutes of the meetings of February 1 and 2, 1984, were approved.

Hearings were held on HB 2764 and HB 2522.

HB 2764 - An act relating to controlled substances, entrapment defense not available.

Representative Jack Shriver, sponsor of the bill, furnished copies of the present entrapment statute (Attachment No. 1); a newspaper article (Attachment No. 2) regarding a Kansas Supreme Court ruling on entrapment; a Kansas Supreme Court syllabus concerning State v. John Driscoll (Attachment No. 3) which was the policy in the state until it was overturned in the case of State v. Reichenberger (Attachment No. 4); an article by Richard Seaton on entrapment (Attachment No. 5); and an article by Stephen Mirokian published in the Washburn Law Journal (Attachment No. 6). Representative Shriver then presented a statement (Attachment No. 7) in support of HB 2794 and outlining the history of the defense of entrapment. He believed that police officers should not be required to wait until drug offenses are committed in their presence, and a ruling that thwarts the detection and punishment of criminals should not be allowed.

There was discussion regarding the U.S. Supreme Court ruling that entrapment violates due process rights, why the bill does not cover all crimes and not just drugs, and if criminal law should be expanded to include all persons in the household of suppliers of drugs such as marijuana.

Sergeant Danny Bardezbain, Sedgwick County Sheriff's Department, said he was assigned to the narcotics section which supports HB 2794. It would enhance potential for arresting dealers in large-scale drug operations. At present, although there have been convictions whether or not defense of entrapment is raised, it is almost impossible to get a case against drug suppliers and dealers who have an arsenal of defenses in court.

Bob Clester, Kansas Sheriffs Association, spoke in favor of the bill for that group and also as a recent retiree from the KBI and a former Cowley County sheriff. He believed the bill would have a positive impact on controlling illegal narcotics sales. Because offenders caught by undercover agents use defense of entrapment, removing the criminal's right to this would deter sales. He believed law enforcement officers today are too professional to use entrapment.

HB 2522 - An act relating to presence of witnesses not required at preliminary examinations.

The Chairman noted the bill was heard during the 1983 session. The Kansas County and District Attorneys Association requested a rehearing because there have been new developments in the court that affects the bill.

Jim Clark, Kansas County and District Attorneys Association, furnished copies of the Florida statute (Attachment No. 8) regarding preliminary hearings and an article from the Kansas City Star regarding the Florida system (Attachment No. 9). In his statement supporting HB 2522 (Attachment No. 10), Mr. Clark said, because of the Kansas Supreme Court cases, State v. Green and State v. Cremer, the bill would need amending on line 33. Language suggested for the amendment (page 2, last paragraph, Attachment No. 10) was taken from the State v. Cremer (Attachment No. 11) syllabus which states that hearsay may be used at preliminary hearings if the legislature chooses to make this change. Attachment No. 12 is a U.S. District Court decision regarding a Florida case, Gerstein v. Pugh. Attachment No. 13 is a Kansas Supreme Court syllabus, State v. Sherry and Finley, which states that KBI laboratory reports may be introduced as evidence even though it is hearsay.

In Mr. Clark's opinion, preliminary examinations were held at the expense of the victim. These hearings were not a right required by the constitution but were a convenience for the accused which, if abolished, would reduce court time. In cases of transient population, depositions could be obtained. Although the purpose of preliminary hearings was to determine probable cause, he believed the same evidence could be obtained with a search warrant.

Emil Tonkavitch, Professor, KU Law School, gave his background of experience with constitutional law questions and as a federal prosecutor. Based on this experience, he believed there was a need for change in the Kansas system of preliminary examinations which cause unnecessary harassment to the victim and result in high cost to taxpayers. The Kansas system goes far beyond what is required by the constitution and the state Supreme Court. Permitting hearsay would abolish the preliminary examinations with the only requirement being a prompt judicial determination of probable cause which can be made by the magistrate at the initial appearance. The magistrate can always determine there is not enough evidence for a trial. Allowing hearsay would give the magistrate flexibility.

Steve Tatum, Johnson County District Attorney's Office, discussed the bill from the victim's point of view. He gave examples of his experience in preliminary examinations where the victim has been harassed, asked questions by the defense that could not be asked before a jury, and becoming upset from being subjected to two confrontations with the defendant. The victim is inconvenienced in order for the defendant to be convenienced. This has a chilling effect on the victim or witness cooperating with the criminal justice system, and all citizens are potential victims or witnesses. Mr. Tatum quoted from a letter he received from the Governor in which the Governor said his major concern lies with the defendant's constitutional rights. He urged the Committee to consider the victim's rights also.

Georgia Nesselrode, victim/witness coordinator for the Johnson County District Attorney's Office, said her sole responsibility was to deal with crime victims, and HB 2522 should be considered as a victim's rights bill. She noted a change in the hearsay ruling was recommended by the 1982 President's Task Force on Victims of Crimes. She believed Kansas should completely abolish preliminary hearings and allow hearsay. She gave examples of traumatic and emotional experiences of victims and witnesses in preliminary examinations who do not understand why they have to keep repeating their testimony.

Valerie, a rape victim, told of her rape and experience with the preliminary examination process, noting the type of questions asked which seemed to degrade her and the emotional trauma of having to face the defendant and relive the experience, detail by detail, twice.

Dan Love, Ford County District Attorney, supported HB 2522 and told of his experience with preliminary hearings, their mini-trial aspects, unnecessary length of time and costs, and the negative effect this has on witnesses.

Jim Rumsey, Kansas Trial Lawyers Association, opposed the bill, noting his experience as both a longtime prosecution and defense attorney. He noted the importance of cross-examinations and said amending the statute to allow hearsay would lead to more amendments. Under the Florida system, nobody really knows or has a basis for making decisions

concerning the case, and, many times, it is a detective, who might fudge on testimony, that says a person is guilty. Without preliminary examinations, a lot of motions will be filed to determine what the legal issues are. He said if victims are asked inadmissable questions at preliminary examinations, the court has power to stop this. He did not believe this bill could be compared with federal cases where hearsay is used because federal cases only deal with large issues. Previous conferees had painted an inaccurate picture of intimidation of witnesses. Preliminary hearings are a valuable tool in gathering information before a trial, it better prepares each side for the trial, and moves the court docket faster. Mr. Rumsey noted a study promoted by the Kansas Chief Justice to consider revision of preliminary examinations showed that costs would increase because of additional court staff and attorneys.

Anthony Di Placido, Chief of Police, Westwood, representing the Kansas State Chiefs of Police Association, noted the inconveniences preliminary examinations cause witnesses which make them less likely to cooperate the next time. He believed the effect these hearings have on victims and witnesses was a major problem, and he supported HB 2522.

The Chairman said, due to lack of time, the remaining conferees who had not testified on HB 2522 would be given the opportunity at a later meeting.

The meeting was adjourned at 5:15 p.m.

which it is probable that he will be subjected to compulsion or threat.

History: L. 1969, ch. 180, § 21-3209; July 1, 1970.

Judicial Council, 1968: It is the general rule that although coercion does not excuse taking the life of an innocent person, it does excuse in all lesser crimes. The section codifies that rule. Twenty states have legislation on this subject.

Subsection (2) creates an exception for the person who connects himself with criminal activities or is otherwise indifferent to known risk.

Subsection (1) is similar to Illinois Code, 7-11. Subsection (2) is taken from the Model Penal Code, 2.09 (2).

Law Review and Bar Journal References:

Perjury in Kansas, 13 W.L.J. 479, 493 (1974).

CASE ANNOTATIONS

1. Evidence raising defense of compulsion properly excluded when no immediate threat shown. State v. Milum, 213 K. 581, 516 P.2d 984.

2. Cited; presumption that person possesses a free will and is accountable for his rational conduct; exceptions. State v. Jones, 2 K.A.2d 220, 226, 577 P.2d 357.

3. Cited; threat of harm must be "imminent". State v. Jones, 2 K.A.2d 220, 224, 577 P.2d 357.

4. Refusal to instruct on compulsion or duress under facts of case; aggravated juvenile delinquency charge. State v. Bolden, 2 K.A.2d 470, 472, 473, 581 P.2d 1195.

5. Defense of compulsion (21-3209) not available if defendant had reasonable opportunity to escape compulsion without committing crime. State v. Harrison, 228 K. 558, 559, 560, 561, 618 P.2d 827.

6. Existence of nuclear power plant does not constitute compulsion or threat which justifies criminal activity. State v. Greene, 5 K.A.2d 698, 700, 623 P.2d 933.

7. Statute on compulsion not violative of constitutional rights; defendant had reasonable opportunity to avoid doing act without undue exposure to death or serious bodily harm. State v. Rider, Edens & Lemons, 229 K. 394, 409, 625 P.2d 425.

21-3210. Entrapment. A person is not guilty of a crime if his criminal conduct was induced or solicited by a public officer or his agent for the purposes of obtaining evidence to prosecute such person, unless:

(a) The public officer or his agent merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by such person or a co-conspirator; or

(b) The crime was of a type which is likely to occur and recur in the course of such person's business, and the public officer or his agent in doing the inducing or soliciting did not mislead such person into believing his conduct to be lawful.

History: L. 1969, ch. 180, § 21-3210; July 1, 1970.

Judicial Council, 1968: While Kansas recognizes the defense of entrapment (*State, ex rel., v. Leopold,* 172 Kan. 371) it has seldom been asserted effectively. The section seeks to clarify the status of the defense and make it more usable.

The defense of entrapment codified in this section is based upon the theory that improper law enforcement methods should be penalized, and that depriving the person using such methods of the fruits of his labor is a proper way of penalizing him. The defense is available only when the person doing the entrapping is a public officer or his agent. The defendant will raise the defense by showing that he was induced or solicited to commit the crime for the purpose of obtaining evidence with which to prosecute him. It then will be up to the state to prove that the entrapment methods were proper by proving either the facts set forth in subsection (*a*) or the facts set forth in subsection (*b*). If the idea for committing the crime originated with the actor or a co-conspirator, entrapment is no defense.

Some criminal activity is very difficult to detect unless law enforcement officers are permitted to take the initiative, in the form of a solicitation. Under the safeguards provided for the defendant in subsection (*b*), they are permitted to do so. The crime must be of a type which is likely to occur and recur in the course of the actor's business or activity. For example, if the actor is in the business of selling intoxicating liquors or if his activity is selling narcotics, it is permissible for a law enforcement official to solicit a sale. If the actor is willing to sell to the official who pretends to be an ordinary patron, it is safe to assume that he would make similar unlawful sales to other persons. In such a case, the idea of committing the specific offense did not originate with the actor or a co-conspirator (so subsection (*a*) is not applicable), but the fact that such crimes are difficult to detect and the fact that the general idea of committing crimes of the type in question usually exists in the actor's mind before the solicitation to commit the specific criminal act, make it proper to abandon in this type of case the requirement of subsection (2) that the idea of committing the specific crime must originate with the actor or a co-conspirator. There are further safeguards provided under section (*b*). The person doing the entrapping cannot mislead the actor into thinking that the conduct is lawful (*e.g.,* by having an Indian who looks like a white man purchase liquor for the purpose of entrapping the actor into the federal crime of unlawful sale of liquor to Indians), nor can he use undue means of encouragement such as an appeal to the actor's impulses of pity (*e.g.,* feigning excruciating pain to induce an unlawful sale of narcotics).

This section goes beyond the classical common-law defense of entrapment. That defense is based upon the premise that a person who instigates another to commit a crime requiring proof of nonconsent may go so far as to consent to whatever conduct is in question, thereby making it impossible for the state to prove one of the essential elements of the crime. This is apparently the Kansas view.

Law Review and Bar Journal References:

Discussed; how statute is applied. John E. Caton, 12 W.L.J. 64 (1972).

"The Entrapment Defense in Drug Cases," Richard H. Seaton, 41 J.B.A.K. 217, 220, 221, 237, 238 (1972).

"Arrest Under the New Kansas Criminal Code," Keith G. Meyer, 20 K.L.R. 685, 721 (1972).

Entrapment defense in narcotic sales cases, William J. Olmstead, 12 W.L.J. 231 (1973).

"Entrapment: Time to Take an Objective Look," Stephen G. Mirakian, 16 W. L. J. 324, 339, 340 (1977).

CASE ANNOTATIONS

1. Subsection (*a*) mentioned; no entrapment when predisposition for committing crime shown; marijuana found in car. State v. Williamson, 210 K. 501, 506, 502 P.2d 777.

2. No error found in the instructions given on defense of entrapment. State v. Osburn, 211 K. 248, 253, 505 P.2d 742.

3. Defenses of entrapment and procuring agent not inconsistent; error in failure to instruct on each. State v. Fitzgibbon, 211 K. 553, 554, 507 P.2d 313.

4. Accused cannot rely on defense where he has shown predisposition; permissible for law officer to solicit sale of drugs. State v. Brothers, 212 K. 187, 192, 193, 510 P.2d 608.

5. Conviction for sale of cocaine affirmed; entrapment not established as matter of law. State v. Bagemehl, 213 K. 210, 212, 213, 214, 515 P.2d 1104.

6. Conviction of blackmail; defense of entrapment not available where criminal purpose admitted to have preceded act. State v. Daniels, 215 K. 164, 165, 523 P.2d 368.

7. Instruction quoting section verbatim not clearly erroneous. State v. Worth, 217 K. 393, 395, 537 P.2d 191.

8. Refusal to instruct on entrapment upheld; evidence; conviction of unlawful possession of firearm affirmed. State v. Farris, 218 K. 136, 138, 542 P.2d 725.

9. Applied; police participation merely afforded opportunity for commission of crime; no entrapment. State v. Jordan, 220 K. 110, 116, 551 P.2d 773.

10. Prior disposition to commit crimes may be shown when entrapment defense raised; entrapment defense discussed. State v. Amodei, 222 K. 140, 143, 144, 563 P.2d 440.

11. Defendant not entrapped; activities fell within exception of section. Bongers v. Madrigal, 1 K.A.2d 198, 201, 563 P.2d 515.

12. Conviction of theft and obstructing official duty affirmed; defense of entrapment not established. State v. Gasser, 223 K. 24, 28, 29, 574 P.2d 146.

13. Subsection (b) applied; allegation of solicitation alone insufficient to require instruction on entrapment; sale of cocaine conviction. State v. Hagan, 3 K.A.2d 558, 564, 598 P.2d 550.

14. Defense of entrapment available only when person doing the entrapping is a public officer or the officer's agent. State v. Becknell, 5 K.A.2d 269, 274, 615 P.2d 795.

15. Defense of entrapment must show intent to engage in criminal conduct was instigated by law enforcement officers. State v. Smith, 229 K. 533, 534, 535, 625 P.2d 1139.

21-3211. Use of force in defense of a person. A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force.

History: L. 1969, ch. 180, § 21-3211; July 1, 1970.

Atch. 1

Attachment #1 2-7-85

Attachment # 1

Attachment # 1

2 Attachment #2
2-7-84

Attachment # 2

ports said.

Authorities said an overheated kero-

South Korean military helicopters were credited with saving at least 18

A Pusan fire

Court rules to clarify entrapment

The Kansas Supreme Court, in a ruling designed to clarify its position on the defense of entrapment, ordered a new trial Friday for a Topeka man arrested in 1982 as part of a law enforcement sting operation here.

The Supreme Court said that Robert C. Rogers was entitled to have the trial court judge give instructions about entrapment to the Shawnee County district court jury that convicted him on two counts of attempted felony theft.

The trial judge in the case, Shawnee County District Judge James MacNish, denied the request for jury instruction about entrapment on grounds it was unavailable to a defendant who admits no wrongdoing.

Rogers purchased two television sets from a Topeka police department undercover officer who was part of a sting operation designed to uncover criminal activity in the city.

Rogers pleaded innocent to the charge of attempted felony theft and maintained throughout his trial that he had no knowledge the television sets might have been stolen, that he would not have bought them if he thought they were stolen and that therefore he could not have had any criminal intent in purchasing them.

The 6-1 Supreme Court decision had the effect of upholding a Court of Appeals ruling that Rogers was entitled to a jury instruction on the defense of entrapment and reversed MacNish, who had denied the request.

The Supreme Court said, "It must be conceded that our past decisions are unclear as to when the defense of entrapment is available."

The Supreme Court said that whether a defendant was entitled to a jury instruction on the defense of entrapment depended on whether the defendant admits some involvement in the crime but fails to admit all the facts alleged by the state. It also depends on the degree of involvement he admits.

Black's evidence consisted of his own testimony that he had told the undercover agent, who was a confessed thief, that he did not want anything to do with hot material, any stolen material or objects.

Black testified he did not hear the undercover agent when the agent told him on the telephone that one of the television sets involved was stolen, although the police offered tape recordings of the phone conversation to prove the statement was made.

Black said that such a statement could have been made and that there were friends and customers in his liquor store who distracted him when the undercover agent called him and offered to sell him the allegedly stolen TV.

Your horoscope

Sunday, Jan. 15

CAPRICORN (Dec. 22-Jan. 19) It won't spel material gains for you, yet you'll derive satistac tion today from helping others get things for which they're striving.

AQUARIUS (Jan. 20-Feb. 19) Favorable changes are in the wind today. Goals too difficult to achieve earlier in the week can now be attained with relative ease.

PISCES (Feb. 20-March 20) You are blessed with a marvelous imagination, and today it's apt to be in full gear. Where others can't find an answer, you'll

Atch. 2

entitled to it. We are of the opinion that, from all the circumstances as they now appear, the trial court was amply justified in not believing the claims of the defendant and in refusing a new trial.

In *People v. LeMorte*, 289 Ill. 11, it was said:

"Applications for new trial on the ground of newly discovered evidence are not looked upon with favor by the courts, 'and in order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequences of an adverse verdict, such applications should always be subjected to the closest scrutiny by the court, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been no lack of due diligence. The matter is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse.' (20 R. C. L. 289.) In *People v. Williams*, 242 Ill. 197, 89 N. E. 1030, 17 Ann. Cas. 313, this court had occasion to consider what was necessary to be shown in order to justify a new trial on the ground of newly discovered evidence, and stated that the evidence must be such as will probably change the result if a new trial is granted; that it must have been discovered since the trial and be such as could not have been discovered before the trial by the exercise of due diligence; that it must be material to the issues, and must not be merely cumulative to the evidence offered on the trial. These same requirements are substantially set forth in Wharton's Criminal Pleading and Practice (8th ed.), § 866. It has been frequently stated by this court that newly discovered evidence, on motion for new trial, must be clearly conclusive in its character to require the court to grant a new trial. (*Henry v. People*, 198 Ill. 162, 6 N. E. 120, and cases there cited.) . . . Courts are not required to believe an unreasonable story, even though it is not contradicted, merely because it has been sworn to by a witness on the trial of the case. (*People v. Davis*, 269 Ill. 256; *Stephens v. Hofman*, 275 Ill. 497.) This rule applies with equal if not greater force as to relying on and believing *ex parte* affidavits on a motion for new trial." (pp. 21, 24. See, also, *State v. Nimerick*, 74 Kan. 658, 87 Pac. 722; *State v. Creager*, 97 Kan. 337, 155 Pac. 29; *McIntyre v. Surety Co.*, 97 Kan. 629, 156 Pac. 690; *Hiltabidle v. Bradburn*, 110 Kan. 623, 204 Pac. 707; *State v. Giles*, ante, p. 417; *Fusselman v. Yellowstone Valley, etc., Co.*, 53 Mont. 254; *State v. Matkins et al.*, 45 Mont. 58; *Nicholson et al. v. Metcalf*, 31 Mont. 276; *Territory v. Claypool and Lueras*, 11 N. M. 568; *People v. Rushing*, 130 Cal. 449; *Williams v. State*, 53 Fla. 89; *Stevens v. State*, 93 Ga. 307; *State v. Jones*, 89 S. C. 41; *State v. Danforth*, 73 N. H. 215.)

The judgment is affirmed.

No. 26,376.

THE STATE OF KANSAS, *Appellee*, v. JOHN DRISCOLL, *Appellant*.

SYLLABUS BY THE COURT.

INTOXICATING LIQUORS—*Evidence—Sale Through Solicitation of Officer.* It is no defense to one who violates the prohibitory liquor law that an officer, in order to detect and prosecute him for the violation of the law, solicited him to obtain and sell intoxicating liquor to the officer and that his prosecution for the violations was based on the evidence so obtained.

Appeal from Saline district court; DALLAS GROVER, judge. Opinion filed October 10, 1925. Affirmed.

W. B. Crowther and *F. C. Norton*, of Salina, for the appellant.

Charles B. Griffith, attorney-general, *C. A. Burnett*, assistant attorney-general, and *Bryan J. Hoffman*, county attorney, for the appellee; *H. N. Eller*, of Salina, of counsel.

The opinion of the court was delivered by

JOHNSTON, C. J.: John Driscoll was charged with five violations of the intoxicating-liquor law and convicted upon a count for the unlawful transportation of intoxicating liquors.

In his appeal he assigns as error the refusal of the court to give the following requested instruction:

"The jury are instructed that if they believe from the evidence that the witness Peterson, while acting as an officer of the law, induced the plaintiff to commit the crime charged, so that said witness was the moving cause of the commission of said crime, then you cannot convict the defendant for such crime."

In respect to the charge upon which the conviction is based, Peterson, who was aiding the sheriff in procuring evidence of violations of the prohibitory liquor law, testified that he and James Dippler went to the defendant's garage in Gypsum City and asked him to get liquor for them. At first defendant refused to do so, but finally did leave his garage and go somewhere, and later returned, bringing back in his automobile a quart of whisky, half of which he gave to Peterson for the price of $2, and kept the other half for himself. Defendant admitted that at Peterson's request he went out in his automobile and did get a quart of whisky, which he divided with Peterson and Dippler, and for which Peterson paid him $2. De-

1. Criminal Law, 16 C. J. § 57; 25 L. R. A. 346; 30 L. R. A., n. s., 946; 18 A. L. R. 164; 15 R. C. L. 391.

fendant contends that he should escape punishment for this conceded violation of law because Peterson, a law-enforcing officer, asked him to obtain whisky. The fact that an officer seeking to discover violations of law asked for and obtained liquor from the defendant is not a defense to the charge upon which he was convicted. Evidently the officer had reasons to suspect that defendant was engaged in the illegal traffic, as there is some testimony in the record to the effect that defendant had sold a bottle of whisky prior to the time of the transaction in question, but there was no conviction for that sale.

It is sometimes quite difficult for an officer to procure evidence of the surreptitious sales of liquor or other violations of the prohibitory liquor laws, and one of the common methods of uncovering such violations is to have purchases made by one to whom the bootlegger is willing to risk a sale. The defendant inveighs against informers, detectives and secret agents, but of them it has been said:

"Detectives perform a valuable and necessary function in modern society. They are merely private citizens trained in the collection of evidence against criminals and in the study of the habits of criminals. Modern governments which are in earnest in seeing that their laws are enforced, that their coinage is preserved from counterfeiting, that their mails are free from molestation and robbery, make free use of detectives and secret-service men. The profession of detectives may be regulated by law, but no sound reason can be suggested why their testimony should be singled out as deserving of less credence than the evidence of witnesses in general." (*State v. Mullins*, 95 Kan. 280, 302, 147 Pac. 828.)

In *State v. Spiker*, 88 Kan. 644, 129 Pac. 195, the defendant was convicted of a violation of the prohibitory liquor law, and he challenged the validity of the conviction because purchases of liquor were made by persons seeking to discover whether the defendant was making unlawful sales. It was held the fact that purchases were made for that purpose constituted no defense to the charge and did not render the testimony incompetent.

In *State v. Gray*, 90 Kan. 486, 135 Pac. 566, the defendant, who had been convicted of violating the prohibitory liquor law, complained that witnesses connected with the State Temperance Union had been paid for procuring evidence against him and that this fact should have been specially called to the attention of the jury. A general instruction had been given in the case that the jury should consider the interest, bias or prejudice of the witnesses, and it was

held that the failure to emphasize the fact that witnesses had visited the defendant's place to procure evidence against defendant was not error.

Cases are cited tending to support the view that if officers invite or aid a person in the commission of a criminal act in order to lay the foundation for his prosecution, a conviction cannot be maintained. A number of such cases are collected in a note in 25 L. R. A. 341. A subsequent note in the same work gathers a large number of the later cases holding that a purchase of liquor for the purpose of having the defendant prosecuted for an illegal sale is no bar to a prosecution, and showing that the courts now almost unanimously hold that a purchase made by an officer or by another with money furnished by the officer for the purpose of detecting and securing the punishment of persons engaged in the illegal traffic in liquor is no defense for such violation. (30 L. R. A., n. s., 946.) Officers who are vested with the authority and responsibility of preserving public peace and security and the enforcement of law are not required to wait until offenses are committed in their presence or until some one brings indubitable proof to them of criminal acts by an offender. They should be vigilant in detecting and exposing crime, and we have no disposition to hamper the officers by a ruling that would prevent the use of the ordinary means employed and in that way thwart the detection and punishment of criminals. In doing so the officers are discharging a public duty and fulfilling a function they were chosen to perform. One who concedes that he has violated the law will not be permitted to shelter himself and escape punishment in the fact that the one to whom he brought and sold the liquor happened to be an officer instead of an ordinary customer. In a New York case, where officers had hired persons to purchase liquor in order to discover, expose and prosecute illegal sales of liquor, it was held that that fact did not prevent a conviction of the defendant, and in answer to his plaint the court said:

"Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian, ethics, it never will." (*Onondaga County Comrs. v. Backus*, 29 How. Pr. 33.)

No error was committed in refusing the requested instruction, and certainly the evidence was ample to sustain the conviction.

The judgment is affirmed.

No. 26,378.

ARCH GRUBL BEAMER, *Appellant*, v. KANSAS SOLDIERS' COMPENSATION BOARD, *Appellee*.

SYLLABUS BY THE COURT.

SOLDIERS' COMPENSATION—*Residence—Sufficiency of Evidence.* Record examined and held to contain sufficient evidence to support the trial court's findings and judgment that the appellant was a permanent resident of Tulsa, Okla., and not a resident of Kansas at the time he enlisted and served in the United States navy in the world war, and not entitled to compensation for such service under the Kansas statute.

Appeal from Jackson district court; MARTIN A. BENDER, judge. Opinion filed October 10, 1925. Affirmed.

Thomas A. Fairchild and *H. R. Fulton*, both of Holton, for the appellant.

Charles B. Griffith, attorney-general, *C. A. Burnett*, assistant attorney-general, and *Floyd W. Hobbs*, county attorney, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: Arch Grubl Beamer enlisted in the United States navy on June 8, 1917. He was called into active service on August 19, 1917, and discharged on December 19, 1918. His claim for compensation was rejected on the ground that he was not a resident of Kansas when he enlisted and served in the world war.

On appeal to the district court from the order of the compensation board rejecting his claim for compensation, evidence on claimant's behalf was heard at length, together with certain relevant facts which tended to uphold the determination of the board. The trial court made findings of fact and entered judgment against appellant pursuant to a conclusion of law which it deduced from the evidence and findings, viz.:

"That on June 8, 1917, the appellant, Arch G. Beamer, was a permanent resident of Tulsa, Okla., and not a resident of Kansas, within the meaning of chapter 201, Laws of 1923, . . . and that he is not entitled to compensation under said statute."

Beamer brings the case here for review, assigning various errors which center about one main proposition: Was there any evidence to justify the trial court's finding, conclusion and judgment that he was not a resident of Kansas at the time he entered the navy?

With this question in mind this court has carefully read the record, and the most that it can say in appellant's behalf is that if the trial court had been disposed to give very generous credence to appellant's testimony and to overlook certain discrepancies between his testimony and his representations to the naval authorities at the time he enlisted, it might have been possible to have reached a conclusion that he was a citizen of Kansas. But there was no want of evidence to justify a finding that not long before his enlistment appellant had taken up an abode in Tulsa, Okla., and that he gave that place as his residence, and that when he was discharged from the navy and had made a short visit with relatives in Kansas he returned to Tulsa, married and settled down in that place, all in accordance with his statement given to the naval authorities at the time he entered the service.

It is needless to reproduce the testimony, and it should be needless to explain to his experienced counsel that it is altogether beside the mark to present such an argument to this court as that which appears in appellant's brief, viz.:

"The appellant . . . cannot believe . . . that this court will deprive him of the bonus. . . ."

Of course this court will not *deprive* him of the bonus. It merely reviews the record to determine whether the compensation board or the trial court committed any error in disposing of appellant's claim for compensation. Here the trial court upon sufficient evidence found that appellant was not a resident of Kansas at the time he entered the navy. That finding cannot be disturbed under settled principles of appellate procedure, too well understood to require discussion. See *In re Soldiers' Compensation Appeals, Doniphan's Case*, 116 Kan. 601, 603, 227 Pac. 1117; id., 116 Kan. 677, 229 Pac. 355; *Baldwin v. Soldiers' Compensation Board*, 117 Kan. 129, 229 Pac. 82; *Lord v. Kansas Soldiers' Compensation Board, Schrontz's Case*, 117 Kan. 345, 230 Pac. 1033; *Lord v. Kansas Soldiers' Compensation Board, Hill's Case*, 117 Kan. 345, 230 Pac. 1033; *Cault v. Soldiers' Compensation Board*, 118 Kan. 589, 235 Pac. 850.

The judgment is affirmed.

No. 46,542

STATE OF KANSAS, *Appellee*, v. STEPHEN P. REICHENBERGER, and GARY D. FOUCH, *Appellants*.

(495 P. 2d 919)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Entrapment—When Issue a Question for Trier of Facts.* Where some evidence is offered by a defendant in support of the defense of entrapment and a conflict is presented where the intent to engage in an enterprise involving narcotics originated in the mind of defendant or was instigated by officers or agents of the state, the issue becomes a question for the trier of facts, overruling *State v. Driscoll*, 119 Kan. 473, 239 Pac. 1105, and all decisions adhering thereto insofar as they are inconsistent herewith.
2. SAME—*Entrapment—Evidence of Prior Connection With Narcotics Admissible—Other Means to Establish Predisposition.* Although evidence of a defendant's prior connection with narcotics is admissible in a narcotic prosecution to rebut a proffered defense of entrapment, it is not the only means available to the prosecution to establish predisposition on the part of defendant.
3. SAME—*Entrapment—Trap for Unwary and Innocent Must be Distinguished.* In considering facts relative to the issue of entrapment it is essential to distinguish between a trap set for the unwary criminal and a trap set to ensnare the innocent and law abiding citizen into the commission of a crime.
4. SAME—*Entrapment Based on Solicitation—No Evidence of Prior Convictions or Criminal Activity—Persuasion or Inducement Employed.* In a criminal prosecution where entrapment is claimed as a defense based on the solicitation of a law enforcement officer or cooperating agent and the prosecution submits no evidence of prior convictions, previous criminal activity or design on the part of defendant, the question raised is whether the officer or undercover agent employed methods of persuasion or inducement which create a substantial risk that the offense in question will be committed by persons other than those who are ready to commit it.
5. SAME—*Sale of Marijuana—Defense of Entrapment—Question for Trier of Facts—Judgment for Possession of Marijuana—Judgment Convicting for Sale of Marijuana Set Aside.* In a prosecution for the possession and sale of marijuana under the provisions of the Uniform Narcotic Drug Act, the record is examined and it is *held:* (1) The testimony of defendants in support of the defense of entrapment presented a question for the trier of facts. (2) The judgment of the trial court convicting defendants of the possession of marijuana is supported by the evidence and is affirmed. (3) The judgment of the trial court convicting defendants for the sale of marijuana is set aside for reasons appearing in the opinion.

Appeal from Sedgwick district court, division No. 1; WM. C. KANDT, judge. Opinion filed April 8, 1972. Affirmed in part and reversed in part.

G. Edmond Hayes, of Wichita, argued the cause and was on the brief for the defendants.

Mark W. Anderson, Deputy County Attorney, argued the cause, and *Vern Miller*, Attorney General; *Keith Sanborn*, County Attorney, and *Barry Arbuckle*, Deputy County Attorney, were with him on the brief for the appellee.

The opinion of the court was delivered by

KAUL, J.: Defendants appeal from felony convictions for possession and sale of marijuana in violation of the Uniform Narcotic Drug Act (K. S. A. 65-2501, *et seq.*). In a trial to the court the defense of entrapment was asserted by each defendant. The trial court's adverse finding is the subject of attack in this appeal. Defendants contend the evidence established entrapment as a matter of law.

The information was filed in two counts. Defendant Fouch was charged individually in count one and jointly with Defendant Reichenberger in count two. The information was filed on May 14, 1970, and the offenses charged were alleged to have occurred on April 4, 1970.

Count one concerned actions of defendant Fouch occurring outside the Odessa Club at Second Street and Hydraulic in Wichita and count two concerned actions of both defendants occurring at the Quality Chevrolet Parking Lot at 1620 East Douglas in Wichita.

Attorney Russell Shultz represented both defendants in the trial below. There was no request for severance and the defendants were tried jointly without objection. A jury was waived and the case was tried to the court on September 10, 1970. The journal entry, approved by counsel for all parties, relates the trial proceedings pertinent to the issue on appeal as follows:

"After the State's evidence had been presented, counsel for defendants moved that defendants be discharged because of the law pertaining to entrapment. This motion was by the Court overruled for the reason that the defendants had willingly obtained and sold marijuana upon request, and had not been entrapped.

"The defendants then presented their evidence, both defendants having testified in person.

"After argument, the Court found that both defendants were guilty of possession and sale of marijuana as charged."

Each defendant was sentenced to a term of not more than seven years pursuant to K. S. A. 1971 Supp. 65-2519a. The defendants were then released on their own recognizance conditioned that their appeals be prosecuted in good faith and with diligence.

In his argument to the court below, Mr. Shultz conceded that defense of entrapment presupposes commission of the offenses; likewise, defendant's counsel on appeal challenges only the trial court's adverse finding on the defense of entrapment. Since the fact of the commission of the offenses is not challenged, the state's evidence may be briefly summarized.

The state's evidence consisted primarily of the testimony of Charles E. Hastings, an officer assigned to the vice squad of the Wichita Police Department. On the evening of April 4, 1970, Hastings met with several officers, including Rick Palone and Charlotte McPhetters, at the Sedgwick County Sheriff's office. Palone was described as a commissioned buyer, employed by the sheriff. His main duties were to buy narcotics for the sheriff in an undercover capacity. Apparently, Charlotte McPhetters was also an undercover agent for the sheriff.

Hastings searched Palone for money and drugs, finding none, Hastings then gave Palone money consisting of bills, the serial numbers of which had been previously recorded by Hastings.

By prearrangement, Palone and McPhetters drove in Palone's Camaro automobile to Second Street and Hydraulic and parked near the Odessa Club. Hastings followed and parked his automobile across the street from the Odessa Club in a position where he could observe Palone and McPhetters seated in Palone's automobile. Hastings' testimony established the first contact between defendants and Palone and McPhetters which was arranged by a "thin bespectacled man", who was later identified by defendant as a person going by the name of John Nichols, who was reputed to be an informer or police undercover agent. Defendants delivered a packet of marijuana to Palone and were paid $105 in marked money; $100 of which was found on defendant Fouch after his arrest. The other $5 was said to have been given to Nichols.

A second purchase was arranged between defendants and Palone and McPhetters with delivery to be made at the Quality Chevrolet Parking Lot at 1620 East Douglas. Hastings and Dick Fent, an officer of the Sheriff's Department, accompanied Palone and McPhetters in Palone's automobile. When they arrived at the Quality Parking Lot, Hastings and Fent crouched down in the back seat. Soon after the Palone automobile arrived at the parking lot an automobile drove alongside, the two defendants got out and approached the Palone automobile; at this point Hastings and Fent arose from the back seat, exited the Palone automobile and

placed both defendants under arrest. Fouch was seen to drop a foil packet and kick it beneath the automobile. It was retrieved and proved to be marijuana. Fouch was searched and $100 of the marked money was found on his person. Reichenberger was searched and a hashish pipe and a foil packet of marijuana were found on his person.

The events surrounding the first contact with Nichols inside the Odessa Club and the later solicitation by Palone are established by the testimony of defendants. The state offered no evidence to refute the testimony of defendants, thus we take their accounting as accurate.

Fouch testified that he did not use marijuana and normally did not traffic in it. He described the approach by Nichols in his direct examination in this manner:

"Q. How did it happen you came in possession of it at that time?
"A. Well, this Johnny Nichols was inside the club. He went around asking people if they had marijuana or knew where he could get some because he had a friend who had asked him to get some, which later turned out to be Rick Palone over at the Sheriff's Department.
"Q. Did Mr. Nichols ask you if you had any?
"A. Yes.
"Q. Did you have any?
"A. No, sir.
"Q. What happened then?
"A. He asked us if we could get some. I said we might be able to.
"Q. When you say we, who do you refer to as 'we'?
"A. I and Steve Reichenberger.
"Q. What did you say—strike that. What were you doing at the Odessa?
"A. Drinking beer and listening to the band.
"Q. At the time you went to the Odessa did either one of you, to the best of your knowledge, have any marijuana in your possession?
"A. No, we did not.
"Q. After you were approached by Mr. Nichols, did you obtain marijuana?
"A. Yes.
"Q. From whom?
"A. A mexican guy that was inside of the Odessa Club.
"Q. Do you know his name?
"A. No, I do not.
"Q. Did you pay for it?
"A. Me and Steve paid for it.
"Q. How much did you pay for it.
"A. $75.00.
"Q. And had Mr. Nichols talked to you about price?
"A. Yes.
"Q. What did he say about it?
"A. He said that his guy wanted him to buy some—offered him $105.00

for an ounce of it; that he would give me $100 for the ounce so he could make $5.00 off the deal.

"Q. You and Mr. Reichenberger purchased some?

"A. Yes.

"Q. And did this Mexican person have it?

"A. He left the club for a period of about one or two minutes and came back with a package of what he said was marijuana in a tinfoil package."

On cross-examination Fouch testified:

"Q. And you were doing this to make some money, is that right?

"A. Not exactly: not only that but because Mr. Nichols asked us.

"A. We wouldn't have been buying it if Mr. Nichols hadn't come up and asked us not for money or otherwise.

"Q. You mean that the money wasn't the chief consideration for participating in activity of this kind?

"A. That is right.

"Q. Are you saying it was Mr. Nichols' persuasiveness in talking to you?

"A. He asked us if we could see if we could find him some.

"Q. So, to help this person out you went ahead and tried to find him some?

"A. I didn't see no harm in it at the time.

"Q. What was the prime consideration, then?

"A. Because he came up and asked us if we would find him some marijuana.

"Q. So then just because he asked you you went to find him some marijuana?

"A. Along with several other people in the Club. They said they would ask around to try and find him some."

After delivery of the first package to Palone, Fouch testified:

"Q. And then what happened?

"A. Mr. Palone asked us if we could get him some more marijuana. He said that he wanted to buy some more marijuana.

"Q. What did you tell him?

"A. We told him we weren't sure but we could ask and if we could we would. We asked him how much he wanted and he said two more ounces. He said to see what we could do and meet him at the Quality Chevrolet Parking Lot in thirty-minutes."

Reichenberger's testimony generally conformed with that of Fouch. On direct examination Reichenberger testified:

"Q. Why did you buy any on this particular occasion?

"A. Just sitting around the bar there and I thought it was something to do. I don't really know why I did it.

"Q. Well, did you buy it for yourself?

"A. No. —Well, I did it because Mr. Nichols asked me if that is what you mean.

"Q. And . . .

"A. I just wanted to give him the favor. It wasn't the money. I didn't need any money.

"Q. Why did you buy the second portion that you went up to 29th Street to get?

"A. Officer Palone asked us to."

Before considering the specific issue on appeal, we pause to observe that while this court has long recognized entrapment as a defense in a criminal prosecution (See *State v. Jansen,* 22 Kan. * 498; and *State v. Spiker,* 88 Kan. 644, 129 Pac. 195), it was not until the enactment in 1969 of K. S. A. 1970 Supp. 21-3210 (effective July 1, 1970, now 1971 Supp.), that the subject received legislative attention. Entrapment, as defined under the new statute, was not argued to the court below and although alluded to by both counsel on appeal neither contend, as we understand their positions, that the issue herein should be decided in the context of the new statute. We view the new statute as substantive law and since the offenses charged occurred on April 4, 1970, we decide the issue herein under the law in existence on the date, reserving until properly presented consideration of the subject in the context of the new statute.

By way of further prefatory framework it should be pointed out that, though this prosecution was a trial to the court, the facts found, if supported by substantial competent evidence, must be accorded on appellate review the same weight as if found by a jury.

Entrapment, as a defense in a crimnial prosecution, was considered by this court in the recent case of *State v. Wheat,* 205 Kan. 439, 469 P. 2d 338, wherein we dealt with a situation where the police had learned of defendant Wheat's particular criminal specialty, *i. e.,* "stripping cars." We approved an instrutcion which explained entrapment in terms and rationale similar to those expressed by Chief Justice Hughes, speaking for the court, in *Sorrells v. United States,* 287 U. S. 435, 77 L. Ed. 413, 53 S. Ct. 210, 86 A. L. R. 249, (see discussion thereof by Judge Learned Hand in *United States v. Becker,* 62 F. 2d 1007 [2 Cir. 1933]). The first impression *Sorrells* decision was followed by *Sherman v. United States,* 356 U. S. 369, 2 L. Ed. 2d 848, 78 S. Ct. 819, and *Masciale v. United States,* 356 U. S. 386, 2 L. Ed. 2d 859, 78 S. Ct. 827, reh. den. 357 U. S. 933, 2 L. Ed. 1375, 78 S. Ct. 1367. The three cases referred to established guidelines for the federal courts which are also generally followed by state courts in jurisdictions wherein the defense of entrapment is recognized.

In both *Sherman* and its companion case *Masciale* the sole issue was whether entrapment was established as a matter of law. In

Sherman the agent's continued persuasion over a period of time, coupled with appeals to pity because of illness and other reprehensible inducement, was held to constitute entrapment as a matter of law. On the other hand, in *Masciale,* even though the agent and defendant met on at least ten occasions, the court held the issue had been properly submitted to the jury. Masicale argued, as do the defendants in the instant case, that his undisputed testimony explained why he was willing to deal with the agent and established as a matter of law. The court rejected the contention holding that while Masciale presented enough evidence for the jury to consider, entrapment was not established as a matter of law and that the trial court propertly submitted the case to the jury.

The first paragraph of the *Wheat* instruction reads:

"'In considering the defense of entrapment, the court advises you that the law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement, and where a crime is committed as a consequence of such entrapment, no conviction may be had with a person so entrapped as his acts do not constitute a crime,'" (p. 440.)

The second paragraph of the instruction applied principles of entrapment to the specific situation in *Wheat* where officers had received information that a person intended to commit a crime.

In the third and last paragraph of the instruction the circumstances under which a defendant can rely on entrapment were summed up as follows:

"'In other words a defendant can rely on the defense of entrapment when he is induced to commit a crime which he had no previous intention of committing, but cannot rely on the defense when he has a previous intention of committing a crime and is merely afforded the opportunity to complete the crime by the peace officer.'" (p. 441.)

The *Wheat* instruction, as a definition of entrapment, was quoted with approval in *State v. Hamrick*, 206 Kan. 543, 479 P. 2d 854, wherein the trial court's refusal to instruct was held not erroneous since there was no evidence of inducement by an officer.

We believe the instruction in *Wheat* correctly states the law of entrapment and fully explains the application thereof where officers had been informed that a person intends to commit a crime.

In the case at bar, defendants latch on to the term "previous intention" as used in the *Wheat* instruction as a basis for their argument. Defendants' industrious and thorough counsel asserts that in order to overcome a defense of entrapment or to frame a submissible question of fact in connection therewith there must be some evidence of previous intention or predisposition, and he cites many cases including *Sorrells* and *Sherman* in support of his position. The thrust of his argument is that since there is no evidence of predisposition or criminal design on the part of either defendant prior to their encounters with Nichols and Palone, it must be concluded that defendants were innocent parties induced by law enforcement officers to commit the crime so that defendants could be arrested. We agree that previous intention or predisposition must be shown to rebut entrapment; we do not agree with defendants' claim that there is no evidence of predisposition here.

The state, on the other hand, asserts that solicitation by officers of sales in an ordinary way as between buyer and seller does not constitute entrapment as a matter of law or of fact. (Citing 33 A. L. R. 2d, Anno. [Entrapment-Narcotics Offense], p. 884.) The state correctly points out that the law of entrapment with respect to a buyer-seller situation was developed by this court in cases dealing with sales of liquor and that in those cases (*State v. Merklinger,* 180 Kan. 283, 303 P. 2d 152; *State v. Driscoll,* 119 Kan. 473, 239 Pac. 1105; *State v. Gray,* 90 Kan. 486, 135 Pac. 566; and *State v. Spiker,* 88 Kan. 644, 129 Pac. 195), the defense of entrapment was rejected as a matter of law. The rationale of the court appeared to be as stated by Chief Justice Johnston speaking for the court in *Driscoll*:

". . . One who concedes that he has violated the law will not be permitted to shelter himself and escape punishment in the fact that the one to whom he brought and sold the liquor happened to be an officer instead of an ordinary customer. . . ." (p. 475.)

The reasoning of the *Driscoll* court appears to rest on the premise that it was difficult for an officer to procure evidence of the surreptitious sale of liquor, thus the court was warranted in not examining the conduct of the officer in procuring the sale. Insofar as the cases referred to stand for the proposition that the conduct of an officer or agent in making a buy of such illegal merchandise is not to be scrutinized or subjected to censor as a matter of law, the decisions are expressly overruled in conformity with our holding herein.

From our perusal of authorities dealing with the subject we be-

lieve it may be said that where the events culminating in a criminal offense commence with a police solicitation, the defense of entrapment will almost always present a question of fact for the jury (*United States v. Moses*, 220 F. 2d 166, [3 Cir. 1955]; and *United States v. Stocker*, 273 F. 2d 754, [7 Cir. 1960]), except where the undisputed evidence shows totally unacceptable conduct by the officer or agent as illustrated by *Sherman v. United States*, supra, and *United States v. Klosterman*, 248 F. 2d 191, (3 Cir. 1957). On the other hand, the defense may be rejected as a matter of law where the basic elements are not established as in *State v. Hamrick, supra, and State v. Porter*, 201 Kan. 778, 443 P. 2d 360, cert. den. 393 U. S. 1108, 21 L. Ed. 2d 805, 89 S. Ct. 919.

In the case at bar, it must be conceded that predisposition is not shown by evidence of prior convictions, criminal activity or even previous suspicious conduct. However, the means referred to is only one of the accepted methods of establishing predisposition. Uncensurable solicitation by an officer met with ready compliance by the actor is generally, if not universally, accepted as evidence of predisposition. (*United States v. Rodriques*, 433 F. 2d 760 [1 Cir. 1970]; *State v. LeBrun*, 245 Or. 265, 419 P. 2d 948; *Swallum v. United States*, 39 F. 2d 390, [8 Cir. 1930]; and cases collected in 33 A. L. R. 2d Anno., pp. 883-891, § 3.)

Except in the Kansas cases referred to, where the defense was rejected as a matter of law, this court has not been confronted with the specific question of how predisposition may be shown in a buyer-seller situation. However, an abundance of authority may be found in both state and federal cases wherein the court came directly to grips with the question.

In *Swallum v. United States*, supra, the defendant argued that the agent who procured illegal prescriptions for morphine from him did not have reasonable cause to believe that the law was being violated by him and therefore entrapment was conclusively shown. The court rejected this contention stating:

"We do not find any authority holding that lack of probable cause to believe defendant was unlawfully selling morphine, or lack of suspicion in the mind of an agent who makes a pretended purchase, alone, constitutes entrapment. See *United States v. Siegel* (D. C.) 16 F. (2d) 134, where the above authorities are digested." (p. 393.)

Harmonious holdings of various federal circuits are noted in the case of *Kadis v. United States*, 373 F. 2d 370 (1 Cir. 1967), wherein the defendant argued that no inducement of any kind is justified

unless the police had prior grounds warranting the initiation of their activity. In answering the contention the court said:

". . . We rejected this contention in *Whiting v. United States*, 1 Cir. 1963, 321 F. 2d 72, cert. den. 375 U. S. 884, 84 S. Ct. 158, 11 L. Ed. 2d 114. So have a number of other circuits *Kivette v. United States*, 5 Cir. 1956, 230 F. 2d 749, 754, cert. den. 355 U. S. 935, 78 S. Ct. 419, 2 L. Ed. 2d 418; *Silva v. United States*, 9 Cir. 1954, 212 F. 2d 422, 424; *United States v. Abdallah*, 2 Cir. 1945, 149 S. 2d 219, 222 n. 1, cert. den. 326 U. S. 724, 66 S. Ct. 29, 90 L. Ed. 429; *Hadley v. United States*, 8 Cir. 1927, 18 F. 2d 507, 508; *Newman v. United States*, 4 Cir., 1924, 299 F. 128, 129. We adhere to that view." (p. 373.)

Apparently, the most recent reported federal case dealing with the question is *United States v. Burgess*, 433 F. 2d 987 (5 Cir. 1970). Defendant was convicted of possession of untaxed liquor based on a purchase by an undercover agent. Defendant testified the agent informed him that he needed a case of whiskey for resale in the next county to obtain money for the agent's family which he said was ill and hungry. The whiskey was sold, according to defendant, because of this strong plea to his humanitarian instincts. As in the case at bar, defendant's testimony was uncontroverted and he argued entrapment as a matter of law to the Court of Appeals. The court rejected defendant's argument stating that—

". . . [T]he defense of entrapment is not established as a matter of law when, as in this case, the only evidence of such entrapment is the defendant's own undisputed tetstimony. . . ." (p. 988.)

The court held that the question was properly submitted to the jury. (Citing *Masciale v. United States*, supra.)

Where the question has been raised state courts follow closely the federal decisions.

In the recent case of *State v. LeBrun*, supra, the Supreme Court of Oregon was squarely faced with the identical issue confronting us. Defendant LeBrun was convicted of unlawful possession of morphine on evidence of a sale made to an agent when, as defendant put it, he was drunk and finally yielded to the agent's pestering about narcotics. LeBrun argued that he was entitled to an instruction to the effect that he was entrapped as a matter of law unless previously suspected. The court rejected defendant's contention holding that suspicion or reasonable cause to suspect defendant was a law violator at the time negotiations for the purchase of narcotics was commenced was not a prerequisite to the prosecutor's reply to defense of entrapment. The defendant was not overpersuaded by

the police and was ready and willing to seize the opportunity to make a sale of narcotics.

Illinois has codified the entrapment defense (Ill. Rev. Stats. 1967, Ch. 38, §§ 7-12) in general language similar to that used in the *Wheat* instruction. In the recent case of *People v. Gonzales,* 125 Ill. App. 2d 225, 260 N. E. 2d 234 (1970), the defendants, Gonzales and Mata, argued there was no evidence of predisposition to sell narcotics since the state had offered no evidence of prior convictions or previous criminal activity. The court noted there was no overbearing persuasion on the part of the agents and that the only reluctance displayed by defendants related to the price. The court held that since the evidence showed defendants were ready to make the unlawful sale, this established the criminal design in the minds of defendants resulting in the acceptance of the opportunity offered, thus negating the defense of entrapment.

Many other state court decisions in harmony are collected in 33 A. L. R. 2d Later Case Service Supplement pp. 883-910. The attention of a reader interested in further perusal of the subject is directed to the commentary of the Wisconsin Board of Criminal Court Judges in their recent publication of "Wisconsin Jury Instructions Criminal" on "Entrapment", p. 780; and a comprehensive analysis of the entire spectrum of entrapment by John S. Goodnow, Vol. 45, Boston University Law Review, (1965), page 542.

Applying what has been said to the evidence before the trial court in the instant case, we are cited no authority and our research reveals none that would support a holding here that the conduct of Nichols in the first instance and that of Palone in the second, considered with the responses of defendants, amounts to entrapment as a matter of law. The testimony of defendants fails to show persistent persuasion or any appeal to sympathy or pity. No claim is made that the money offered was exorbitant or that it was the motivating factor behind the actions of defendants. The responses of defendants, by their own testimony, do not show hesitancy, reluctance or unwillingness that required undue persuasion to overcome.

In considering the facts relative to the issue of entrapment it is essential to distinguish between a trap set for the unwary criminal and a trap set to ensnare the innocent and law abiding citizen into the commission of a crime. (*Sherman v. United States,* supra.). Where a conflict is presented as to whether defendant or the state originated criminal enterprise involving possession or sale of narcotics, the issue whether entrapment occurred is for the trier of facts. (*Frady v. State,* 235 So. 2d 56 [Fla. App. 1970]; cases collected in 33 A. L. R. 2d Anno. [Entrapment-Narcotics Offense], p. 902, § 5, and Later Case Service Supplement, p. 180 § 5.)

In view of the definition of entrapment approved by this court in the *Wheat* case and after considering a wide range of authority on the subject, we conclude that the proper test for determining predisposition or criminal intent, as applied to the evidence here, is whether Nichols or Palone conducted themselves in such a manner or employed methods of persuasion which would have created a substantial risk that defendants would have procured and possessed marijuana in the absence of a predisposition to do so.

The trial court made the requisite finding that the evidence shows predisposition in the minds of these defendants to possess and sell marijuana upon request. We cannot say as a matter of law that the offenses committed by defendants under the circumstances related would have been committed by persons other than those ready and willing to commit them.

One further matter requires our attention concerning this appeal. At the conclusion of the case the trial court announced that it became necessary, because of the testimony of the defendants, to merge the two counts of the information into one. Thus it appears defendants were convicted only of the offenses charged in count two. We have carefully examined count two of the information, we find it fully charges each defendant with possession of marijuana for personal use or otherwise, but it does not charge a sale offense as to either defendant. Thus the convictions for the sale of marijuana as to each defendant must be set aside. The convictions for possession are affirmed.

The cause is remanded with directions that the judgment be corrected accordingly.

PRAGER, J., dissenting: I respectfully dissent from the holding of the majority in respect to the issue of entrapment. In my judgment the defense of entrapment should be sustained as a matter of law under the particular facts and circumstances presented in this case. I have no quarrel with the statement of legal principles as set forth in the opinion of Justice Kaul. The majority opinion approves the statement of the law of entrapment adopted in *State v. Wheat,* 205 Kan. 439, 469 P. 2d 338. In that case this court declared that the

law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of crime which he would not have committed but for such inducement, and where a crime is committed as a consequence of such entrapment, no conviction may be had with a person so entrapped as his acts do not constitute a crime. In other words a defendant can rely on the defense of entrapment when he is induced to commit a crime which he had no previous intention of committing, but cannot rely on the defense when he has a previous intention of committing a crime and is merely afforded the opportunity to complete the crime by the peace officer.

The opinion of the majority approves the proposition that once an inducement or solicitation by a police officer has been shown, the state has the burden of proving a previous intention to commit the crime in order to rebut the entrapment. The majority opinion concedes that in the case at bar the previous intention is not shown by evidence of prior convictions, criminal activity or previous suspicious conduct. The majority opinion relies upon the proposition that uncensorable solicitation by a police officer met with ready compliance by the actor is generally accepted as evidence of previous intention. I have no quarrel with this statement of law where under the facts of the case the nature of the response to the solicitation raises a reasonable inference of previous intention to commit the offense.

Let us examine the undisputed facts presented in the case at bar:

(1) The Wichita police officers provided marked currency and originated an exploratory probe to be conducted at the Odessa Club in Wichita. Detective Rick Palone and policewoman, Charlotte McPhetters, were to act as the buyers. An undercover agent, whose exact identity was not established in the record but who was assigned the name of John Nichols, was to be the solicitor.

(2) There was no evidence of any previous sale of narcotics having taken place at the Odessa Club and no particular person was sought for the buy.

(3) The police undercover agent, Nichols, inquired among the 200 odd people at the Odessa Club asking people if they had any marijuana for sale or knew as to where he could get some.

(4) The defendants, Fouch and Reichenberger, were sitting at

one of the tables in the club drinking beer and listening to the band. Neither of the defendants had any previous history of possession or sale of marijuana or other narcotics. The record contains no evidence to show that either of the defendants was engaged in the business of selling narcotics.

(5) Nichols approached the defendants and asked them if they had any marijuana. Their answer was "No".

(6) Nichols told the defendants that a friend wanted him to buy some marijuana and had offered him $105 for an ounce; that he Nichols would pay defendant Fouch $100 for an ounce so Nichols would make $5 off of the deal. It is important to note that the police undercover agent suggested the price to the defendants. It should also be noted that it was the police agent who offered an inducement for the commission of the crime.

(7) Nichols asked the defendants if they could get some marijuana. The defendant Fouch said they *might* be able to.

(8) After Nichols had made the solicitation and inducement, Fouch asked other patrons of the Odessa Club where he could buy marjuana. Someone informed Fouch that a Mexican who was in the place playing pool was the one selling marijuana. It should be noted that the undisputed evidence is that the defendants did not have previous knowledge of a source of supply of marijuana. It was necessary for them to make inquiry of others to locate a source of supply.

(9) The unidentified Mexican left the Odessa Club, procured the marijuana, and returned to the club. Defendants paid him $75. The undercover agent Nichols received the package of marijuana.

(10) Nichols and the defendants left the Odessa Club and met the other undercover police officers, Charlotte McPhetters and Rick Palone, who were handed the marijuana. The police officers then induced the defendants to obtain additional marijuana for them.

In my opinion the nature of the response by defendants to the solicitation in this case was not sufficient to raise a reasonable inference of any previous intention to commit the crime. In the first place it should be emphasized that there is no evidence to show the defendants were sellers of marijuana at the time of the solicitation or inducement. They had no marijuana in their possession available for sale. It is likewise undisputed that at the time of the inducement or solicitation the defendants had no knowledge of a source of supply of marijuana and had to obtain information as

to a source of supply from other patrons at the club. It should also be noted that the defendants did not have a ready quotable price for the marjuana and the amount to be paid was suggested by the undercover police agent.

In its essence the basis of my dissent is that the undisputed evidence is not sufficient to raise a reasonable inference that either of the defendants had any prior intention to commit the offense charged. As the majority opinion states the law should not tolerate a law enforcement officer generating in the mind of a person who is innocent of any criminal purpose the original intention to commit a crime thus entrapping such person in the commission of a crime that he would not have committed or even contemplated but for such inducement. I would reverse the case with instructions to discharge both defendants.

SCHROEDER, J., joins in the foregoing dissent.

No. 46,551

STATE OF KANSAS, *Appellee*, v. RONALD E. DAVIS, *Appellant*.

(495 P. 2d 965)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Intent of Code of Criminal Procedure Stated—Speedy Trial Defined.* The Kansas Code of Criminal Procedure, effective July 1, 1970, was intended to provide for the just determination of every criminal proceeding, and is to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay. (K. S. A. 1971 Supp. 22-2103.) The Code also contains a new definition of the term "speedy trial" as comtemplated by Section 10 of the Bill of Rights of the Constitution of Kansas.
2. SAME—*Code of Criminal Procedure—Effect on Pending Actions.* K. S. A. 1971 Supp. 22-4602 (1) clearly establishes the expressed intention of the Legislature that the Code of Criminal Procedure was to govern prosecution commenced prior to the effective date of the Code unless the accused elects to be prosecuted under the prior law, in force at the time the prosecution was commenced.
3. SAME—*Code of Criminal Procedure—Speedy Trial—Time.* A defendant charged before the effective date of the Code of Criminal Procedure may be entitled to the benefits of a speedy trial within 180 days, as provided in K. S. A. 1971 Supp. 22-3402 (2).
4. SAME—*When Docket Does Not Permit Trial Within Time Prescribed—One Continuance May be Granted.* The state may be permitted one continuance of not more than thirty days upon the ground that the state of the criminal docket does not permit commencement of the trial within the 180 days as provided in K. S. A. 1971 Supp. 22-3402 (3) (*d*).
5. SAME—*Material Evidence Unavailable — One Ninety Days Continuance.* The state may be permitted one continuance of not more than ninety days, unless for good cause shown, as provided in K. S. A. 1971 Supp. 22-3402 (3) (*c*), upon the ground that evidence material to its case is unavailable and after a proper showing by the state of due diligence on its part to secure such evidence.
6. SAME—*Continuance Properly Granted State—No Denial of Speedy Trial.* The record in a criminal case is examined, and, as more fully set forth in the opinion, it is *held*: Under the facts and circumstances, the district court did not err in granting the state continuances under K. S. A. 1971 Supp. 22-3402 (3) (*c*) and (*d*), and the accused was not denied his right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution, or Section 10 of the Bill of Rights of the Kansas Constitution.

Appeal from Johnson district court, division No. 1; HERBERT W. WALTON, judge. Opinion filed April 8, 1972. Affirmed.

James W. Dahl, of Kansas City, argued the cause and was on the brief for appellant.

entitled to it. We are of the opinion that, from all the circumstances as they now appear, the trial court was amply justified in not believing the claims of the defendant and in refusing a new trial.

In *People v. LeMorte*, 289 Ill. 11, it was said:

"Applications for new trial on the ground of newly discovered evidence are not looked upon with favor by the courts, 'and in order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequences of an adverse verdict, such applications should always be subjected to the closest scrutiny by the court, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been no lack of due diligence. The matter is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse.' (20 R. C. L. 289.) In *People v. Williams*, 242 Ill. 197, 89 N. E. 1030, 17 Ann. Cas. 313, this court had occasion to consider what was necessary to be shown in order to justify a new trial on the ground of newly discovered evidence, and stated that the evidence must be such as will probably change the result if a new trial is granted; that it must have been discovered since the trial and be such as could not have been discovered before the trial by the exercise of due diligence; that it must be material to the issues, and must not be merely cumulative to the evidence offered on the trial. These same requirements are substantially set forth in Wharton's Criminal Pleading and Practice (8th ed.), § 866. It has been frequently stated by this court that newly discovered evidence, on motion for new trial, must be clearly conclusive in its character to require the court to grant a new trial. (*Henry v. People*, 198 Ill. 162, 6 N. E. 120, and cases there cited.) . . . Courts are not required to believe an unreasonable story, even though it is not contradicted, merely because it has been sworn to by a witness on the trial of the case. (*People v. Davis*, 269 Ill. 256; *Stephens v. Hofman*, 275 Ill. 497.) This rule applies with equal if not greater force as to relying on and believing *ex parte* affidavits on a motion for new trial." (pp. 21, 24. See, also, *State v. Nimerick*, 74 Kan. 658, 87 Pac. 722; *State v. Creager*, 97 Kan. 337, 155 Pac. 29; *McIntyre v. Surety Co.*, 97 Kan. 629, 156 Pac. 690; *Hiltabidle v. Bradburn*, 110 Kan. 623, 204 Pac. 707; *State v. Giles*, ante, p. 417; *Fusselman v. Yellowstone Valley, etc., Co.*, 53 Mont. 254; *State v. Matkins et al.*, 45 Mont. 58; *Nicholson et al. v. Metcalf*, 31 Mont. 276; *Territory v. Claypool and Lueras*, 11 N. M. 568; *People v. Rushing*, 130 Cal. 449; *Williams v. State*, 53 Fla. 89; *Stevens v. State*, 93 Ga. 307; *State v. Jones*, 89 S. C. 41; *State v. Danforth*, 73 N. H. 215.)

The judgment is affirmed.

No. 26,376.

THE STATE OF KANSAS, *Appellee*, v. JOHN DRISCOLL, *Appellant*.

SYLLABUS BY THE COURT.

INTOXICATING LIQUORS—*Evidence—Sale Through Solicitation of Officer.* It is no defense to one who violates the prohibitory liquor law that an officer, in order to detect and prosecute him for the violation of the law, solicited him to obtain and sell intoxicating liquor to the officer and that his prosecution for the violations was based on the evidence so obtained.

Appeal from Saline district court; DALLAS GROVER, judge. Opinion filed October 10, 1925. Affirmed.

W. B. Crowther and *F. C. Norton*, of Salina, for the appellant.

Charles B. Griffith, attorney-general, *C. A. Burnett*, assistant attorney-general, and *Bryan J. Hoffman*, county attorney, for the appellee; *H. N. Eller*, of Salina, of counsel.

The opinion of the court was delivered by

JOHNSTON, C. J.: John Driscoll was charged with five violations of the intoxicating-liquor law and convicted upon a count for the unlawful transportation of intoxicating liquors.

In his appeal he assigns as error the refusal of the court to give the following requested instruction:

"The jury are instructed that if they believe from the evidence that the witness Peterson, while acting as an officer of the law, induced the plaintiff to commit the crime charged, so that said witness was the moving cause of the commission of said crime, then you cannot convict the defendant for such crime."

In respect to the charge upon which the conviction is based, Peterson, who was aiding the sheriff in procuring evidence of violations of the prohibitory liquor law, testified that he and James Dippler went to the defendant's garage in Gypsum City and asked him to get liquor for them. At first defendant refused to do so, but finally did leave his garage and go somewhere, and later returned, bringing back in his automobile a quart of whisky, half of which he gave to Peterson for the price of $2, and kept the other half for himself. Defendant admitted that at Peterson's request he went out in his automobile and did get a quart of whisky, which he divided with Peterson and Dippler, and for which Peterson paid him $2. De-

1. Criminal Law, 16 C. J. § 57; 25 L. R. A. 346; 30 L. R. A., n. s., 946; 18 A. L. R. 164; 15 R. C. L. 391.

fendant contends that he should escape punishment for this conceded violation of law because Peterson, a law-enforcing officer, asked him to obtain whisky. The fact that an officer seeking to discover violations of law asked for and obtained liquor from the defendant is not a defense to the charge upon which he was convicted. Evidently the officer had reasons to suspect that defendant was engaged in the illegal traffic, as there is some testimony in the record to the effect that defendant had sold a bottle of whisky prior to the time of the transaction in question, but there was no conviction for that sale.

It is sometimes quite difficult for an officer to procure evidence of the surreptitious sales of liquor or other violations of the prohibitory liquor laws, and one of the common methods of uncovering such violations is to have purchases made by one to whom the bootlegger is willing to risk a sale. The defendant inveighs against informers, detectives and secret agents, but of them it has been said:

"Detectives perform a valuable and necessary function in modern society. They are merely private citizens trained in the collection of evidence against criminals and in the study of the habits of criminals. Modern governments which are in earnest in seeing that their laws are enforced, that their coinage is preserved from counterfeiting, that their mails are free from molestation and robbery, make free use of detectives and secret-service men. The profession of detectives may be regulated by law, but no sound reason can be suggested why their testimony should be singled out as deserving of less credence than the evidence of witnesses in general." (*State v. Mullins*, 95 Kan. 280, 302, 147 Pac. 828.)

In *State v. Spiker*, 88 Kan. 644, 129 Pac. 195, the defendant was convicted of a violation of the prohibitory liquor law, and he challenged the validity of the conviction because purchases of liquor were made by persons seeking to discover whether the defendant was making unlawful sales. It was held the fact that purchases were made for that purpose constituted no defense to the charge and did not render the testimony incompetent.

In *State v. Gray*, 90 Kan. 486, 135 Pac. 566, the defendant, who had been convicted of violating the prohibitory liquor law, complained that witnesses connected with the State Temperance Union had been paid for procuring evidence against him and that this fact should have been specially called to the attention of the jury. A general instruction had been given in the case that the jury should consider the interest, bias or prejudice of the witnesses, and it was

held that the failure to emphasize the fact that witnesses had visited the defendant's place to procure evidence against defendant was not error.

Cases are cited tending to support the view that if officers invite or aid a person in the commission of a criminal act in order to lay the foundation for his prosecution, a conviction cannot be maintained. A number of such cases are collected in a note in 25 L. R. A. 341. A subsequent note in the same work gathers a large number of the later cases holding that a purchase of liquor for the purpose of having the defendant prosecuted for an illegal sale is no bar to a prosecution, and showing that the courts now almost unanimously hold that a purchase made by an officer or by another with money furnished by the officer for the purpose of detecting and securing the punishment of persons engaged in the illegal traffic in liquor is no defense for such violation. (30 L. R. A., n. s., 946.) Officers who are vested with the authority and responsibility of preserving public peace and security and the enforcement of law are not required to wait until offenses are committed in their presence or until some one brings indubitable proof to them of criminal acts by an offender. They should be vigilant in detecting and exposing crime, and we have no disposition to hamper the officers by a ruling that would prevent the use of the ordinary means employed and in that way thwart the detection and punishment of criminals. In doing so the officers are discharging a public duty and fulfilling a function they were chosen to perform. One who concedes that he has violated the law will not be permitted to shelter himself and escape punishment in the fact that the one to whom he brought and sold the liquor happened to be an officer instead of an ordinary customer. In a New York case, where officers had hired persons to purchase liquor in order to discover, expose and prosecute illegal sales of liquor, it was held that that fact did not prevent a conviction of the defendant, and in answer to his plaint the court said:

"Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian, ethics, it never will." (*Onondaga County Comrs. v. Backus*, 29 How. Pr. 33.)

Attachment #5
2-7-48

Attachment # 5

The Entrapment Defense In Drug Cases

By RICHARD SEATON

In the past two or three years, we have seen a dramatic upswing in drug prosecutions in Kansas. Accompanying this trend has been development of the large-scale "drug raid," in which police execute great numbers of arrest warrants simultaneously. Such raids, of course, require that police agents or informers make "buys" of illegal drugs in much greater numbers than formerly.

The solicitation techniques used by police and prosecutors to secure these buys are, in many cases, highly questionable. A typical example is found in *State v. Reichenberger*, 209 Kan. 210 (1972). Police agents entered a Wichita tavern for the purpose of "making" an illegal sale case. They asked the defendants and a number of others if they knew where to buy some marijuana. The defendants had none, but sought out an acquaintance and purchased a small quantity, which they then resold to the agents. As is typical in such cases, the police, not the defendants, conceived the idea of the illegal sale and made the initial suggestion or solicitation. They were not engaged in the "business" of selling illegal drugs. Rather, they were persons close to the drug scene, with access to drugs, who responded to a police agent's solicitation by arranging for a casual sale.

The majority in *Reichenberger* held that a question for the trier of fact was presented as to whether the police agents had entrapped the defendants.[1] The court, however, decided the case under the law as it existed prior to July 1, 1970 and expressly reserved any question regarding the effect of the new Kansas criminal code.

A careful analysis of Section 21-3210 of the new code, which makes entrapment a statutory defense in Kansas for the first time, reveals that the common law rules applied in *Reichenberger* have been substantially changed, and that the defense will frequently be made out as a matter of law in such cases.

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[1] Two justices dissented on the ground that entrapment was made out as a matter of law.

Atch. 5

RICHARD H. SEATON, of Everett and Seaton, Manhattan, is a 1963 graduate of the Harvard Law School. Upon graduation and until 1971, Mr. Seaton was an assistant in the Kansas Attorney General's Office, where he served as Chief of the Criminal Division. In Manhattan, he also serves as University Attorney at Kansas State University. A native of Manhattan, he attended Coffeyville public schools and did his undergraduate work at Harvard.

What were those common law rules? The defense of entrapment emerged only in recent times. It was not even considered by the appellate courts until the late 19th century,[2] and did not gain a firm foothold in the federal courts until 1915.[3] In Kansas, its acceptance came even later.

Perhaps for this reason, the law of entrapment remains unsettled, and courts continue to disagree as to its theoretical basis, as well as the tests to be applied and the procedures to be used when the defense is raised.[4] The subject was even more unsettled in Kansas prior to 1970, because of the very limited application given to the defense. In decisions from other jurisdictions, however, the doctrine generally evolved as follows:

The courts would not permit conviction of a defendant, even though guilty, whose crime was the "product" of police activity.[5] This doctrine was based on judicial policy, and not on constitutional grounds.[6] If it was shown, either by the state's evidence or the defendant's, that his crime was induced or solicited by the police, then the state had to rebut the defense by showing either (1) an existing course of similar criminal conduct by defendant, or (2) a pre-existing intention on his part to commit this or similar crimes, or (3) his willingness or predisposition to commit the crime, as shown by his ready compliance.[7]

Thus in prosecutions for sale of contraband such as narcotics, it was uniformly held "that when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than instance in a uniform series."[8] Likewise, if the accused had already formed an intention to commit a specific crime, the courts held he was not entrapped merely because the police afforded him an "opportunity" to carry out that or some similar crime.[9]

Even in cases like *Reichenberger,* where the police agent suggested a specific crime to one who had no pre-existing criminal intention, and who did not engage in such activity regularly, the courts refused to find entrapment so long as the defendant readily complied.[10] It was said that this showed a "predisposition" to

[2] *E.g., Grimm v. United States,* 156 U.S. 604 (1895); *United States v. Whittier,* 28 Fed. Cas. 591 (C.C.E.D. Mo. 1878).

[3] *Woo Wai v. United States,* 223 Fed. 412 (9th Cir. 1915).

[4] See *Sorrells v. United States,* 287 U.S. 435 (1932) and *Sherman v. United States,* 356 U.S. 369 (1958). The issues are systematically explored in Note, Entrapment: An Analysis of Disagreement, 45 B.U.L.J. 542 (1965).

[5] "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officers and their agents." *Lopez v. United States,* 373 U.S. 427 (1963).

[6] *Benson v. California,* 336 F.2d 791 (9th Cir. 1964); *United States ex rel. Hall v. Illinois,* 329 F.2d 354 (7th Cir. 1964).

[7] *United States v. Becker,* 62 F.2d 1007 (2d Cir. 1933) (L. Hand, J.).

[8] *Id,* at 1008; 22 C.J.S. Criminal Law 345 (2), p. 145.

[9] *United States v. Chiarella,* 184 F.2d 903 (2d Cir. 1950), rev'd. on other grounds, 341 U.S. 946 (1951).

[10] *United States v. White,* 223 F.2d 674, 676 (2d Cir. 1955); *United States v. Perkins,* 190 F.2d 49 (7th Cir. 1951); *Vamvas v. United States,* 13 F.2d 347 (5th Cir. 1926); *Anno.* 33 A.L.R.2d 883 (1954).

commit the crime charged.[11] Thus where a solicitation or offer to buy narcotics was initiated by an agent, there was no entrapment so long as the defendant was "ready and willing, without persuasion and awaiting any propitious opportunity, to commit the offense."[12] Only if there was evidence of inducement going beyond a mere offer or request would the jury be instructed on entrapment.[13]

Procedurally, it was generally held that the defendant bears the initial burden of showing inducement, and that the prosecution then has the burden of proving, beyond a reasonable doubt, either an existing course of criminal conduct, a pre-existing intention, or a predisposition to commit the crime.[14] The question of entrapment has, in the main, been committed to the jury for decision,[15] although there have been significant objections voiced to this practice.[16]

Generally, the defendant was permitted to raise the defense by way of a plea of not guilty, without any special plea in bar.[17] At the same time, the courts uniformly held that one who denied that he committed the offense could not assert the defense of entrapment.[18] In fact, entrapment was unique among common law defenses in excusing a guilty defendant, because of police conduct, rather than excusing the defendant's act as non-criminal.[19]

Against this common-law backdrop, the Kansas entrapment cases prior to the code make only a minor show. Not until 1952 did the Kansas court unequivocally recognize the defense.[20] The court still has never reversed a conviction on grounds of entrapment. During national prohibition, when the defense was developing rapidly in other jurisdictions, it was virtually stillborn in Kansas, in *State v. Driscoll*.[21] There the court held it would not scrutinize the conduct of a police agent who purchased illegal liquor in order to convict the seller, and that the defense of entrapment was not available in such cases. This rule was justified, the court said, because of the difficulty police would otherwise have in proving surreptitious sales of liquor. Three years later, without mentioning *Driscoll*, the court seems to have applied the same rule to an illegal sale of narcotics to a government agent.[22] After repeal, the court continued to apply the *Driscoll* rule in the case of a licensed retail liquor dealer who illegally sold to an ABC agent off the licensed premises and on Sunday.[23]

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[11] *Accardi v. United States*, 257 F.2d 168 (5th Cir.), cert. den., 358 U.S. 883 (1958).

[12] *United States v. White*, 223 F.2d 674 (2d Cir. 1955).

[13] *E.g.*, appeals to sympathy or friendship, *Sherman v. United States*, 356 U.S. 369 (1958); persistent coaxing, *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933); pleas of desperate illness, *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921); or offers of large sums of money, *Morei v. United States*, 127 F.2d 827 (6th Cir. 1942).

[14] I Wharton's Criminal Evidence, 12th ed., Sec. 33.

[15] *Sorrells v. United States*, 287 U.S. 435 (1932).

[16] *Sorrells v. United States*, 287 U.S. 435 (1932) (dissenting opinion of Roberts, J.); *Sherman v. United States*, 356 U.S. 369 (1958) (concurring opinion of Frankfurter, J.); *Masciale v. United States*, 356 U.S. 386 (1958) (dissenting opinion of Frankfurter, J.); Model Penale Code, Sec. 2.13 (2).

[17] *Sorrells v. United States*, 287 U.S. 435 (1932).

[18] *United States v. Martinez*, 373 F.2d 810 (10th Cir. 1967); *Anno.* 33 A.L.R.2d 883 (1954).

[19] Note, 45 Bos. Univ. L. Rev. at 552.

[20] *State ex rel. Corley v. Leopold*, 172 Kan. 371, 240 P.2d 138 (1952).

[21] 119 Kan. 473, 239 Pac. 1105 (1925).

[22] *State v. Lovell*, 127 Kan. 157, 272 Pac. 666 (1928).

[23] *State v. Merklinger*, 180 Kan. 283, 303 P.2d 152 (1956).

Thus in 1969, when the new criminal code was adopted, entrapment had been recognized in principle but not significantly articulated, and was not really available at all to a defendant who had sold contraband to a government agent. This state of the law is significant, because it left the criminal code committee, the judicial council, and the legislature with virtually a clean slate in drafting the statutory defense now found in K.S.A. 1971 Supp. 21-3210.

Since adoption of this section, the court has decided three more entrapment cases, applying the pre-code law.[24] The first two[25] did not involve surreptitious sales. The court simply approved instructions embodying the general common law rule that entrapment is a defense where the defendant was "induced to commit a crime which he had no previous intention of committing," but is not a defense where he had such a pre-existing intention.

The third case is *State v. Reichenberger*.[26] The facts are set out above. The court overruled *State v. Driscoll* and held that the conduct of a police agent in making a buy of illegal merchandise should always be scrutinized for possible entrapment: "[W]here the events culminating in a criminal offense commence with a police solicitation, the defense of entrapment will almost always present a question of fact for the jury."[27] The court held that a showing of prior criminal intent or predisposition will rebut the defense of entrapment, and that the test is whether the agents acted so as to create "a substantial risk that the defendants would have procured or possessed marijuana in the absence of a predisposition to do so."[28] The court held there was evidence of predisposition, pointing to the lack of any hesitancy, reluctance or unwillingness which required "undue persuasion to overcome."[29]

In short, the majority adopted the common law rule that mere solicitation by the agent, followed by defendant's ready compliance, does not constitute entrapment. It also recognized that a prior pattern of similar criminal conduct, or a pre-existing intention to commit the crime, would rebut the defense.

Justice Prager, on the other hand, in a dissent joined by Justice Schroeder, took the view that willingness to comply with an officer's solicitation does not defeat the defense, unless by the nature of defendant's response he displays a "previous intention" to commit the crime charged.[30] Mere ready compliance by the defendant is not enough, in the dissenters' opinion, if he is not shown to have engaged in a pattern of criminal activity and if he had no previous intent to commit the offense in question.

If the dissenters' views were to become law, they would outlaw the techniques now being used to obtain many, if not most, drug convictions in Kansas. *Reichenberger* is the typical case, not the exception.

With this background let us examine Section 21-3210 of the Kansas criminal code. It provides:

"A person is not guilty of a crime if his criminal conduct was induced

[24] *State v. Wheat*, 205 Kan. 439, 469 P.2d 338 (1970); *State v. Hamrick*, 206 Kan. 543, 479 P.2d 854 (1971); *State v. Reichenberger*, 209 Kan. 210, 495 P.2d 919 (1972).

[25] *State v. Wheat* and *State v. Hamrick*, *supra*, note 24.

[26] *Supra*, note 24.

[27] 209 Kan. at 218. The Court did recognize that there will be cases in which "the undisputed evidence shows totally unacceptable conduct by the officer or agent," as well as cases "where the basic elements (of the defense) are not established" as a matter of law.

[28] 209 Kan. at 221.

[29] 209 Kan. at 220.

[30] 209 Kan. at 222.

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or solicited by a public officer or his agent for the purposes of obtaining evidence to prosecute such person, unless:

(a) The public officer or his agent merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by such person or a co-conspirator; or

(b) The crime was of a type which is likely to occur and recur in the course of such person's business, and the public officer or his agent in doing the inducing or soliciting did not mislead such person into believing his conduct to be lawful."

This section represents the first effort to provide the defense by statute in Kansas. Adopted in 1969,[31] it was actually recommended by the judicial council a year earlier, and was part of a draft which the criminal code committee of the council had labored over for several years before that. Hence it was drafted, recommended and adopted before the decisions in the *Wheat*, *Hamrick* and *Reichenberger* cases.[32] At that time the Kansas case law was not well developed; and it does not appear to have had any significant influence on the language of the new section.[33] Rather, the draftsmen seem to have consciously looked outside Kansas, principally to legislation in Illinois and proposed legislation in Wisconsin, and to have produced a section which, in the words of the judicial council note, "goes beyond the classical common-law defense of entrapment" and "seeks to clarify the defense and make it more usable" in Kansas.

The statute says that if the defendant's criminal conduct was induced or solicited by the police, then he is not guilty, unless either subsection (a) or (b) applies. The note indicates that the burden is on the defendant to "raise the defense by showing that he was induced or solicited to commit the crime for the purpose of obtaining evidence with which to prosecute him," and that if he does so the burden then shifts "to the state to prove that the entrapment methods were proper by proving either the facts set forth in subsection (a) or the facts set forth in subsection (b)."

What is the statute's effect on a case such as *Reichenberger?* Clearly, the defendants' initial burden, to show police solicitation, would have been met by the agent's own testimony as to how the case was "made." Subsection (b) of 21-3210 would not be available, since there was no evidence whatsoever of a "business" or of prior dealings in narcotics by the defendants. What about subsection (a)? Did the agent merely afford the defendants "an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by" the defendants? Certainly the idea of selling marijuana to the agent was not "originated by" the defendants, but by the agent.

Any doubt, as to the meaning of the phrase, "criminal purpose originated by such person or a co-conspirator," is resolved in the judicial council note which follows. After explaining that the state must show either (a) or (b) to rebut the defense, the note disposes of (a) by saying, "If the idea for committing the crime originated with the actor or a co-conspirator, entrapment is no defense." Turning then to (b), the note says:

(Continued on Page 237)

[31] L. 1969, Ch. 180, Sec. 21-3210.

[32] *Supra*, note 24.

[33] The judicial council note begins: "While Kansas recognizes the defense of entrapment (*State ex rel. v. Leopold*, 172 Kan. 371) it has seldom been asserted effectively. The section seeks to clarify the status of the defense and make it more usable."

Entrapment Defense—Drugs

(Continued from Page 221)

"Some criminal activity is very difficult to detect unless law enforcement officers are permitted to take the initiative, in the form of a solicitation. Under the safeguards provided for the defendant in subsection (b), they are permitted to do so. The crime must be of a type which is likely to occur and recur in the course of the actor's business or activity. For example, if the actor is in the business of selling intoxicating liquors or if his activity is selling narcotics, it is permissible for a law enforcement official to solicit a sale. If the actor is willing to sell to the official who pretends to be an ordinary patron, it is safe to assume that he would make similar unlawful sales to other persons. In such a case, the idea of committing the specific offense did not originate with the actor or a co-conspirator [so subsection (a) is not applicable], but the fact that such crimes are difficult to detect and the fact that the general idea of committing crimes of the type in question usually exists in the actor's mind before the solicitation to commit the specific criminal act, make it proper to abandon in this type of case the requirement of subsection (a) that the idea of committing the specific crime must originate with the actor or a co-conspirator."[34]

Clearly, the note contemplates that in cases where the idea of committing the specific crime charged did not originate with the defendant or a co-conspirator, the state must rely on subsection (b) to rebut the defense. The provision of subsection (a), that entrapment is rebutted where there is a "criminal purpose originated by such person or a co-conspirator," refers only to cases in which the idea of committing the *specific* offense originated with the defendant or a co-conspirator.

The meaning of the note is unambiguous, and is consistent with the language of the statute. Hence, there is no reason to believe it would not be followed by the court.

Examination of the sources for 21-3210 confirms these conclusions. The two principal sources are the Illinois entrapment statute[35] and a proposed Wisconsin section[36] which was never adopted.[37] Both are reproduced in footnotes to this article.[38]

[34] The reference to subsection (2) is an error, and was obviously intended to be to subsection (a).

[35] Smith-Hurd Ill. Ann. Stats. Ch. 38, Sec. 7-12. ("A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.")

[36] Proposed Wisconsin Criminal Code of 1953, Sec. 339.44. ("The fact that the actor was induced or solicited to commit a crime for the purpose of obtaining evidence with which to prosecute him is a defense unless: [1] The idea of committing the crime originated with the actor or a co-conspirator and not with the person so soliciting or inducing its commission; or [2] The crime was of a type which is likely to occur and recur in the course of the actor's business or activity, and the person doing the inducing or soliciting did not mislead the actor into believing his conduct to be lawful and did not use undue inducement or encouragement to procure the commission of the crime.")

[37] Letter from Professor Paul E. Wilson, Reporter for the Criminal Code Committee, to the author, dated June 16, 1972.

[38] *Supra*, notes 36 and 37.

Essentially, the Kansas statute follows the structure and language of the Wisconsin proposal, although it borrows certain of its phrases from the Illinois statute. The judicial council note to the Kansas statute was taken in large part from a reporter's comment which follows the Wisconsin draft; and the crucial discussion of subsections (a) and (b) is copied verbatim. Since the Wisconsin legislature did not adopt the proposal, there is no judicial gloss on its language. But it is apparent from comparing the wording of the Wisconsin draft with its reporter's comment, that if the police officer or agent was the first to have the idea of committing the specific crime, then the state must prove a "business" under the second subsection in order to rebut the entrapment defense. It is also clear that this meaning was carried over to the Kansas section, since both the statute and the note follow the Wisconsin model.

In effect, the Kansas and Wisconsin sections appear to codify two of the three common law justifications for police solicitations, i.e., a preexisting intention to commit the specific crime, or an existing course of similar criminal conduct. But they reject the third one, namely, a defendant's general willingness to engage in crime as shown by his ready compliance with an agent's suggestion of a specific criminal act. This third justification is the one relied on by the majority in *State v. Reichenberger*.[39] The new code's effect on cases like *Reichenberger*, then, is to make entrapment a defense as a matter of law.

In other cases, however, the question will arise as to what must the state prove in order to show that "the

[39] *Supra*, note 24.

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crime was of a type which is likely to occur and recur in the course of such person's business?"[40] The note gives as examples the case of one whose business is selling intoxicating liquor or selling narcotics. It says an initial solicitation by the police to commit a specific crime is justified in such cases, because of the difficulty of detecting such crimes, and because it is safe to assume the defendant would have made "similar unlawful sales to other persons." From this language, it appears that the business shown by the state must be an "unlawful" business.

In the case of narcotics, evidence that the defendant has been convicted of illegal sales or has engaged in such sales in the recent past would be admissible to show his "business."[41] In fact, a defense of entrapment may be ill-advised in such cases, because of the effect of such rebuttal evidence on the jury. Testimony as to hearsay or reputation regarding defendant's business activity should not be admitted.[42] Opinion testimony would be admissible, but only if found by the court to be based on the rational perceptions of the witness and to be helpful to a clearer understanding of his testimony.[43]

CONCLUSION

The result worked on drug cases by the new entrapment statute will undoubtedly meet with disapproval in some circles, especially among law enforcement officers. If permitted to stand, it will require some drastic changes in the methods used to enforce our drug laws.

However, the defense will not be available to the dealer in illegal narcotics, nor to one who originates the idea of an illegal sale. The significant change made by the law is to provide the defense where the defendant arranges or makes the sale in question only because the police have asked him to. In such cases the state has effectively *created* the crime; and it is precisely such "manufacturing of crime by law enforcement officials and their agents"[44] which the entrapment defense is supposed to deter. Hence the step taken by the code is not radical, but rather in furtherance of the laudatory purposes of the defense.[45]

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[40] The other requirement of (b), that the state show that the officer or agent did not mislead the defendant into believing his conduct to be lawful, seems to explain itself. In most cases, it should be an easy burden for the state to sustain.

[41] K.S.A. 60-455 and 60-450. K.S.A. 60-447 (b) (ii), relating to character evidence, is not applicable since the evidence is not offered to show defendant's character, but his business.

[42] K.S.A. 60-446 is not applicable, since the defendant's business, not his character, is in issue.

[43] K.S.A. 60-450 and 60-456.

[44] *Lopez v. United States*, 373 U.S. 427 (1963).

[45] In fact, two Justices of the Supreme Court were willing to take the same step under the common law existing prior to the code.

Stephen Mirakian

Attachment #6
2-7-84

Attachment # 6

Entrapment: Time to Take an Objective Look

I. Introduction

Since 1864[1] the defense of entrapment has posed difficult problems for the legal profession.[2] In *Hampton v. United States* the United States Supreme Court made its fourth attempt in the past fifty years to end confusion surrounding the entrapment defense.[3] As in each of its previous three decisions,[4] the Court was divided on the question of what constitutes entrapment. Despite its failure to resolve problems encumbering the entrapment defense, the *Hampton* decision is important because of the shift in rationale portended by the alignment of Justices.[5]

The significance of the "3-2-3" alignment is that it once again opens the door, thought to have been closed permanently in *United States v. Russell,* for adoption of a modified test of entrapment. Even if Justice Stevens, who did not participate in the *Hampton* decision, later joins with Justices Rehnquist, Burger and White in adopting the subjective test, Justices Powell and Blackmun have indicated their willingness to concur with the

1. Board of Comm'rs of Excise of Onundaga County v. Backus, 29 How. Pr. 33, 42 (N.Y. 1864) (dictum). "[T]his plea has never . . . availed to shield crime . . . and it is safe to say that under any code of civilized . . . ethics, it never will."

2. Sherman v. United States, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring). "[T]he basis of this defense, affording guidance for its application in particular circumstances, is as much in doubt today as it was when the defense was first recognized . . . ."

3. Hampton v. United States, 96 S. Ct. 1646 (1976).

4. Russell v. United States, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

5. *Hampton* was a five to three decision. Justice Rehnquist, joined by Chief Justice Burger and Justice White, wrote the plurality opinion that reaffirmed the majority opinion written by Justice Rehnquist in *Russell*.

Justices Powell and Blackmun concurred in part. The significance of Justice Powell's concurring opinion is his refusal to foreclose reliance on due process principles and the Court's power to bar a prosecution in the case of outrageous governmental conduct.

Justices Stewart and Marshall joined in Justice Brennan's dissent. The dissent

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Stewart, Marshall and Brennan viewpoint in a case involving outrageous governmental conduct contrary to fundamental principles of justice.

In its simplest form, entrapment occurs when a government officer or his agent induces a person to commit a crime, not previously contemplated by that person, for the sole purpose of instituting criminal proceedings against him.[6] This definition has a serious shortcoming in that it allows for the use of the entrapment defense by only those who had not previously "contemplated" the crime. The question whether to focus on the predisposition of the accused is the root of the controversy surrounding the use of the entrapment defense.[7]

The failure of a clear majority of the Court to settle this issue makes lower court resolution difficult. This failure has resulted primarily from the Court's refusal to acknowledge the potential injustice inherent in the current entrapment doctrine. While the shift in rationale alluded to in *Hampton* is a positive sign, the most expeditious approach to resolving the entrapment problem is through remedial legislation. The absurdity of the existing entrapment rule and the necessary components of a remedial statute become apparent only if one is aware of the origin and development of the entrapment defense and the unresolved problems burdening its use. The design of this note is to provide a basis of understanding and to propose a statutory scheme to govern future use of the entrapment defense. Recognition by the Court and Congress of the need for a new approach to entrapment will be a major step toward ending the intolerable situation that presently exists.

II. Origin and Development in Federal Courts

Entrapment[8] has been defined differently by nearly every federal court judge who has attempted to formulate a definition. Regardless of the definition courts have chosen to follow, they have universally held "entrapment" is an affirmative defense in the nature of confession and avoidance.[9] Lower federal courts have generally held denial of commission of the offense to be inconsistent with an assertion of the entrapment defense.[10]

Before discussing the origin and development of the entrapment defense it is necessary to specify the perameters which have traditionally governed the doctrine of entrapment. No one would argue that it is not socially desirable

6. *See*, People v. Lindsey, 91 Cal. App. 2d 914, 916, 205 P.2d 1114, 1115 (1949): Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

7. *See*, Annot., 62 A.L.R.3d 110 (1975); Note, 73 HARV. L. REV. 1333 (1960); 66 J. CRIM. L. & C. 325 (Spring 1975); 25 MERCER L. REV. 957 (1974); 10 N. ENG. L. REV. 179 (1974).

8. United States v. Whittier, 28 F. Cas. 591 (No. 16,688) (E.D. Mo. 1878)

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to apprehend criminals and bring them to justice.[11] In doing so, the police must be allowed to set traps and use decoys to catch a suspect in the commission of a crime or to detect his plan and prevent him from acting.[12] However, the state cannot tolerate having law enforcement officers instigating crime by implanting criminal ideas in peoples' minds or otherwise inducing them to commit anti-social acts.[13] Under the "objective" test, while a suspect may be "tested" by offering him the opportunity or facility to commit crime in his usual manner, if the officer induces the suspect to commit crime there is entrapment as a matter of law.[14] Under the "subjective" test, the traditional focus has been on the origin of the intent to commit crime. When the suspect is predisposed to commit a crime, and the crime is completed, the fact the officer furnished the opportunity to commit the offense or aided in the offense to secure evidence is no defense.[15] The difficulty with this approach is that the court must be able to distinguish between the "unwary innocent" and the "unwary criminal."[16] It is this difficult and sometimes inequitable distinction that has led to the contradictory and widely divergent application of the entrapment defense.

A. Woo Wai v. United States

Judge Bacon of New York stated the entrapment plea "was first interposed in Paradise: 'The serpent beguiled me, and I did eat.' That defense was overruled by the great Lawgiver, and has never since availed."[17] This view prevailed in federal courts until the 1915 decision in *Woo Wai v. United States*.[18] There an agent for the United States Immigration Commission, believing Woo Wai had information about the importation of illegal aliens, conceived a plan to arrest Woo Wai for violating a collateral federal law and then coerce the defendant into divulging the desired information.[19] In reversing defendant's conviction, the Court of Appeals for the Ninth Circuit affirmed the existing principle that entrapment by government officers was not a defense. The court, however, went on to hold it against public policy to sustain a conviction obtained in the manner disclosed by the evidence.[20] *Woo Wai* merely created an exception to the existing rule on the

11. R. PERKINS, CRIMINAL LAW at 1031 (2d ed. 1969).

12. Sorrells v. United States, 287 U.S. 435, 441 (1932). "Artifice and strategem may be employed to catch those engaged in criminal enterprises."

13. R. PERKINS, CRIMINAL LAW at 1031 (2d ed. 1969). The traditional distinction has been between detection and instigation. *Id.* at 1033.

14. *Cf.*, Reigan v. People, 120 Colo. 472, 210 P.2d 991 (1949). In the case of entrapment, a law enforcement official can be liable for conspiracy to commit the crime he was trying to induce the suspect to commit.

15. 21 AM. JUR. 2d *Crim. Law* § 144 (1965).

16. Sherman v. United States, 356 U.S. 369, 372 (1958); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962).

17. Board of Comm'rs of Excise of Onundaga County v. Backus, 29 How. Pr. 33, 43 (N.Y. 1864).

18. 223 F. 412 (9th Cir. 1915).

19. *Id.* The plan was to induce the defendant into helping transport the illegal

grounds of public policy[21] and failed to elevate entrapment to the level of an affirmative defense. *Woo Wai* is significant in that it laid the foundation for the "objective" approach, enunciated seventeen years later, which focuses on police conduct rather than the predisposition of the accused.

After *Woo Wai*, courts began to adopt entrapment as a defense. This phenomenon resulted primarily from two developments in the field of criminal justice: the creation by statute of many new crimes (e.g., sale and transport of liquor, narcotics, obscene material, etc.); and the establishment of special enforcement bodies for the detection and punishment of violators of the new laws.[22] The newly created crimes were the type involving willing victims. As a result, traditional law enforcement techniques relying on complaints by victims and their testimony at trial were no longer effective. In order to enforce the law, police began using decoys, informers, and undercover agents to a much greater extent than before.

As the use of the entrapment defense increased, courts were faced with two potentially conflicting responsibilities. On the one hand courts recognized the social necessity of supporting police efforts to uphold the law and carry out the legislative mandate. On the other hand courts could not shirk their responsibility to preserve the integrity of the judicial process by condemning outrageous police conduct.[23]

B. Sorrells v. United States

Seventeen years after *Woo Wai*, the United States Supreme Court, in *Sorrells v. United States*,[24] made its first attempt to resolve the conflict among federal courts and to end confusion surrounding the entrapment defense. *Sorrells* failed to end the confusion, but gave birth to the two divergent views which, after forty-four years, remain at the heart of the entrapment controversy.

Chief Justice Hughes, writing for the majority in *Sorrells*, enunciated the "subjective" test.[25] The Chief Justice based his reversal of the conviction upon a theory of statutory construction that emphasized Congress did not intend to include within its criminal statutes the prosecution of persons, not predisposed to commit crime, who had been lured into crime by government agents.[26] Concurring in the result, Justice Roberts, in formulating the "objective" test, found the existence of an affirmative defense which did not deny defendant's commission of the offense, but was based upon a court's power

21. 10 N. ENG. L. REV. 179, 182 (1974).

22. Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring).

23. 10 N. ENG. L. REV. 179, 183 (1974).

24. Sorrells v. United States, 287 U.S. 435 (1932).

25. United States v. Russell, 411 U.S. 423, 440 n.4 (1973) (Stewart, J., dissenting).

26. Sorrells v. United States, 287 U.S. 435, 448 (1932). The evidence at trial

to preserve "the purity of its own temple"[27] by preventing the use of its process to consummate a wrong.

In theory the objective test is not far removed from the subjective approach. Proponents of the subjective test argue that because the defendant is 'otherwise innocent,' his action is not within the proscription of the statute. The objective approach is not as direct. Since this approach is not concerned with defendant's predisposition, one must first admit a crime has been committed. The defendant, however, is not deserving of punishment since his culpability is diminished by intolerable police conduct.[28] The significant difference between the two approaches is more practical than theoretical. Only the objective test, however, serves as a deterrent to impermissable police conduct and helps formulate standards of proper law enforcement.[29]

C. *Sherman v. United States*

Despite the confusion which arose in lower federal courts following *Sorrells*, the Supreme Court did not re-enter the fray until 1958 when it decided *Sherman v. United States*.[30] Again, while deciding unanimously to reverse defendant's conviction, the Court split; five Justices applying the subjective test, four the objective test. Chief Justice Warren wrote the majority opinion reaffirming *Sorrells*. In an effort to amplify and clarify Chief Justice Hughes' discussion of the 'otherwise innocent' person, the Chief Justice drew a line between the "unwary innocent" and the "unwary criminal."[31]

Despite Chief Justice Warren's effort to end lower court confusion through his reaffirmation of the *Sorrells* subjective test and his amplification of Chief Justice Hughes' remarks, little was resolved by the *Sherman* decision. Whether a defendant was to be called "otherwise innocent" or an "unwary innocent," lower courts were still faced with the difficult task of trying to read the accused's mind to determine predisposition for the criminal act.

Justice Frankfurter's highly critical concurring opinion was directed at the Chief Justice's adoption of Hughes' theory of statutory construction.[32] According to Justice Frankfurter, the only legislative intent one could glean from a statute was the intention to make criminal exactly the conduct for which the defendant was arrested and charged.[33] Accordingly, no statutory

27. *Id.* at 457.

28. Note, 73 HARV. L. REV. 1333, 1334 (1960).

29. *Id.*; *see*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) (only effective deterrent is to deprive police of desired result). The problem is that there is no precedent for using acquittal as a deterrent. McNabb v. United States, 318 U.S. 332 (1943) and Weeks v. United States, 232 U.S. 383 (1914) had a different base because of the court's traditionally broad power over the exclusion or admission of evidence. While the objective approach would acquit an accused who is admittedly guilty of the offense, the Court has said such power belongs solely to the executive. *See, Ex parte* United States, 242 U.S. 27, 42 (1916).

30. 356 U.S. 369 (1958).

construction was necessary and whether the intent to violate the statute originated with the officer or with the defendant was irrelevant. The only factor to which the court should direct its attention once the defendant raises the issue of entrapment is whether the police conduct was within bounds of proper "use of governmental power."[34]

After *Sherman*, six federal circuit courts, still confused and unwilling to accept the subjective test in all circumstances, either refused to follow the precepts of *Sorrells* and *Sherman* or made exceptions to accomodate special circumstances.[35] The federal circuit courts which chose not to follow the *Sorrells* and *Sherman* principles make exceptions in three situations.

First, there are situations where the court determines the government was so deeply enmeshed in crime as to be shocking and offensive to normal precepts of justice.[36] In *Greene v. United States*, the Ninth Circuit Court of Appeals reversed defendant's conviction because the evidence showed continuous government involvement for over two and a half years. Defendant had been convicted and later paroled when a government agent induced him to resume bootlegging and furnished him with equipment, a still operator, and 2000 pounds of sugar. In addition, the government agent acted as the sole buyer.[37] In reversing a subsequent conviction, the court called this prosecution "repugnant to American criminal justice."[38] The Seventh Circuit Court of Appeals, in *United States v. McGrath*, followed the same basic approach. While the court did not reject *Sorrells* and *Sherman*, it by-passed any consideration of the defendant's predisposition.[39] Relying on a court's fundamental concern for supervising the police, the seventh circuit felt com-

by the state, should not be construed to have been excluded from the statute's proscription.

34. *Id.* at 382-84. While recognizing the police may hold out inducement and offer opportunities to commit crimes for those who are ready and willing to do so, these inducements must be such as are likely to induce only those people, and not others who would normally avoid crime. Though both Justices Roberts and Frankfurter (*Sorrells* and *Sherman*, concurring respectively) allude to the defendant's predisposition or willingness to commit a crime, the focus of their objective test is on police conduct. This is necessary, in their view, because focusing on the defendant's predisposition places him in the unfair position of either foregoing the entrapment defense, or taking the risk of being convicted on the basis of evidence of bad character, reputation or unrelated prior arrests or convictions admitted to prove predisposition for crime.

> This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. *Id.* at 384.

35. *See*, United States v. West, 511 F.2d 1083 (3d Cir. 1975); United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); Waker v. United States, 344 F.2d 795 (1st Cir. 1965) (reaffirmed *Sorrells* and *Sherman*, but made exception when police conduct is shocking or offensive *per se*); United States v. Smith, 331 F.2d 784 (D.C. Cir. 1964) (reaffirmed *Sorrells* and *Sherman*, but made exception when evidence shows "police frame-up," and focuses on police conduct).

36. Cases cited note 35 *supra*.

37. Greene v. United States, 454 F.2d 783, 784-86 (9th Cir. 1971).

38. *Id.* at 787.

pelled to reverse the conviction because "feelings of decency are offended."[40] In *McGrath* the government agent, being aware of the defendant's plan to print counterfeit money, provided him with paper and essentially operated the printing process. He then delivered the money to defendant and arrested him for producing and possessing counterfeit money.

The First Circuit Court of Appeals has aligned itself with the *Greene* and *McGrath* rationales. While maintaining its acceptance of the *Sorrells* and *Sherman* tests, the first circuit found it necessary to make an express exception to the Supreme Court's doctrine in order to encompass "shocking and offensive" police conduct.[41]

The second line of cases in which circuit courts vary from the Supreme Court's rationale is illustrated by *United States v. Bueno*[42] and *United States v. West*.[43] The facts in *Bueno* and *West* are almost identical. In both cases the defendant received heroin from a government informer and was arrested for selling to a government agent. In these cases, the courts rely on judicial policy as a basis for formulating a *per se* rule of entrapment. The courts in *Bueno* and *West* did not expressly reject the subjective test of entrapment. However, these courts found application of the *Sorrells* and *Sherman* tests to the *Bueno* and *West* fact situations would result in injustice.[44] Hence, to avoid injustice, these courts create a *per se* rule of entrapment as a matter of law when the government supplies and then repurchases contraband through the *conduit* of the defendant.[45] The *per se* rule of entrapment from *Bueno* and *West* is quite different than the "shocking police conduct" rationale of *Greene* and *McGrath*. The *per se* test applies only to specific fact situations, regardless of the nature of police conduct. The *Greene* approach, however, looks strictly at the nature of police conduct without regard for the type of transaction between government agents and the defendant.

A third exception, which has received limited acceptance, involves the use of contingent-fee informers. This type of informer receives payment

40. *Id.*

41. Waker v. United States, 344 F.2d 795, 796 (1st Cir. 1965).

42. 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973).

43. 511 F.2d 1083 (3d Cir. 1975).

44. The court in *Bueno* said in this fact situation the government was "buying heroin from itself, through an intermediary, the defendant, and then charging him with the crime." 447 F.2d at 905. In *West* the court said the social objectives of proper law enforcement and curbing intolerable government conduct required it to adopt the "conduit" rule.

> [B]ut when the government's own agent has set the accused up in illicit activity by supplying him with narcotics and then introducing him to another government agent as a prospective buyer, the role of the government has passed the point of toleration. Moreover, such conduct . . . serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime . . . .

511 F.2d at 1085-86.

45. *Accord*, United States v. Mosley, 496 F.2d 1012, 1016 (5th Cir.), *aff'd on*

only if the information he provides leads to a conviction. While the payment of informers for information which leads to an arrest is not condemned, there is a point beyond which the law enforcement agency may not go. In *Williamson v. United States*,[46] the court, while recognizing there was no entrapment in the traditional sense of *Sorrells* and *Sherman*, created an exception to the rule. This exception was limited to a narrow fact setting encompassing those cases wherein the contingent-fee arrangement was against specifically named defendants for a crime as yet uncommitted.[47] The facts in *Williamson* were such that the court, while recognizing the legitimate use of informers was necessary, drew a line saying, "there comes a time when enough is more than enough—it is just too much."[48]

In 1959, the federal district court for the Southern District of New York commented on the dangers inherent in the use of contigent-fee informers.[49] Since the informer, whose livelihood is dependent upon the funds derived from his activities, is paid only when his efforts are successful, he has every motive to induce the commission of criminal offenses.[50] The ease with which the informer can supply contraband, his motives for so doing, and the lack of any standards of conduct increase the risk that he may draw an innocent person into crime.[51]

D. United States v. Russell

The Supreme Court's decision to grant certiorari in *United States v. Russell* may be attributed to its desire to end the growing number of exceptions emerging in the circuit courts to circumvent the *Sorrells* and *Sherman* principles.[52] In *Russell* the court of appeals for the Ninth Circuit had not openly rejected the Supreme Court's subjective test. Instead, the court relied on the exception it had formulated in *Greene* to encompass those cases in which there had been an intolerable degree of governmental involvement.[53]

Justice Rehnquist, joined by Chief Justice Burger and Justices White, Blackmun and Powell, writing for the majority in *Russell*,[54] reaffirmed both *Sorrells* and *Sherman*. In *Russell* an undercover agent suspected the defendant of manufacturing and selling an illegal drug. The agent met with defendant and offered to supply him with phenyl-2-propanone, an essential but

46. 311 F.2d 441 (5th Cir. 1962).

47. 10 N. ENG. L. REV. 179, 204 (1974).

48. 311 F.2d at 445 (Brown, C.J., concurring specially). The informer was promised $200 for legally admissible evidence against Williamson, and $100 for such evidence against Lowrey. The court refused to sanction a contingent-fee arrangement directed at specific defendants for crimes as yet uncommitted.

49. United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959).

50. *Id.* at 559.

51. 59 MINN. L. REV. 444, 456 (1974-1975).

52. 25 MERCER L. REV. 957 (1974).

difficult ingredient to obtain. The defendant consented without hesitation and the agent was allowed to observe the manufacturing process. Some time later, the agent returned and arrested defendant. The defendant did not attempt to deny his predisposition to commit the crime. He based his defense upon an alleged violation of due process under the Fifth Amendment to the United States Constitution resulting from an intolerable degree of governmental participation in criminal activity. Most of Justice Rehnquist's opinion was directed toward illustrating why the due process defense was not applicable. The defendant's attempt to analogize the entrapment defense to the evidentiary exclusionary rule was faulty because the evidentiary exclusionary rule was court-made for the purpose of deterring the government from violating its own rules. The exclusionary rule is based upon the court's traditionally broad power over the admission or exclusion of evidence. Moreover, the exclusionary rule is derived from the fourth amendment, whereas the entrapment defense is not constitutionally based. In *Russell*, Justice Rehnquist found no constitutional violation and no law was broken by the government agent.[55] The finding that the agent's conduct stopped far short of violating fundamental rights of the defendant can hardly be challenged. Even under the objective test, it is not improper for the police to offer an opportunity for criminal activity to one who is "ready and willing" to violate the law.[56] Additionally, the chemical the agent supplied to defendant was both legal and obtainable.[57] Since the agent merely became involved in an ongoing operation and supplied nothing illegal, Justice Rehnquist found no intolerable degree of governmental involvement. While he held the facts did not reveal any violation of due process, Justice Rehnquist did not foreclose the due process defense as a basis for aquittal in other circumstances.[58] Finally, Justice Rehnquist used *Russell* to specifically criticize federal courts that expanded or made exceptions to *Sorrells* and *Sherman* for using a " 'chancellor's foot' veto over law enforcement practices of which [the circuit courts] did not approve."[59]

In his dissent, Justice Stewart, joined by Justices Brennan and Marshall, adopted the Frankfurter view from *Sherman*. Justice Stewart criticized the majority's continued failure to recognize the purpose of the entrapment defense is to deter unlawful governmental activity in detecting and preventing crime.[60] Stewart emphasized that by focusing on the defendant's predisposition for crime, the test of permissable or impermissable police conduct varied depending upon the past record of the accused. There was not, according to Justice Stewart, any defensible reason for allowing the police to

55. *Id.* at 430-31.

56. Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring).

57. *Id.* Evidence at trial showed the defendant had been able to procure the ingredient independent of the agent both before and after the agent supplied him with it.

58. 411 U.S. 423, 432. In *Hampton* Justice Rehnquist closed the due process door

use tactics, which would not be permissable on an 'otherwise innocent' person, merely because he had broken the law in the past. By limiting the availability of the entrapment defense to those 'otherwise innocent,' the majority missed the "glaring reality" that inducement by a government agent did not make the defendant any more innocent or less predisposed than if the inducement had been by a private citizen; in which event, the defense of entrapment has never availed.[61]

Despite the validity of Justice Stewart's dissent, the majority opinion is well founded if *Russell* is limited to its facts. The failure of the *Russell* opinion is that the Court could have reached the same result while propounding a more equitable and easily applied test for entrapment. Instead, the Court chose to rely on the *Sorrells* and *Sherman* principles which have confounded the lower federal courts since 1932.

The facts in *Russell* indicate the defendant was actively involved in an ongoing, independent criminal activity. Courts and commentators have long recognized affirmative police traps as perhaps the only way to detect and prevent such "victimless crimes."[62] Additionally, the facts show a totally different situation than those presented in cases such as *Bueno* where the "conduit" rule was formulated. The defendant in *Russell* could not have availed himself of the "conduit" rule because he was not a mere conduit for the sale of contraband by the government to itself.[63] Defendant was given a legal product and prosecuted for doing something illegal with it.

The problem with *Russell* lies neither in its reasoning nor in the fairness of its result, but rather in its failure to merge the subjective and objective tests. Since the two tests are not incompatible in this factual setting, the Court should have united them to formulate a new rule to govern the use of the entrapment defense in future cases.[64]

E. Hampton v. United States

In *Hampton v. United States* the Supreme Court once again raises more questions than it answers.[65] Justice Rehnquist, writing the plurality opinion, makes it clear the only acceptable test of entrapment is the subjective test from *Sorrells*, *Sherman* and *Russell*. In addition, the Court impliedly rejects the conduit rule from *Bueno* by affirming the trial court's refusal to give the jury a conduit-rule instruction.[66] The Court also affirms the trial court's re-

61. *Id.*

62. *Cf.*, Annot., 69 A.L.R.2d 1397 (1960) (bribery); Annot., 53 A.L.R.2d 1156 (1957) (abortion); Annot., 33 A.L.R.2d 883 (1954) (narcotics).

63. *See*, United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971).

64. 25 MERCER L. REV. 957, 959 (1974).

65. Hampton v. United States, 96 S. Ct. 1646 (1976).

66. *Id.* While *Russell* did not involve a situation wherein the defendant was supplied with contraband by a government agent and was then arrested for sale of the

fusal to give an instruction incorporating an objective test of entrapment. This rules out the availability of an entrapment defense based upon governmental misconduct when the defendant's predisposition for crimes is shown.[67]

Having rejected both the objective test and the conduit rule, Justice Rehnquist goes on to clarify the remarks he made in *Russell* concerning due process. The Court holds defendant misunderstood the meaning of those remarks.[68] In both cases the government agent did no more than act in concert with defendant's scheme. Since the due process clause of the fifth amendment applies only when governmental activity violates some protected right of the defendant, there can be no denial of due process when, as here, the government agent did no more than act in concert with the defendant's scheme.[69]

While Justice Powell concurs, the significance of his opinion lies in the dissenting portion. Justice Powell finds defendant's attempt to distinguish *Russell* on its facts to be a "distinction without a difference."[70] Hence, Powell joins with the plurality in impliedly rejecting the conduit rule. However, Justice Powell does not concur beyond that point. He does not understand *Russell* or any other case to say:

> [T]he concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.[71]

While agreeing the defense of entrapment should focus on the predisposition of the accused, Justice Powell does not agree entrapment is the only doctrine relevant to cases wherein the government instigates or acts in concert with the defendant.[72]

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67. *Id.* at 1649.

68. Justice Rehnquist perceived the defense in *Hampton* to be based upon a violation of due process under the standard of Roachin v. California, 372 U.S. 165 (1952), rather than on traditional entrapment principles.

69. Hampton v. United States, 96 S. Ct. 1646 (1976).

> The remedy of the criminal defendant with respect to the acts of government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment. But as noted, the petitioner's conceded predisposition rendered this defense unavailable to him. *Id.* at 1649.

The willingness to acquit a defendant because of a due process violation which Justice Rehnquist expressed in *Russell* is apparently illusory. According to his statement above, there can not be a due process violation, regardless of the type of governmental conduct, if the defendant fails to resist the inducement. Hence, a criminally predisposed defendant is effectively without a defense. He can not raise entrapment because he was predisposed, and he cannot raise due process because he failed to resist.

70. *Id.* at 1650. Justice Powell believes the practicalities of combating drug traffic frequently require police to supply items that a drug ring requires. Some of these items are necessarily contraband.

71. *Id.* at 1651.

72. *Id.* at 1651 n.2, *citing* Judge Friendly from United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973):

> [T]here is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents

Justice Powell is also unwilling to accept the plurality's foreclosure of a court's power to bar the conviction of a predisposed defendant when there was evidence of outrageous police conduct. Powell fears the exclusive focus on the defendant's predisposition would create a risk that courts would "shirk their responsibility . . . to accomodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of criminals."[73]

The dissenting opinion, written by Justice Brennan and joined in by Justices Stewart and Marshall adopts fully the objective test of entrapment and suggests the Court should engraft the conduit rule from *Bueno*.[74] The Court is split between the use of the subjective and objective tests. Since this split continues to result in confusion and opposition by lower federal courts, the time has come for a statutory resolution of the issue. In order to understand the necessary components of a statutory proposal to govern use of the entrapment defense, one must be fully cognizant of the basic differences between the subjective and objective tests and the problems that burden the use of each.

III. Current Problem Areas

The subjective approach, first propounded by Chief Justice Hughes in *Sorrells*, focuses primarily on the predisposition of the accused to commit the offense charged. Since *Sorrells*, most courts have attempted to apply this test using a four question analysis.[75] First, did the government agent attempt to induce defendant to commit a crime? Second, did the inducement result in the commission of the crime charged? Third, was there a causal connection between the inducement and the crime? Fourth, was the defendant otherwise predisposed to commit the crime?

Because the subjective test focuses on the defendant's predisposition and not police conduct, entrapment exists only if the defendant was not predisposed to commit the crime and the first three questions are answered affirmatively. If, however, the defendant was predisposed to violate the law, the degree of police inducement and type of governmental conduct are irrelevant.[76]

The objective test focuses primarily on police conduct. The significant difference between the subjective and objective tests lies in the latter's refusal to consider the predisposition of the accused as a relevant element of the entrapment defense. Since the basis of an entrapment aquittal is the judiciary's responsibility to deter improper police conduct and not that the defendant is any less guilty, the issue of defendant's predisposition to commit the crime charged is deemed irrelevant.[77]

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73. Sherman v. United States, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring).

74. Hampton v. United States, 96 S. Ct. 1646, 1654 (1976).

Perhaps the greatest failure of the subjective test is its unfairness to the second offender. The Supreme Court has yet to enunciate a workable method of proving predisposition without prejudice to the defendant.[78] Prosecutors have traditionally been allowed to present evidence, much of which is hearsay, of the accused's character, reputation, and past criminal conduct. In addition, evidence of the accused's criminal background is not limited to convictions, but may include mere arrests.[79] Since the issue of entrapment has traditionally been tried before the jury, critics of the subjective test find such evidence to be both unreliable and highly prejudicial.[80] The result of focusing on the accused's predisposition is that the type and amount of inducement the police may use increases as the accused's past becomes more suspect. This produces the unjust situation wherein two suspects arrested under identical circumstances receive opposite judicial treatment: one may have been entrapped because he had no past record; as to the other, no entrapment will be found due to his prior record of totally unrelated criminal offenses.[81]

For the truly "innocent" defendant the subjective test is adequate protection even though it is difficult to show lack of predisposition for the crime charged. For the defendant with a "shady" past, however, the subjective test is a "*catch-22*."[82] In order for the defendant to prove improper police conduct or excessive inducement, he must open himself up for proof by the prosecution of his predisposition. As discussed before, such evidence is often highly prejudicial to the defendant.[83] This evidence, coupled with the fact defendant must admit commission of the offense to raise the entrapment defense, will often motivate the jury to disregard the issue of police misconduct.[84]

The major problems in applying the entrapment defense can best be illustrated by using the California example.[85] In *People v. Benford*[86] the California Supreme Court adopted the objective test of entrapment and expressly recognized the defense was grounded upon sound public policy.[87] The court also enunciated two objectives to further that policy: deterrence

78. 49 NOTRE DAME LAW. 579, 583 (1974).

79. Heath v. United States, 169 F.2d 1007, 1010 (10th Cir. 1948).

80. Russell v. United States, 411 U.S. 423, 443 (1973).

81. 49 NOTRE DAME LAW. 579, 584 (1974).

82. 25 MERCER L. REV. 957, 960 (1974).

83. *See, e.g.*, Orfield, *The Defense of Entrapment in Federal Courts*, 1 DUKE L.J. 39, at 59-60 (1967).

84. 25 MERCER L. REV. 957, 960 (1974). *Cf.*, Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965). The author proposes that in addition to the unfairness of the subjective test to the second offender, it may well involve a denial of equal protection under the Fourteenth Amendment to the United States Constitution.

85. California is chosen because, while professing to follow the objective test, its courts tend to apply a subjective analysis to the entrapment defense. The resulting confusion illustrates the major problem areas yet to be resolved by many federal and

of impermissable police conduct and the formulation of standards of criminal justice.

Since 1959, despite continually citing *Benford* as controlling, the California courts have repeatedly focused their attention on the predisposition of the accused.[88] Three major inconsistencies occur when the "police conduct" rationale of entrapment is applied through use of the subjective test. These are in the areas of burden of proof, admissability of the accused's predisposition, and submission of the entrapment issue to the jury.

A. Burden of Proof

Under the *Benford* rationale entrapment is a judicially created defense to deter police misconduct.[89] Applying this view, the court must scrutinize police methods separately from the defendant's conduct. Hence, lack of entrapment is not an element of the offense charged and there should be no burden on the state to prove it. The burden of proving improper police conduct by a preponderance of the evidence should be on the defendant.[90] To obtain an aquittal a defendant must first admit commission of the offense and then prove there was impermissable police conduct. If a court uses the completely objective test of *Benford*, no undue burden is imposed on the defendant. If, however, a court applies the subjective test, the state receives the unfair advantage of being allowed to circumvent the substantive police conduct requirements of *Benford* without having to prove its case.[91] A reasonable solution for those courts using the subjective test is to reassign the burden of proof. Once the defendant raises the issue of entrapment, the state should be required to prove non-entrapment along with the other elements of the offense beyond a reasonable doubt.[92]

B. Evidence of Defendant's Predisposition

Perhaps the most troublesome problem resulting from use of the purely subjective test is the necessity of focusing upon the predisposition of the defendant to determine whether an "innocent person" was seduced into a "crim-

88. *E.g.*, People v. Hawkins, 210 Cal. App. 2d 669, 27 Cal. Rptr. 144 (1963). Despite the evidence showing the defendant repeatedly refused a police informant's requests for marijuana over a six month period because he had a police record and did not want to get involved, the court applied the origin of intent test. The conviction was affirmed without addressing the issue of improper police conduct.

89. Sherman v. United States, 356 U.S. 369, 382-84 (1958).

90. *Accord*, People v. Valverde, 246 Cal. App. 2d 318, 54 Cal. Rptr. 528 (1966) (in situations involving special defenses which are not elements of the crime, the court, for policy reasons, may place the burden of proof by a preponderance of evidence on defendant). *Accord*, People v. Perez, 27 Cal. App. 3d 352, 355, 103 Cal. Rptr. 669, 671 (1972) (absence of entrapment is not a part of the *corpus dilecti*, hence the prosecution need not prove it).

91. 11 CALIF. W.L. REV. 390, 398 (1974-1975).

92. *Accord*, United States v. Gurule, 522 F.2d 20 (10th Cir. 1975); United States v. Watson, 489 F.2d 504 (3d Cir. 1973); United States v. Ambrose, 483 F.2d 742

inal career" by a law enforcement officer.[93] The key words are "innocent" and "criminal," and the availability of the entrapment defense bears an inverse relationship to the defendant's "criminality," or predisposition for crime. Using the subjective test, a person who is predisposed to commit a crime is, by definition, "criminal" for entrapment purposes.[94] The California Jury Instructions—Criminal affirm the California district courts' reliance on the subjective test.[95] In *Benford*, the California Supreme Court stated two objectives in recognizing the entrapment defense are deterring impermissable police conduct and formulating standards of criminal justice. The jury instructions, however, fail to consider the issue of police conduct. Neither defendant's past record, his habit of committing this type of crime, or his readiness to commit the offense furnish any indicia of acceptable levels of police conduct.[96]

The California Supreme Court in *Benford* held evidence of past criminal tendencies or activities of the accused not admissable and that admission of such evidence would deny equal protection.[97] The admission of such evidence would permit the police to obtain the conviction of a second offender whom they badgered into resumption of crime, when a person without a record, similarly induced, would not be convicted.[98]

Courts which continue to use the subjective test might solve the equal protection problem by strictly limiting the type of evidence which is admissable to show the defendant's predisposition. While evidence of the accused's past record and reputation for crime should certainly be excluded, the state could be allowed to show predisposition through evidence of *modus operandi*, familiarity with criminal business, and possession of tools of the trade.[99] Courts which utilize the objective test hold evidence of the accused's predisposition to be irrelevant and inadmissable, thereby avoiding the problem of prejudice to the defendant.

C. *Submission to a Jury*

A third problem in the use of the entrapment defense is whether the issue should be submitted to the jury. While it is both proper and reasonable

93. People v. Estrada, 211 Cal. App. 2d 722, 726, 27 Cal. Rptr. 605, 607 (1963).

94. 11 CALIF. W.L. REV. 390, 394 (1974-1975).

95. Though California professes to follow the objective test of *Benford*, the California Jury Instructions—Criminal show an inconsistency. Briefly, the jury instructions require acquittal only if the idea to commit the crime did not originiate in the defendant's mind.

> A person is not guilty . . . when the idea . . . did not originate in the mind of the defendant but originated in the mind of another and was suggested to the defendant . . . for the purpose of inducing defendant to commit the crime . . . .

RICHARDS, CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 4.60 (3d ed. West Supp. 1974).

96. 11 CALIF. W.L. REV. 390, 395 (1974-1975).

> [T]he court must concern itself with the activity it would seek to control. It must not lose sight of that purpose by focusing on the character and conduct of the accused. People v. Moran, 1 Cal. 3d 755, 765, 463 P.2d 763, 769,

to submit the issue of entrapment to the jury when the subjective standard is used, it is improper and unreasonable to do so under the objective test.[100] Unless the judge decides as a matter of law whether the police conduct is improper, the goals of deterring intolerable police conduct and formulating proper standards of law enforcement will not be attained. A simple "guilty" or "not guilty" by a jury neither deters improper police conduct nor formulates standards of law enforcement. A "guilty" verdict does not necessarily indicate the police conduct was proper, since it may simply mean the jury chose not to believe defendant's testimony. Likewise, a "not guilty" verdict does not necessarily condemn the police conduct, since it may only mean the prosecution failed to prove its case.

IV. *The Kansas View of Entrapment*

Kansas courts have been slow to recognize the entrapment defense. Despite casual mention in several early cases,[101] the Kansas Supreme Court did not formally allow an entrapment plea as an affirmative defense until 1952.[102] Even then the effect of pleading entrapment as a defense was limited by the rule of *State v. Driscoll*[103] announced in 1925. In *Driscoll*, the court held a defendant could not raise the entrapment defense to avoid conviction on a charge involving "illegal sale." The court's rationale was based upon a belief that the difficulties surrounding the detection and prosecution of persons for illegal sale justified barring the entrapment defense.[104]

Three recent cases, *State v. Reichenberger*,[105] *State v. Houpt*,[106] and *State v. Bagemehl*[107] exemplify the current Kansas rule of entrapment. *Reichenberger* preceded the adoption of the present Kansas statute governing the use of the entrapment defense[108] and adheres to the subjective test used by the United States Supreme Court.[109] While *Reichenberger* primarily

100. 11 CALIF. W.L. REV. 390, 403 (1974-1975). When the subjective test is used the issue is whether the intent to commit the offense charged originated in the mind of the defendant. This is a proper question to be decided by a jury and one which is within their ability to decide. When using the objective test, however, the issue is whether the conduct of the police exceeded permissible standards. Such a determination should be a question of law, and, as such, decided by the judge alone.

101. *E.g.*, State v. Gray, 90 Kan. 486, 135 P. 566 (1913); State v. Jansen, 22 Kan. 349 (1878).

102. State, *ex rel.* Corley v. Leopold, 172 Kan. 371, 240 P.2d 138 (1952).

103. 119 Kan. 473, 239 P.2d 1105 (1925).

104. Note, 12 WASHBURN L.J. 64, 69 (1972). The court feared use of the entrapment defense would hamper necessary law enforcement practices by allowing a defendant to escape prosecution because of the mere happenstance he sold contraband to a law enforcement officer. *See*, State v. Lovell, 127 Kan. 157, 272 P.2d 666 (1928) (*Driscoll* applied in sale of narcotics).

105. 209 Kan. 210, 495 P.2d 919 (1972).

106. 210 Kan. 778, 504 P.2d 570 (1972).

107. 213 Kan. 210, 515 P.2d 1104 (1973).

108. KAN. STAT. ANN. § 21-3210 (Supp. 1971).

109. The defendant argued entrapment as a matter of law, urging the evidence did not establish any prior disposition for the offense charged. The supreme court affirmed

restates existing law, it makes one significant departure by specifically overruling *Driscoll*.[110]

In *Houpt*, the Kansas Supreme Court construed and applied *Kansas Statutes Annotated* section 21-3210 for the first time. Though the Judicial Council stated the statute was predicated upon a theory that improper law enforcement should be penalized (thereby incorporating the objective test), the court did not so hold.[111] Rather, the court held the language of the statute merely codified the *Reichenberger* decision.

One year later in *Bagemehl* the court reaffirmed its use of the subjective test as applied in *Reichenberger* and *Houpt*. There the court noted the comments of the Judicial Council following the statute were not part of the legislative enactment, and were not binding upon the court.[112]

As currently applied, *Kansas Statutes Annotated* section 21-3210 has three major weaknesses. First, it places the burden of proving entrapment on the defendant. This gives the state the unfair advantage of avoiding the issue of improper police conduct without having to prove defendant committed the crime. Second, the state must prove defendant was predisposed to commit the offense. In so doing the prosecution may present evidence of defendant's bad character, bad reputation, and prior convictions. Since the issue of entrapment is tried before the jury, this evidence is not only highly prejudicial, but poses equal protection problems as well. Third, because the issue of entrapment is tried before the jury with the focus on defendant's predisposition rather than the police conduct, there is no potential for deterring outrageous police conduct and formulating standards of proper law enforcement.

V. Considerations in Proposing an Objective Statute

Judicial attempts to formulate an equitable and uniform entrapment standard have generally been unsuccessful. It is time for Congress to provide specific policy and procedural guidelines by enactment of a uniform statute to govern the defense of entrapment. The model statute should incorporate the objective test to dissipate problems currently burdening the use of the entrapment defense. In drafting such a statute, the words of Justice Frankfurter should be kept in mind:

> If he [the entrapped defendant] is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offense described. In these circumstances, conduct is not less criminal because it is the result of temptation. . . .[113]

position to refute the defendant's allegation of entrapment as a matter of law. In their dissenting opinions, Justices Prager and Schroeder urged proof of predisposition required more than a mere showing of "ready acceptance" by the defendant.

110. 209 Kan. 210, 217, 495 P.2d 919, 925 (1972).

111. *Special Report*, 1968 KAN. JUD. COUN. BULL. 39.

The statute should focus primarily on police conduct, without reference to the defendant's past, and should seek to accomplish the dual objectives of deterring intolerable police conduct and formulating proper law enforcement standards. Hence, when police conduct becomes intolerable, the defense of entrapment will be equally available to all defendants.[114]

The statute should combine two important elements in order to objectively measure the propriety of police conduct and the type of inducement, if any, offered the defendant. First, the statute should specify that the "intent" to commit the offense must originate with the officer. This "intent" must be with regard to the commission of a specific crime and not the mere predisposition to commit an offense generally.[115] Second, if the intent did originate with the officer, his conduct must have been such as would have induced the ordinarily reasonable and law abiding citizen in similar circumstances to commit the offense. If, however, the intent did not originate with the officer, there should be no entrapment found unless his conduct exceeded the level of judicial toleration.

The statute should incorporate the "conduit" rule as an exception to the two-pronged approach discussed above. The court should find entrapment as a matter of law when the evidence shows the government furnished contraband to defendant and, some time later, bought it back from him.

In order to preserve the freedom of police to conduct necessary operations to detect and prevent crime, the statute should affirm the police practice of conducting reasonable and proper undercover activities. The statute should specifically place the burden of proving entrapment by a preponderance of evidence on the defendant. Additionally, the statute should expressly prohibit the prosecution from introducing evidence of the defendant's past record, character, or reputation on the issue of entrapment.

Finally, the statute should require the issue of entrapment to be decided initially by the judge as a matter of law. However, constitutional problems concerning denial of the right to trial by jury may arise if the trial judge decides the entrapment issue. To avoid this problem the statute should provide for aquittal if the trial judge finds entrapment. If, however, the trial judge does not find entrapment as a matter of law, the defendant should be statutorily entitled to an instruction to the jury incorporating the objective test as outlined in the statute, and requiring the jury to acquit should they find entrapment as a matter of fact.

VI. Statutory Proposal

Entrapment

(1) Entrapment is established as an affirmative defense to a criminal prosecution for the purpose of deterring improper govern-

mental conduct and formulating proper standards for law enforcement in the detection, investigation, and prevention of criminal activities.

(2) Entrapment shall be found to exist as a matter of law when

(a) the specific intent to commit the crime charged originates with a law enforcement officer or one acting under the direction, suggestion, or control of a law enforcement officer, and

(b) the conduct of the law enforcement officer or one acting under the direction, suggestion, or control of a law enforcement officer creates a substantial risk that a reasonable person in similar circumstances would be induced to commit the offense charged, or

(c) in a prosecution for "possession and sale" the evidence shows the contraband was supplied to the defendant by a law enforcement officer or one acting under the direction, suggestion, or control of a law enforcement officer, and was subsequently repurchased by a law enforcement officer or one acting under the direction, suggestion, or control of a law enforcement officer.

(3) The reasonable and proper use of undercover agents, decoys, informants, and schemes limited to providing another person an opportunity or facility to commit an offense of his own origin does not constitute entrapment.

(4) The issue of entrapment shall be decided initially by the judge as a matter of law. The burden shall be on the defendant to prove entrapment, as defined in subsection 2(a)-(c), by a preponderance of the evidence.

(a) If the trial judge finds the existence of entrapment as a matter of law, the defendant shall be acquitted, however

(b) If the trial judge finds entrapment does not exist as a matter of law, the defendant shall be entitled, upon request, to a jury instruction that incorporates the definition of entrapment as defined in subsection 2(a)-(c).

VII. Conclusion

Since the 1958 decision in *Sherman v. United States*,[116] there has been a gradual but continuous growth in the number of federal and state courts adopting the objective test to determine the viability of the entrapment defense. Some of these courts continue to profess adherence to the Supreme Court's subjective test, while creating express exceptions based upon judicial

policy and due process notions. Other courts have directly adopted the objective test.[117] It remains for the Supreme Court to provide standards for application of the outrageous governmental conduct-due process test alluded to in *Russell* and *Hampton*.

Until either the Supreme Court or Congress provides definitive guidelines, some courts will continue to determine that certain police conduct is not proper regardless of the person to whom it is directed. The import of this course of action is best summarized by Justice Frankfurter in his concurring opinion in *Sherman*:

> Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.
>
> No matter what the defendant's past record and present inclination to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.[118]

Stephen G. Mirakian

117. Grossman v. State, 457 P.2d 226 (Alaska 1969); State v. Mullen, 216 N.W.2d 375 (Iowa 1974); Re

Attachment #7
2-7-84

STATE OF KANSAS

JOHN F. (JACK) SHRIVER
REPRESENTATIVE, 79TH DISTRICT
COWLEY COUNTY
115 NO. 8
ARKANSAS CITY, KANSAS 67005

TOPEKA

COMMITTEE ASSIGNMENTS
MEMBER WAYS AND MEANS
PENSIONS AND INVESTMENTS

Attachment # 7

HOUSE OF
REPRESENTATIVES

HB 2764

THE EVOLVATION OF THE DEFENSE OF ENTRAPMENT FROM THE BEGINNING OF TIME UNTIL THIS YEAR OF 1984 IS AT LEAST INTERESTING IF NOT IN FACT STRANGE. IN JANUARY OF THIS YEAR THE SUPREME COURT IN A RULING DESIGNED TO CLARIFY ITS POSITION ON THE DEFENSE OF ENTRAPMENT ORDERED A NEW TRIAL FOR A TOPEKA MAN ARRESTED IN 1982 AS PART OF A LAW ENFORCEMENT STING OPERATION. THE TRIAL JUDGE IN THE CASE DENIED THE REQUEST FOR JURY INSTRUCTION ABOUT ENTRAPMENT ON GROUNDS IT WAS UNAVAILABLE TO A DEFENDANT WHO ADMITS NO WRONGDOING, CONSISTANT WITH PAST CASE LAW AND COURT RULINGS.

THE SUPREME COURT IN RULING THE DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION SAID, "IT MUST BE CONCEDED THAT OUR PAST DECISIONS ARE UNCLEAR AS TO WHEN THE DEFENSE OR ENTRAPMENT IS AVAILABLE", WENT ON TO SAY THAT WHETHER A DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION ON THE DEFENSE OF ENTRAPMENT DEPENDED ON WHETHER THE DEFENDANT ADMITS SOME INVOLVEMENT IN THE CRIME BUT FAILS TO ADMIT ALL THE FACTS ALLEGED BY THE STATE.

DURING NATIONAL PROHIBITION, WHEN THE DEFENSE WAS DEVELOPING, KANSAS IN STATE V. DRISCOLL THE COURT HELD IT WOULD NOT SCRUTINIZE THE CONDUCT OF A POLICE AGENT WHO PURCHASED ILLEGAL LIQUOR IN ORDER TO CONVICT THE SELLER, AND THE DEFENSE OF ENTRAPMENT WAS NOT AVAILABLE IN SUCH CASES. THIS RULE WAS JUSTIFIED, THE COURT SAID, BECAUSE OF

Atch. 7

THE DIFFICULTY POLICE WOULD OTHERWISE HAVE IN PROVING ILLEGAL SALES OF LIQUOR. THREE YEARS LATER WITHOUT MENTIONING DRISCOLL, THE COURT SEEMS TO HAVE APPLIED THE SAME RULE TO AN ILLEGAL SALE OF NARCOTICS TO A GOVERNMENT AGENT.

THE COURT SEEMS TO HAVE CONTINUED THIS RULE UNTIL STATE V. REICHENBERGER, 1972. "WE CONCLUDE THAT THE PROPER TEST FOR DETERMINING PREDISPOSITION OR CRIMINAL INTENT, AS APPLIED TO THE EVIDENCE HERE, IS WHETHER THE OFFICERS CONDUCTED THEMSELVES IN SUCH A MANNER OR EMPLOYED METHODS OF PERSUASION WHICH WOULD HAVE CREATED A SUBSTANTIAL RISK THAT DEFENDANTS WOULD HAVE PROCURED AND POSSESSED MARIJUANA IN THE ABSENSE OF A PREDISPOSITION TO DO SO." THE CONVICTION FOR SALE WAS SET ASIDE, THE CONVICTION FOR POSSESSION WAS AFFIRMED. THIS RULING IS CONTRARY TO PREVIOUS RULINGS; HOWEVER, TWO JUSTICES WENT EVEN FURTHER IN DISSENTING ON THE POSSESSION CHARGE. "MERE READY COMPLIANCE BY THE DEFENDANT IS NOT ENOUGH. IF HE IS NOT SHOWN TO HAVE ENGAGED IN A PATTERN OF CRIMINAL ACTIVITY, AND IF HE HAD NO PREVIOUS INTENT TO COMMIT THE OFFENSE IN QUESTION." IF THE DISSENTER'S VIEWS WERE TO BECOME LAW, AND I BELIEVE WE ARE ALMOST THERE, THEY WOULD OUTLAW THE TECHNIQUES NOW BEING USED AND ARE NECESSARY TO OBTAIN MANY, IF NOT MOST, DRUG CONVICTIONS IN KANSAS. REICHENBERGER IS THE TYPICAL CASE, NOT THE EXCEPTION.

OFFICERS WHO ARE VESTED WITH THE AUTHORITY AND RESPONSIBILITY FOR THE ENFORCEMENT OF THE ILLEGAL DRUG LAWS OF THIS STATE SHOULD NOT BE REQUIRED TO WAIT UNTIL OFFENSES ARE COMMITTED IN THEIR PRESENCE OR UNTIL SOMEONE BRINGS INDUBITABLE PROOF TO THEM OF CRIMINAL ACT OF SELLING DRUGS BY THE OFFENDER. THEY SHOULD BE VIGILANT IN DETECTING AND EXPOSING

THIS CRIME, AND WE AS A MATTER OF PUBLIC POLICY IN THIS STATE SHOULD NOT ALLOW A RULING THAT PREVENTS THE USE OF ORDINARY MEANS THAT THWART THE DETECTION AND PUNISHMENT OF THESE CRIMINALS. ONE WHO CONCEDES THAT HE HAS VIOLATED THIS LAW SHOULD NOT BE PERMITTED TO SHELTER HIMSELF AND ESCAPE PUNISHMENT IN THE FACT THAT THE ONE WHO BOUGHT AND SOLD THE DRUGS HAPPENED TO BE AN OFFICER OF THE LAW INSTEAD OF AN ORDINARY CUSTOMER.

EVEN IF INDUCEMENTS TO COMMIT THE CRIME OF SELLING ILLEGAL DRUGS COULD BE ASSUMED TO EXIST. THE ALLEGATION OF ENTRAPMENT BY THE DEFENDANT IS AS OLD AS THE WORLD, AND FIRST USED IN PARADISE: THE SERPENT ENTICED ME AND I DID EAT OF THE FORBIDDEN FRUIT. THAT DEFENSE WAS OVERRULED BY THE GREAT LAWGIVER, AND WHATEVER ESTIMATE WE MAY FORM, OR WHATEVER JUDGEMENT PASS UPON THE CHARACTER OR CONDUCT OF THE TEMPTER. THIS PLEA SHOULD NEVER BE AVAILABLE TO SHIELD THIS CRIME OR GIVE INDEMNITY TO THE CULPRIT.

Jim Clark

Attachment # 8
2-7-84

Rule 3.131. Pretrial Probable Cause Determinations and Adversary Preliminary Hearings

Attachment # 8

(a) Nonadversary Probable Cause Determination.

(1) *Defendants in Custody.* In all cases where the defendant is in custody, a nonadversary probable cause determination shall be held before a magistrate within 72 hours from the time of the defendant's arrest; provided, however, that this proceeding shall not be required when a probable cause determination has been previously made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged. The magistrate for good cause may continue the proceeding for not more than 24 hours beyond the above 72-hour period. This determination shall be made if the necessary proof is available at the time of the first appearance as required under Rule 3.130, but the holding of this determination at said time shall not affect the fact that it is a nonadversary proceeding.

(2) *Defendants on Pretrial Release.* A defendant who has been released from custody before a probable cause determination is made and who is able to establish that his pretrial release conditions are a significant restraint on his liberty may file a written motion for a nonadversary probable cause determination setting forth with specificity the items of significant restraint that a finding of no probable cause would eliminate. The motion shall be filed within 21 days from the date of arrest, and notice shall be given to the State. The magistrate shall, if he finds significant restraints on the defendant's liberty, make a probable cause determination within 7 days from the filing of the motion.

(3) *Standard of Proof.* Upon presentation of proof, the magistrate shall determine whether there is probable cause for detaining the arrested person pending further proceedings. The defendant need not be present. In determining probable cause to detain the defendant, the magistrate shall apply the standard for issuance of an arrest warrant, and his finding may be based upon sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded.

(4) *Action on Determination.* If probable cause is found, the defendant shall be held to answer the charges. If probable cause is not found or the specified time periods are not complied with, the defendant shall be released from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial. A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and filed, together with the evidence of such probable cause, with the clerk of the court having jurisdiction of the offense for which the defendant is charged.

Atch. 8

(b) Adversary Preliminary Hearing.

(1) *When Applicable.* A defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

(2) *Process.* The magistrate shall issue such process as may be necessary to secure attendance of witnesses within the state for the state or the defendant.

(3) *Witnesses.* All witnesses shall be examined in the presence of the defendant and may be cross-examined. Either party may request that the witnesses be sequestered. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf, and in such cases he shall be warned in advance of testifying that anything he may say can be used against him at a subsequent trial. He may be cross-examined in the same manner as other witnesses, and any witnesses offered by him shall be sworn and examined.

(4) *Record.* At the request of either party, the entire preliminary hearing, including all testimony, shall be recorded verbatim stenographically or by mechanical means, and at the request of either party shall be transcribed. If the record of the proceedings, or any part thereof, is transcribed at the request of the prosecuting attorney, a copy of this transcript shall be furnished free of cost to defendant or his counsel.

(5) *Action on Hearing.* If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall cause the defendant to be held to answer to the circuit court; otherwise, the magistrate shall release the defendant from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial.

A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and, together with the evidence received in the cause, shall be filed with the clerk of the circuit court.

Attachment # 9
2-7-84

Attachment # 9

Speeding the Criminal Justice System

SEP 2 1979 SUN

By Sidney L. Willens

MIAMI — If you crave to keep innocent people out of jail and guilty criminals off the streets, then listen to this story.

In Dade County, Fla., a formidable chief trial judge and a forthright state attorney have put in motion a directing criminal justice program where the innocent go free and the guilty are put away in 60 days.

(No Jackson County statistics are kept to show arrest-to-trial time, but informed sources estimate an average of five months.)

The Dade County chief trial judge, Edward D. Cowart, and the state attorney, Janet Reno, seized on a United States Supreme Court decision that nicks an ancient first step in the criminal justice trial process called "preliminary hearing."

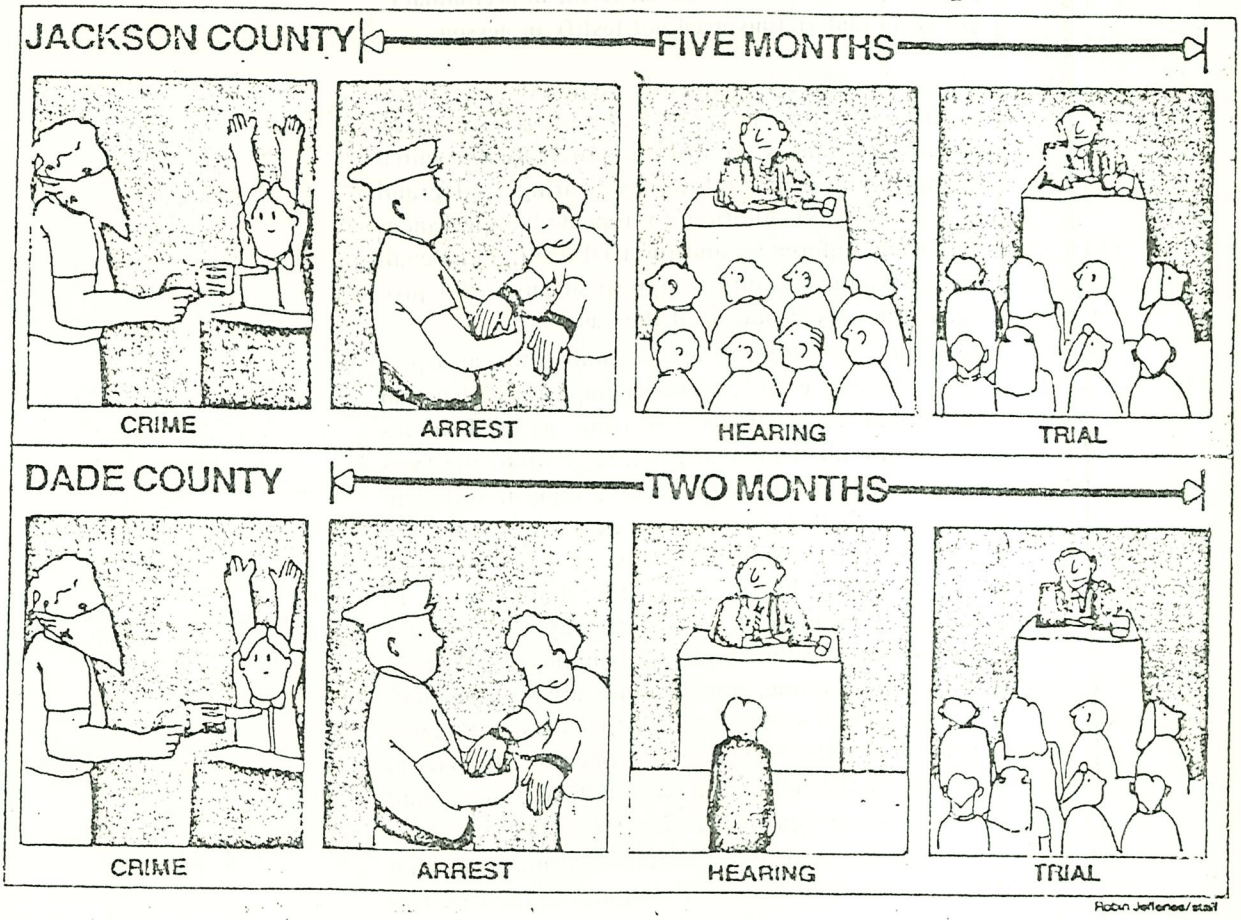
The story begins in 1975 when the high court told the state of Florida in *Gerstein vs. Pugh* that you can dump the "adversary" part of the hearing.

"It is not essential to meet the Fourth Amendment's probable cause standard to confront and cross-examine witnesses to believe a suspect has committed a crime," Justice Powell wrote. "An informal determination can be made by a judicial officer either before or promptly after arrest."

That means, of course, if a policeman yanks you into a police station, a judge should see to it quickly that the officer had good reason ("probable cause") to deprive you of your freedom.

The sticky question is whether a criminal defense lawyer has a right to tackle the cop and other state witnesses quickly after arrest and in open court or whether the judge can make a "probable cause" decision by reading only sworn written reports without flesh-and-blood testimony.

Early this year Judge Cowart and Ms. Reno put the kiss of death to the "adversary" preliminary hearing in Dade County in favor of sworn documentation. Today in Dade County a second-hearing judge decides "probable cause" for arrest without live testimo-



Robin Jefferies/staff

Are Dade County defense lawyers satisfied with a streamlined criminal justice system that removes the traditional first courtroom confrontation with prosecution witnesses?

"The program works well," Bennett Brummer, Dade County public defender told me. "The office of state attorney under Janet Reno tells the defense everything. No surprise evidence pops up during trial."

A top civil liberties lawyer who asked not to be identified credits the program's success to Cowert and Reno.

"They don't buckle when they get pressure from the cops. Hell, assistant state attorneys under Reno throw out more cases at the 'pre-trial conference' than judges did at the preliminary hearings."

C. David Weed, executive assistant public defender, told me the program is working "fine" but he expressed his personal belief that "a defendant has a constitutional right to an adversary preliminary hearing."

Hank Adorno, chief trial assistant under Janet Reno, said the refusal of Dade County's 12 felony judges to post-pone cases without good cause and the "pre-trial conference" go a long way in protecting defendant rights.

"Garbage is dumped at a 'pre-trial conference' that must be scheduled within 14 days of arrest," Adorno explained. "Our assistants meet together face-to-face with crime victims, witnesses, including policemen. If we can't make a case, we stop wasting everybody's time and dismiss or reduce to misdemeanor."

(In Jackson County an assistant prosecutor serves as police chief beforehand, a protection against police abuse.)

Adorno says a key to the program's success is that his 36 assistants stay hitched to a case from start to finish as does a felony judge. So it pays assistant state attorneys to drop felony cases within the 14-day arraignment period where prosecution is not warranted and to pursue cases that have merit.

Dade County assistant state attorneys at "pre-trial conference" are trained to quiz crime victims and witnesses, comfort them and remind them the law jumps from "probable cause" for arrest to "beyond a reasonable doubt" for conviction.

An assistant state attorney must fish or cut bait at the "arraignment" in open court scheduled within 14 days of arrest. There the assistant state attorney simply announces to the judge and defendant and counsel the decision whether to dismiss charges, reduce them or try the case. A trial date is set within 45 days which, of course, aims at 60 days from arrest to trial.

"The beauty of keeping the same assistant state attorney on a case from beginning to end," Adorno says, "is that he or she aims for the bottom line, innocence or guilt beyond a reasonable doubt."

(In Jackson County a criminal case leapfrogs from one assistant prosecutor to another.)

In Dade County a criminal felony defendant appears in court twice before trial, once for a bond hearing and "probable cause" determination and once for arraignment and setting of trial date. In Jackson County a criminal felony defendant appears in court three times before trial, once for a bond hearing (arraignment), once for an "adversary" preliminary hearing and once for a second bond hearing and assignment to a court division (also called arraignment). So Jackson County has one more step in the process than Dade County, with an adversary hearing thrown in and duplication that should be eliminated.

Do policemen in Dade County favor the new seven-month-old program? At first they didn't. The police union grumbled at loss of overtime pay for attending a preliminary hearing. Today Dade County policemen show no regrets over its demise.

"We like it," Bobby L. Jones, acting director of the Dade County Public Safety Department, told me. "Ms. Reno rides patrol cars, speaks to policemen at roll calls and exchanges memos with me."

According to James Bryant, chief of court services of the Public Safety Department, the Dade County police department has so far saved $6,000 a month with the new program. Policemen no longer rack up overtime pay waiting out preliminary hearings.

My interview with Judge Cowart took place after I had learned by long distance phone of the murder of Katherine Jo Allen in Kansas City. I asked the judge whether the new Dade County criminal justice system could have saved the life of a rape victim ready to testify at her alleged rapist's trial.

"I can't answer that," the judge replied. "After all, each situation is so totally different. But what I do know is that the quicker you dispose of a serious criminal case without sacrificing rights of defendants, victims and witnesses, the safer everybody is."

Judge Cowart released to me statistics showing that 59 percent of Dade County's felony defendants have dropped out of the system since the first of the year, which meant to the judge that the people involved with the cases that remained were dealt with more efficiently and fairly.

The Dade County state attorney, Janet Reno, is a woman described by others as "forthright," "erudite," "energetic" and "innovative."

When I asked Ms. Reno how she has been able to achieve a right blend of efficiency and fairness in a sprawling criminal justice system involving 20,000 felony cases a year, she replied:

"Cooperation from well-motivated people inside the judiciary, the police department, the public defender's office and even lower level employees. After all, a system is only as good as people who manage it."

Ms. Reno praised Dade County's court aide victim-witness program where a full-time staff tracks 100 volunteer "court watchers" who also notify crime victims and witnesses when and where to appear in court. According to Bobbi Silber, program director, volunteer hours from 1976 to June 1979 totaled 25,139. The program was started by the Crime Commission of Dade County.

Hank Adorno, Ms. Reno's outspoken right-hand man, finds no problems working with a woman whom he calls, "Boss."

I asked Adorno the same question I asked Ms. Reno, namely, how his office seems to have combined efficiency and fairness. Adorno's response was, "Come back to Miami for a longer stay and I'll tell you how much more we've got to do to make the justice system work."

A Streamlined System Here?

Can Jackson County under the 1975 United States Supreme Court decision of *Gerstein vs. Pugh* abolish "preliminary hearings" in order to efficiently and fairly speed up arrest-to-trial time? Yes, if the Dade County, Fla., experience is followed.

Shortly after *Gerstein vs. Pugh*, the Florida Supreme Court repealed the "adversary" rule, Dade County chief trial judge Edward D. Cowart made an "in-house" study for his court, found justice could be served by removing the adversary aspects of a preliminary hearing, tested the idea beginning in October 1978 and removed "adversary" preliminary hearings from the system beginning the first of this year.

Judge Cowart said that in his judgment the only thing necessary for implementation in Jackson County would be a Missouri Supreme Court ruling permitting it. *S.L.W.*

Sidney L. Willens, a Kansas City lawyer, has helped develop police and county complaint offices, a police-social worker program and witness assistance project here. He regularly reviews books for The Star and The Times on the law and court system.

Atch. 9

Executive and Legislative Recommendation 3:
Legislation should be proposed and enacted to ensure that hearsay is admissible and sufficient in preliminary hearings, so that victims need not testify in person.

Victims of crime are frequently required to come to court time after time in connection with a single case. Separate appearances are often required for the initial charging of the case, preliminary hearing, and grand jury testimony, in addition to repeated appearances for pre-trial conferences and the trial itself. The penalty for the victim's failure to appear at any court proceeding is usually dismissal of the case.

Requiring the victim to appear and testify at a preliminary hearing is an enormous imposition that can be eliminated. A preliminary hearing, as used in this context, is an initial judicial examination into the facts and circumstances of a case to determine if sufficient evidence for further prosecution exists. It should not be a mini-trial, lasting hours, days, or even weeks, in which the victim has to relive his victimization. In some cases, the giving of such testimony is simply impossible within the time constraints imposed. Within a few days of the crime, some victims are still hospitalized or have been so traumatized that they are unable to speak about their experience. Because the victim cannot attend the hearing, it does not take place, and the defendant is often free to terrorize others.

It should be sufficient for this determination that the police officer or detective assigned to the case testify as to the facts, with the defendant possessing the right of cross-examination. The defendant's right to pre-trial discovery of the government's case outside the courtroom and pursuant to local rules would remain intact. The sufficiency of hearsay at a preliminary hearing is firmly established in the federal courts, as well as in a number of local jurisdictions.

Attachment # 10
2-7-8

Kansas County & District Attorneys Association
827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351
EXECUTIVE DIRECTOR • JAMES W. CLARK

Attachment # 10

TO: HOUSE JUDICIARY COMMITTEE

FROM: KANSAS COUNTY & DISTRICT ATTORNEYS ASSOCIATION

SUBJ: HB 2522 AMENDMENT

I APOLOGIZE FOR HAVING TO AMEND A BILL THAT THIS COMMITTEE INTRO - DUCED AT THE REQUEST OF OUR ASSOCIATION. THE AMENDMENT IS NEEDED, HOWEVER, BECAUSE OF TWO DECISIONS BY THE KANSAS SUPREME COURT THAT WERE HANDED DOWN AFTER THE BILL WAS REQUESTED.

IN STATE V. GREEN, __ Kan. __, 666 P. 2d 717 (July 15, 1983), the Court abrogated legislative intent to preclude direct appeal of a conviction and sentence upon a plea of guilty by holding that since new court policy allows review of sentences, and since the statute does not specifically say "sentence", the Supreme Court would allow a review of sentences on direct appeal. This matter was covered in the hearing on HB 2802, held Monday, February 6, 1984.

IN STATE V. CREMER, __ Kan. __, #54, 432, (January 13, 1984), the Kansas Supreme Court becomes concerned over legislative intent, and reverses a Court of Appeals decision which had allowed the admission of hearsay testimony at preliminary hearings. The Supreme Court, while recognizing that earlier Kansas cases had recognized that strict observance of rules of evidence was not required in preliminary hearings held, however, that enactment of the Kansas Code of Civil Procedure in 1963 applied the same rules of evidence to all procedures, absent a court rule or statute to the contrary (emphasis added). The

Atch. 10

Supreme Court recognized one such statutory exception when it upheld the validity of K. S. A. 1982 Supp. 22-2902a, which allows the hearsay report of the K.B.I chemist in preliminary examinations. State v. Sherry , 233 Kan. 920, 667 P. 2d 367 (1983). The Supreme Court then holds in Cremer that K. S. A. 60-402 should be strictly construed and rules that the rules of evidence excluding hearsay apply to preliminary examinations.

Accordingly, the Kansas County & District Attorneys Association offers the following proposed amendment to HB 2522:

At Line 33, after "present", add ". Hearsay evidence may be admitted, as long as there is a substantial basis for crediting such evidence, and may be relied upon and form the basis for a probable cause finding."

RE: HB 2522 Attachment # 11 2-7-84

GOOD CASE

READ IT

No. 54,432

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Attachment # 11

STATE OF KANSAS,
Appellee,

v.

JACK B. CREMER,
Appellant.

SYLLABUS BY THE COURT

Hearsay evidence may be relied upon and form the basis for a probable cause finding in a preliminary examination so long as a substantial basis for crediting the hearsay is presented.

Appeal from Shawnee District Court; FRANKLIN R. THEIS, judge. Opinion filed July 28, 1983. Affirmed.

Michael L. Harris, of Topeka, for the appellant.

Sue Carpenter, assistant district attorney, Gene M. Olander, district attorney, and Robert T. Stephan, attorney general, for the appellee.

Atch. 11

Before SPENCER, P.J., PARKS and SWINEHART, JJ.

PARKS, J.: Defendant Jack Cremer appeals his jury conviction of felony theft (K.S.A. 21-3701) claiming that the trial court improperly overruled his motion to dismiss (K.S.A. 22-3208) which challenged the sufficiency of the preliminary hearing.

Defendant was employed as the manager of a Quality Oil Company station in Topeka. On Monday, September 17, 1979, defendant's supervisor, Verlon Cooper, received a call informing him that defendant had failed to open the service station for business. Cooper checked the company's account at the Southwest State Bank and was informed that deposits for the weekend's business had not been made. Virginia Pence, the company's comptroller, testified that after she learned of defendant's unauthorized absence, she requested bank statements from the bank. Defense counsel objected to the introduction of Mr. Cooper's testimony and the bank statements as hearsay, but the objections were overruled. The trial court found probable cause and bound the defendant over for trial.

Defendant subsequently filed a motion to dismiss which preserved the right to challenge the sufficiency of the preliminary hearing. K.S.A. 22-3208; State v. Weigel, 228 Kan. 194, Syl. ¶¶ 11, 12, 612 P.2d 636 (1980). Defendant contends that the finding of probable cause was based on inadmissible hearsay evidence and that, if the hearsay evidence had been excluded, there would have been insufficient evidence to bind him over for trial. In overruling defendant's motion to dismiss, the trial court held that the evidence was properly admitted and that in any event, strict adherence to the rules of evidence is not required at a preliminary hearing.

We first consider whether the hearsay evidence was admissible because it fell within the statutory exception of K.S.A.

60-460 (m), business records, or K.S.A. 60-460 (n), absence of entries in business records. K.S.A. 60-460 (m) provides that evidence otherwise inadmissible as hearsay is admissible if it consists of the following:

> "Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness."

The bank statements offered here were made within the regular course of the bank's business but no representative of the bank was present to testify concerning their preparation.

In State v. Guhl, 3 Kan. App. 2d 59, 60, 588 P.2d 957, rev. denied 225 Kan. 846 (1979), this court stated:

> "In order to bring hearsay evidence within the business records exception of K.S.A. 60-460 (m), a witness who can identify the report and explain methods and procedures used in its production must testify, establishing that the records were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which the records were made and the method of preparation indicate their trustworthiness." [Emphasis added.]

The Guhl court distinguished the authority relied on by the State. Olathe Ready-Mix Co., Inc. v. Frazier, 220 Kan. 646, 556 P.2d 198 (1976) and State v. Beasley, 205 Kan. 253, 469 P.2d 453 (1970). The court noted that in those cases "someone who was a member of the organization which made the record laid the foundation for the admission of the record." The court also held that "a purported business record, made by a third party and sent to the identifying business in the regular course of its business and maintained in its files," is inadmissible for lack of proper foundation. Guhl, 3 Kan. App. 2d at 61; and cases cited therein. Without foundation testimony from a representative of the bank generating the record, Mr. Cremer was precluded from inquiring into the possibility of an error on the part of the bank. Thus, the court's reliance upon K.S.A. 60-460 (m) was in error.

The hearsay exception found in K.S.A. 60-460 (n), which the trial court also cited in overruling defendant's motion to dismiss, likewise does not apply. K.S.A. 60-460 (n) permits the admission of the following:

> "Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the nonexistence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them."

It is clear from the reading of this statute that its focus is upon the business making the memorandum or record, which

in this case is the bank. Since no foundation was laid concerning the record-keeping practices of the bank, we conclude that the testimony of Mr. Cooper and the bank statements were hearsay evidence which did not fall within the exceptions of either K.S.A. 60-460 (m) or K.S.A. 60-460 (n).

We must next consider whether the hearsay evidence, although technically inadmissible, could be considered in determining the limited issues pertinent in a preliminary examination.

The purpose of the preliminary examination is not to determine the guilt or innocence of the accused; the magistrate need only decide whether a crime has been committed and whether there is probable cause to believe that the accused committed it. State v. Ramsey, 228 Kan. 127, 131, 612 P.2d 603 (1980). In such a proceeding, the rules of evidence have typically been relaxed and hearsay has been held to be permissible. See e. g., People v. Williams, 628 P.2d 1011, 1014 (Colo. 1981); Gannett Pacific Corp. v. Richardson, 59 Hawaii 224, 232, 580 P.2d 49 (1978). This rule has been the law of Kansas since McIntyre v. Sands, 128 Kan. 521, Syl. ¶ 2, 278 Pac. 761 (1929) stated: "It is not necessary that there should be the same formality or the strict compliance with procedure and the rules of evidence in a preliminary examination as upon the final trial of the accused." See also State v. James Earley, 192 Kan. 167, 170, 386 P.2d 189 (1963).

On January 1, 1964 the comprehensive codification of our code of civil procedure including the rules of evidence went into effect. Included within this enactment was K.S.A. 60-402 which provides that "except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, the rules set forth in this article shall apply in every proceeding, both criminal and civil, conducted by or under the

supervision of a court, in which evidence is produced." There is no specific provision included in the statute which currently defines the parameters of a preliminary examination, K.S.A. 22-2902, referring to a relaxation of the rules of evidence. Thus, it may be argued that the rule of McIntyre is no longer the law in this state. However, our Supreme Court in Thompson v. General Finance Co., Inc., 205 Kan. 76, 95, 468 P.2d 269 (1970), which was decided six years after the enactment of K.S.A. 60-402, approvingly referred to McIntyre. In addition, although there is a general presumption that a change or amendment of a statute results from a legislative purpose to change its effect, this presumption may be strong or weak according to the circumstances, and may be wanting altogether in a particular case. The presumption is fairly strong in the case of an isolated, independent amendment, but is of little force in the case of amendments adopted in a general revision or codification of the law. Board of Education of U.S.D. 512 v. Vic Regnier Builders, Inc., 231 Kan. 731, 736, 648 P.2d 1143 (1982). Thus, we cannot conclude that the expansive language of K.S.A. 60-402 which was enacted as one small part of a major codification of the law of procedure, was intended to prevail over existing case law concerning the rules of evidence in a preliminary examination.

A preliminary examination, like the inquiry made by a magistrate before issuing an arrest or search warrant, is concerned with probabilities--not guilt. Hearsay statements in an affidavit may be relied upon in issuing a search or arrest warrant so long as the affidavit includes sufficient affirmative allegations of fact as to the affiant's personal knowledge to allow the magistrate to rationally reach an independent decision. State v. Marks, 231 Kan. 645, 647, 647 P.2d 1292 (1982). We conclude that a similar rule is still appropriate for preliminary examinations. Therefore, so long as there is a substantial basis for crediting the hearsay, it may be relied upon and form the basis for a probable cause finding in a preliminary hearing.

In this case, there was reason to believe that in all probability the bank statements and information repeated by Mr. Cooper were accurate and reliable even though hearsay. We conclude that the trial court did not err in permitting admission of these exhibits in the preliminary examination.

Affirmed.

Attachment # 12

Attachment #12
2-7-84

[420 US 103]

RICHARD E. GERSTEIN, State Attorney for Eleventh Judicial Circuit of Florida, Petitioner,

v

ROBERT PUGH et al.

420 US 103, 43 L Ed 2d 54, 95 S Ct 854

[No. 73–477]

Argued March 25, 1974. Reargued October 21, 1974.
Decided February 18, 1975.

SUMMARY

A class action instituted in the United States District Court for the Southern District of Florida presented the question whether persons arrested without warrants, and held for trial under informations charging offenses under Florida law, were entitled to a judicial determination of probable cause for continued pretrial detention—Florida law making no provision for such a probable cause hearing. After extended proceedings, the District Court (1) held that the Fourth and Fourteenth Amendments gave such arrested persons the right to a judicial hearing on the question of probable cause for pretrial detention, and (2) prescribed detailed procedures for the protection of such right, involving an adversary hearing with rights to counsel, confrontation, cross-examination, and compulsory process for witnesses (see 355 F Supp 1286). The United States Court of Appeals for the Fifth Circuit affirmed in part and vacated in part, modifying the District Court's decree in minor particulars (483 F2d 778).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded the case to the Court of Appeals. In an opinion by POWELL, J., it was held (1) expressing the unanimous view of the court, that under the Fourth Amendment, a person arrested without a warrant and charged by information with a state offense was entitled to a timely judicial determination by a neutral magistrate of probable cause for significant pretrial restraint of his liberty, the prosecutor's decision to file an information not alone satisfying the Fourth Amendment's requirements, but (2) expressing the view of five members of the Court, that there was no constitutional requirement that the procedure adopted by a state for determining probable cause for detention must include the full panoply of adversary safeguards such as the rights to counsel, confrontation, cross-examination, and compulsory process for witnesses—the case being remanded for reconsideration of the propriety of procedures for the determination of probable cause required by the Fourth Amendment.

STEWART, J., joined by DOUGLAS, BRENNAN, and MARSHALL, JJ., concurring, joined in the court's opinion as to holding (1) above, but expressed the view that having determined that Florida's pretrial detention procedures were constitutionally inadequate, it was unnecessary to go further by way of dicta specifying those procedural protections that constitutionally need not be accorded suspects awaiting trial.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Criminal Law § 57 — Fourth Amendment — probable cause for detention — judicial determination

1a, 1b, 1c, 1d. Under the Fourth Amendment, a person arrested without a warrant and charged by information with a state offense is entitled to a timely judicial determination by a neutral magistrate of probable cause for pretrial restraint of liberty, and may not

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5 AM JUR 2d, Arrest §§ 44, 48, 49, 76, 77; 21 AM JUR 2d, Criminal Law §§ 440–443

5 AM JUR TRIALS 27, Pretrial Procedures and Motions in Criminal Cases

USCS, Constitution, 4th and 6th Amendments

US L ED DIGEST, Criminal Law § 57

ALR DIGESTS, Criminal Law § 132

L ED INDEX TO ANNOS, Arrest; Criminal Law; Probable Cause

ALR QUICK INDEX, Arrest; Criminal Law; Probable Cause

FEDERAL QUICK INDEX, Arrest; Criminal Law; Probable Cause

ANNOTATION REFERENCES

Requirement, under Federal Constitution, that person issuing warrant for arrest or search be neutral and detached magistrate. 32 L Ed 2d 970.

What constitutes probable cause for arrest. 28 L Ed 2d 978.

Federal constitutional right to confront witnesses. 23 L Ed 2d 853.

Accused's right to counsel under the Federal Constitution. 93 L Ed 137, 2 L Ed 2d 1644, 9 L Ed 2d 1260, 18 L Ed 2d 1420.

Necessity and propriety (under 28 USCS § 2281) of three-judge Federal District Court in suit to enjoin enforcement of state statute or administrative order. 4 L Ed 2d 1931, 15 L Ed 2d 904.

Accused's right to assistance of counsel at or prior to arraignment. 5 ALR3d 1269.

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be jailed or subjected to other significant restraints pending trial without any opportunity for such a probable cause determination; the state prosecutor's decision to file an information does not alone meet the requirements of the Fourth Amendment as constituting a determination of probable cause that furnishes sufficient reason for detention pending trial.

Indictment, Information and Complaint §§ 4, 8 — necessity for indictment — Florida law

2. Under Florida law, indictments are required only for prosecution of capital offenses, and prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court.

Criminal Law § 57; Habeas Corpus § 21 — state prisoners awaiting trial — right to probable cause hearing — form of action

3a, 3b. A civil action in a Federal District Court by prisoners arrested without warrants and held for state court trials under informations—the prisoners asserting a constitutional right to a judicial hearing on the issue of probable cause for pretrial restraint of their liberty and requesting declaratory and injunctive relief—does not come within the class of cases for which habeas corpus is the exclusive remedy, where the only relief sought or ordered was that state authorities give the prisoners a probable cause hearing, release from custody having been neither sought nor ordered.

Courts § 698; Criminal Law § 17; Injunction § 79(2) — state prisoners awaiting trial — right to probable cause hearing — federal injunctive relief

4a, 4b. In a civil action in a Federal District Court by prisoners arrested without warrants and held for state court trials under informations—the prisoners asserting a constitutional right to a judicial hearing on the issue of probable cause for pretrial restraint of their liberty—injunctive relief ordering state authorities to give the prisoners immediate hearings to determine probable cause for further detention is not barred by equitable restrictions on federal intervention in state prosecutions, since (1) the injunction is not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that cannot be raised in defense of the criminal prosecution, and (2) the order to hold preliminary hearings cannot prejudice the conduct of trial on the merits.

Appeal and Error § 231; Courts § 225.6 — validity of state criminal procedures — necessity for three-judge District Court — jurisdiction of Court of Appeals

5a, 5b. In a civil action in a Federal District Court by prisoners who had been arrested without warrants and were being held for state court trials under informations, and who asserted a federal constitutional right to a judicial hearing on the issue of probable cause for pretrial restraint of their liberty, a single-judge District Court has jurisdiction to issue an injunction ordering state authorities to give the prisoners immediate hearings to determine probable cause for further detention, and the Federal Court of Appeals has jurisdiction over an appeal therefrom, where the complaint does not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, the practice of denying preliminary hearings to persons charged by information being embodied only in state court decisions; and the District Court's order on remand, reaffirming its original ruling and declaring that state criminal procedure rules which had been amended by the highest state court pending the remand did not comply with federal constitutional requirements, is not outside the jurisdiction of a single judge by virtue of the three-judge court requirements of 28 USCS § 2281, even though on remand, the constitutionality of a state "statute" was drawn into question when the state's criminal rules were amended, and even though the District Court's ruling

held a statewide "legislative rule" unconstitutional, where (1) the District Court's supplemental opinion could fairly be read as a declaratory judgment that the amended state rules were unconstitutional, and (2) the District Court's original injunctive decree was never amended to incorporate the holding of unconstitutionality of the amended rules.

Appeal and Error § 1662; Courts § 763 — validity of state criminal procedures — class action — mootness

6a, 6b. Although by the time a class action by prisoners who had been arrested without warrants and were being held for state court trials under informations, and who asserted that their federal constitutional rights were violated by the state's failure to provide a judicial hearing on the issue or probable cause for pretrial restraint of their liberty, reaches the United States Supreme Court for review, the named plaintiffs' pretrial detention has ended and they have been convicted, nevertheless the claims of the unnamed members of the class are not mooted by the termination of the class representatives' claims, since in view of the temporary nature of pretrial detention, it is unlikely that any given individual can have his constitutional claim decided on appeal before he is either released or convicted, but an individual may nonetheless suffer repeated deprivations and other persons similarly situated will be detained under the allegedly unconstitutional procedures, the claim thus being one that is capable of repetition, yet evading review; although the record does not indicate that the named plaintiffs were still in custody awaiting trial when the District Court certified the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, and although such a showing ordinarily would be required to avoid mootness, nevertheless the case is a suitable exception to such requirement, since (1) the length of pretrial custody cannot be ascertained at the outset and recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial, (2) it is not certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a District Judge to certify the class, and (3) the constant existence of a class of persons suffering the deprivation is certain.

Arrest § 1; Search and Seizure § 3 — Fourth Amendment — probable cause standard

7. Under the Fourth Amendment, the standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense; this standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the state's duty to control crime.

Arrest § 1; Search and Seizure § 5 — Fourth Amendment — probable cause — determination by neutral magistrate

8. To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the existence of probable cause must be decided by a neutral and detached magistrate whenever possible.

Arrest § 2 — necessity for prior approval by magistrate

9. The Fourth Amendment does not require that a magistrate must review the factual justification for an arrest prior to the arrest.

Arrest § 2; Criminal Law § 57 — probable cause — detention after arrest — necessity of judicial hearing

10. Under the Fourth Amendment, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident

requires a judicial determination of probable cause by a neutral magistrate as a prerequisite to extended restraint on liberty following arrest.

Indictment, Information and Complaint § 4 — judicial hearing — prosecution by information.

11. A prior judicial hearing is not a prerequisite to prosecution by information.

Appeal and Error § 1535; Arrest § 1 — illegal arrest or detention — grounds for vacating conviction

12. An illegal arrest or detention does not void a subsequent conviction, and although a suspect who is being detained may challenge the probable cause for such confinement, nevertheless a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause as required by the Fourth Amendment.

Criminal Law §§ 46.4, 50, 57; Witnesses § 4 — probable cause for detention — necessity for adversary hearing

13a, 13b. The full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses—is not essential, as a matter of constitutional principle, for the judicial determination of probable cause for detention required by the Fourth Amendment with regard to persons arrested without warrants and charged by informations with state offenses; the sole issue at such a hearing is whether there is probable cause for detaining the arrested person pending further proceedings, which issue can be reliably determined without an adversary hearing, the appropriate standard being the same as that for arrest, that is, probable cause to believe the suspect has committed a crime.

Criminal Law § 46.4 — right to counsel — preliminary hearing

14. A preliminary hearing to determine whether the evidence against a suspect justifies going to trial under an information or presenting the case to a grand jury requires the appointment of counsel for indigent defendants.

Arrest § 1 — probable cause

15a, 15b. It is not the function of the police to arrest at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

Evidence § 982 — criminal case — proof of guilt

16. Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Federal Constitution, has crystalized into rules of evidence consistent with that standard.

District and Prosecuting Attorneys § 3 — duty as to charging crimes

17a, 17b. A prosecutor has a professional duty not to charge a suspect with a crime unless he is satisfied of probable cause.

Criminal Law § 46.4 — probable cause for detention — judicial hearing — right to counsel

18. Because of its limited function and its nonadversary character, the judicial determination of probable cause for detention, required by the Fourth Amendment as to persons arrested without warrants and charged by informations with state offenses, is not a "critical stage" in the prosecution that requires appointed counsel for the defendant.

Criminal Law § 57 — probable cause for detention — judicial determination — necessity for adversary hearing

19a, 19b. Although the Constitution does not require an adversary determination of probable cause with regard to the Fourth Amendment's requirement of a judicial determination of probable cause for detention pending trial on a state criminal charge, and although the states have discretion as to the type of pretrial procedure to be employed in determining probable cause, nevertheless whatever the procedure a state may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty, which determination must be made by a judicial officer either before or promptly after arrest; such probable cause determination is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial, the key factor being significant restraint on liberty.

Appeal and Error § 1339 — Court of Appeals' judgment — extent of Supreme Court review

20a, 20b. Upon review of a Federal Court of Appeals' judgment which (1) declares the right of a state criminal defendant, arrested without a warrant, not to be detained for trial on an information without a timely judicial determination of probable cause for such detention, and (2) affirms a District Court's order prescribing an adversary hearing for the implementation of such right, the United States Supreme Court, after affirming the holding as to the right to a probable cause determination, must also determine the propriety of the procedural safeguards ordered by the lower courts.

SYLLABUS BY REPORTER OF DECISIONS

1. The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Accordingly, the Florida procedures challenged here whereby a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination are unconstitutional.

(a) The prosecutor's assessment of probable cause, standing alone, does not meet the requirements of the Fourth Amendment and is insufficient to justify restraint of liberty pending trial.

(b) The Constitution does not require, however, judicial oversight of the decision to prosecute by information, and a conviction will not be vacated on the ground that the defendant was detained pending trial without a probable cause determination.

2. The probable cause determination, as an initial step in the criminal justice process, may be made by a judicial officer without an adversary hearing.

(a) The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings, and this issue can be determined reliably by the use of informal procedures.

(b) Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel.

483 F2d 778, affirmed in part, reversed in part, and remanded.

Powell, J., delivered the opinion of the Court, in Parts I and II of which all other Members joined, and in Parts III and IV of which Burger, C.J., and White, Blackmun, and Rehnquist, JJ., joined. Stewart, J., filed a concurring opinion, in which Douglas, Brennan, and Marshall, JJ., joined, post, p 126, 43 L Ed 2d, p 72.

APPEARANCES OF COUNSEL

Argued March 25, 1974.

Leonard R. Mellon argued the cause for petitioner.

Raymond L. Marky argued the cause for State of Florida, as amicus curiae, by special leave of court.

Bruce S. Rogow argued the cause for respondents.

Reargued October 21, 1974.

Paul L. Friedman argued the cause for United States, as amicus curiae, by special leave of court.

Leonard R. Mellon argued the cause for petitioner.

Raymond L. Marky argued the cause for State of Florida, as amicus curiae, by special leave of court.

Bruce S. Rogow argued the cause for respondents.

Briefs of Counsel, p 798, infra.

OPINION OF THE COURT

[420 US 105]

Mr. Justice **Powell** delivered the opinion of the Court.

[1a] The issue in this case is whether a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.[1] Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a $4,500 bond.

[2] In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla Rule Crim Proc 3.140(a); State v Hernandez, 217, So 2d 109 (Fla 1968); Di Bona v State, 121 So 2d 192 (Fla App 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla Rule Crim Proc 1.122 (before amendment in 1972).

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But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See State ex rel. Hardy v Blount, 261 So 2d 172 (Fla 1972).[2] They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See Sullivan v State ex rel. McCrory, 49 So 2d 794, 797 (Fla 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla Stat Ann § 907.045 (1973),[3] and arraignment, which the

1. Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.

2. Florida law also denies preliminary hearings to persons confined under indictment, see Sangaree v Hamlin, 235 So 2d 729 (Fla 1970); Fla Rule Crim Proc 3.131(a); but that procedure is not challenged in this case. See infra, at 117 n 19, 43 L Ed 2d, at 67.

3. This statute may have been construed to make the hearing permissive instead of mandatory. See Evans v State, 197 So 2d 323 (Fla App 1967); Fla Op Atty Gen 067-29 (1967). But cf. Karz v Overton, 249 So 2d 763 (Fla App 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. In re Florida Rules of Criminal Procedure, 272 So 2d 65 (1972).

District Court found was often delayed a month or more after arrest. Pugh v Rainwater, 332 F Supp 1107, 1110 (SD Fla 1971).[4] As a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.

[3a] Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District

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Court,[5] claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.[6] Respondents Turner and Faulk, also in custody under informations, subsequently intervened.[7] Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.[8]

[4a] After an initial delay while the Florida Legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. Pugh v Rainwater, supra. The court certified the case as a class action under Fed Rule Civ Proc 23(b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable

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cause for further detention.[9] It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan

4. The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla Rule Crim Proc 3.160, but counsel for petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr of Oral Arg 17 (Mar. 25, 1974). The Court of Appeals assumed, without deciding, that this was true. 483 F2d 778, 781 n 8 (CA5 1973).

5. The complaint was framed under 42 USC § 1983 [42 USCS § 1983], and jurisdiction in the District Court was based on 28 USC § 1343(3) [28 USCS § 1343(3)].

6. **[3b]** Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F Supp, at 1107, 1115–1116 (SD Fla 1971). Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. Preiser v Rodriguez, 411 US 475, 36 L Ed 2d 439, 93 S Ct 1827 (1973); see Wolff v McDonnell, 418 US 539, 554–555, 41 L Ed 2d 935, 94 S Ct 2963 (1974).

7. Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

8. The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.

9. **[4b]** The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, Younger v Harris, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. See Conover v Montemuro, 477 F2d 1073, 1082 (CA3 1972); cf. Perez v Ledesma, 401 US 82, 27 L Ed 2d 701, 91 S Ct 674 (1971); Stefanelli v Minard, 342 US 117, 96 L Ed 138, 72 S Ct 118 (1951).

prepared by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F Supp 490 (SD Fla 1972). Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

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The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla Rule Crim Proc 3.130(b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see In re Rule 3.131(b), Florida Rules of Criminal Procedure, 289 So 2d 3 (Fla 1974).

[5a] In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F Supp 1286 (SD Fla 1973). Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.[10] The Court of Appeals

10. [5b] Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 USC § 2281 [28 USCS § 2281]. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F2d, at 788–790. Accordingly, a district court of three judges was not required for the issuance of this order. See Kennedy v Mendoza-Martinez, 372 US 144, 152–155, 9 L Ed 2d 644, 83 S Ct 554 (1963); Flemming v Nestor, 363 US 603, 606–608, 4 L Ed 2d 1435, 80 S Ct 1367 (1960).

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affirmed, 483 F2d 778 (CA5 1973), modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. Id., at 788–789.

[6a] State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.[11]

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414 US 1062, 38 L Ed 2d 467, 94 S Ct 567 (1973). We affirm in part and reverse in part.

II

[1b] As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

A

[7] Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See Cupp v Murphy, 412 US 291, 294–295, 36 L Ed 2d 900, 93 S Ct 2000 (1973); Ex parte Bollman, 4 Cranch 75, 2 L Ed 554

11. [6b] At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See Sosna v Iowa, 419 US 393, 42 L Ed 2d 532, 95 S Ct 553 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under Sosna. But this case is a suitable exception to that requirement. See Sosna, supra, at 110 n 11, 42 L Ed 2d 532; cf. Rivera v Freeman, 469 F2d 1159, 1162–1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

(1807); Ex parte Burford, 3 Cranch 448, 2 L Ed 495 (1806). The standard for arrest is probable cause, defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."

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Beck v Ohio, 379 US 89, 91, 13 L Ed 2d 142, 85 S Ct 223 (1964). See also Henry v United States, 361 US 98, 4 L Ed 2d 134, 80 S Ct 168 (1959); Brinegar v United States, 338 US 160, 175–176, 93 L Ed 1879, 69 S Ct 1302 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for

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> accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." Id., at 176, 93 L Ed 1879.

[8] To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in Johnson v United States, 333 US 10, 13–14, 92 L Ed 436, 68 S Ct 367 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection

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> consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

See also Terry v Ohio, 392 US 1, 20–22, 20 L Ed 2d 889, 88 S Ct 1868 (1968).[12]

[9] Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, Beck v Ohio, supra, at 96, 13 L Ed 2d 142; Wong Sun v United States, 371 US 471, 479–482, 9 L Ed 2d 441, 83 S Ct 407 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See Ker v California, 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623 (1963); Draper v United States, 358 US 307, 3 L Ed 2d 327, 79 S Ct 329 (1959); Trupiano v United States, 334 US 699, 705, 92 L Ed 1663, 68 S Ct 1229 (1948).[13]

[10] Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification

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for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, Ransom 32–91 (1965); L. Katz, Justice Is the Crime 51–62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. See, e. g., 18 USC §§ 3146(a)(2), (5) [18 USCS §§ 3146(a)(2), (5)]. When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See Carroll v United States, 267 US 132, 149, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, Pleas of the Crown 77, 81, 95, 121 (1736); 2 W. Hawkins, Pleas of the Crown 116–117 (4th ed 1762). See also Kurtz v Moffitt, 115 US 487, 498–499, 29 L Ed 458, 6 S Ct 148

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12. We reiterated this principle in United States v United States District Court, 407 US 297, 32 L Ed 2d 752, 92 S Ct 2125 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." Id., at 316, 32 L Ed 2d 752.

13. Another aspect of Trupiano was overruled in United States v Rabinowitz, 339 US 56, 94 L Ed 653, 70 S Ct 430 (1950), which was overruled in turn by Chimel v California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See Coolidge v New Hampshire, 403 US 443, 474–481, 29 L Ed 2d 564, 91 S Ct 2022 (1971); id., at 510–512, and n 1, 29 L Ed 2d 564 (White, J., dissenting); Jones v United States, 357 US 493, 499–500, 2 L Ed 2d 1514, 78 S Ct 1253 (1958).

(1885).[14] The justice of the peace
[420 US 115]
would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, supra, at 583–586; 2 W. Hawkins, supra, at 116–119; 1 J. Stephen, History of the Criminal Law of England 233 (1883).[15] The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, supra, at 112–115; 1 J. Stephen, supra, at 243; see Ex parte Bollman, 4 Cranch 75, 97–101, 2 L Ed 554 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the
[420 US 116]
Fourth Amendment, see Ex parte Bollman, supra;[16] Ex parte Burford, 3 Cranch 448, 2 L Ed 495 (1806); United States v Hamilton, 3 Dall 17, 1 L Ed 490 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See Draper v United States, 358 US 307, 317–320, 3 L Ed 2d 327, 79 S Ct 329 (1959) (Douglas, J., dissenting).[17]

14. The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a mittimus, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common goal, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a Mittimus for his warrant of detaining." I M. Hale, Pleas of the Crown 589–590 (1736).

15. The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although this method of proceeding was considered quite harsh, 1 J. Stephen, supra, at 219–225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. Id., at 233.

16. In Ex parte Bollman, two men charged in the Aaron Burr case were committed following an examination in the Circuit Court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Mr. Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

17. See also N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 15–16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, supra, at 149–152; T. Taylor, Two Studies in Constitutional Interpretation 24–25, 39–40 (1969); See Boyd v United States, 116 US 616, 626–629, 29 L Ed 746, 6 S Ct 524 (1886).

B

[1c] Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.[18] Petitioner defends this practice on the
[420 US 117]
ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In Albrecht v United States, 273 US 1, 5, 71 L Ed 505, 47 S Ct 250 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.[19] More recently, in Coolidge v New Hampshire, 403 US 443, 449–453, 29 L Ed 2d 564, 91 S Ct 2022 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in Shadwick
[420 US 118]
v City of Tampa, 407 US 345, 32 L Ed 2d 783, 92 S Ct 2119 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also United States v United States District Court, 407 US 297, 317, 32 L Ed 2d 752, 92 S Ct 2125 (1972).[20] The rea-

18. A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla Rule Crim Proc 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

19. By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury," conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. Ex parte United States, 287 US 241, 250, 77 L Ed 283, 53 S Ct 129 (1932). See also Giordenello v United States, 357 US 480, 487, 2 L Ed 2d 1503, 78 S Ct 1245 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See United States v Calandra, 414 US 338, 342–346, 38 L Ed 2d 561, 94 S Ct 613 (1974).

20. The Court had earlier reached a different result in Ocampo v United States, 234 US 91, 58 L Ed 1231, 34 S Ct 712 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, § 5, 32 Stat 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, Green v United States, 355 US 184, 194–198, 2 L Ed 2d 199, 78 S Ct 221, 61 ALR2d 1119 (1957). Even if it were, the result reached in Ocampo is incompatible with the later holdings of Albrecht, Coolidge, and Shadwick.

son for this separation of functions was expressed by Mr. Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." McNabb v United States, 318 US 332, 343, 87 L Ed 819, 63 S Ct 608 (1943).

[11, 12] In holding that the prosecutor's assessment of probable

[420 US 119]

cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. Beck v Washington, 369 US 541, 545, 8 L Ed 2d 98, 82 S Ct 955 (1962); Lem Woon v Oregon, 229 US 586, 57 L Ed 1340, 33 S Ct 783 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. Frisbie v Collins, 342 US 519, 96 L Ed 541, 72 S Ct 509 (1952); Ker v Illinois, 119 US 436, 30 L Ed 421, 7 S Ct 225 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F2d, at 786–787. Compare Scarbrough v Dutton, 393 F2d 6 (CA5 1968), with Brown v Fauntleroy, 143 US App DC 116, 442 F2d 838 (1971), and Cooley v Stone, 134 US App DC 317, 414 F2d 1213 (1969).

III

[13, 14] Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See Coleman v Alabama, 399 US 1, 26 L Ed 2d 387, 90 S Ct 1999 (1970); Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 957–967, 996–1000 (4th ed 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a prima facie case of guilt.

[420 US 120]

ALI Model Code of Pre-arraignment Procedure, Commentary on Art 330, pp 90–91 (Tent Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. Coleman v Alabama, supra. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See ALI, Model Code of Pre-arraignment Procedure, supra, at 33–34.

[15a, 16] These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.[21] That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition,

[420 US 121]

to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

. . . . . .

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." Brinegar v United States, 338 US, at 174–175, 93 L Ed 1879, 69 S Ct 1302.

Cf. McCray v Illinois, 386 US 300, 18 L Ed 2d 62, 87 S Ct 1056 (1967).

[13b, 17a] The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, Prosecution: The Deci-

21. **[15b]** Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.
"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" Mallory v United States, 354 US 449, 456, 1 L Ed 2d 1479, 77 S Ct 1356 (1957).

sion to Charge a Suspect with a Crime 64-109 (1969).[22] This is not to say that confrontation and

[420 US 122]

cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.[23]

[18] Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. Coleman v Alabama, 399 US 1, 26 L Ed 2d 387, 90 S Ct 1999 (1970); United States v Wade, 388 US 218, 226–227, 18 L Ed 2d 1149, 87 S Ct 1926 (1967). In Coleman v Alabama, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First,

[420 US 123]

under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in Wade and Coleman. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

[19a, 20a] Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,[24]

[420 US 124]

see McNabb v United States, 318 US 332, 342–344, 87 L Ed 819, 63 S Ct 608 (1943), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention.[25] Whatever

[420 US 125]

procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of

22. [17b] In Morrissey v Brewer, 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593 (1972), and Gagnon v Scarpelli, 411 US 778, 36 L Ed 2d 656, 93 S Ct 1756 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 US, at 487, 33 L Ed 2d 484; 411 US, at 786, 36 L Ed 2d 656. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 US, at 485, 33 L Ed 2d 484; 411 US, at 782–783, n 5, 36 L Ed 2d 656. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, DR 7-103(A) (Final Draft 1969) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); American Bar Association Project on Standards for Criminal Justice, The Prosecution Function §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, Rule 4(c) (1963).

23. Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.

24. Several States already authorize a determination of probable cause at this stage or immediately thereafter. See Hawaii Rev Stat §§ 708-9(5), 710-7 (1968); Vt Rules Crim Proc 3(b), 5(c). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. Jaben v United States, 381 US 214, 218, 14 L Ed 2d 345, 85 S Ct 1365 (1965); Mallory v United States, 354 US 449, 454, 1 L Ed 2d 1479, 77 S Ct 1356 (1957).

25. Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The ALI Model Code of Pre-arraignment Procedure (Tent Draft No. 5, 1972, and Tent Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310.1. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within two "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2(2) (Tent. Draft No. 5A, 1973).

liberty,[26] and this determination must be made by a judicial officer either before or promptly after arrest.[27]

IV

[420 US 126]

[1d] We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Mr. Justice **Stewart**, with whom Mr. Justice **Douglas**, Mr. Justice **Brennan**, and Mr. Justice **Marshall** join, concurring.

I concur in Parts I and II of the Court's opinion, since the Constitution clearly requires at least a timely judicial determination of probable cause as a prerequisite to pretrial detention. Because Florida does not provide all defendants in custody pending trial with a fair and reliable determination of probable cause for their detention, the respondents and the members of the class they represent are entitled to declaratory and injunctive relief.

26. **[19b]** Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 USC § 3146 [18 USCS § 3146]; American Bar Association Project on Standards for Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

27. In his concurring opinion, Mr. Justice Stewart objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial. Part II-A, supra. Moreover, the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (e.g., prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

[20b] It would not be practicable to follow the further suggestion implicit in Mr. Justice Stewart's concurring opinion that we leave for another day determination of the procedural safeguards that are required in making a probable cause determination under the Fourth Amendment. The judgment under review both declares the right not to be detained without a probable cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.

Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta. In particular, I would not, in the abstract, attempt to specify those procedural protections that constitutionally need *not* be accorded incarcerated suspects awaiting trial.

[420 US 117]

Specifically, I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, North Georgia Finishing, Inc. v Di-Chem, Inc. 419 US 601, 42 L Ed 2d 751, 95 S Ct 719, the custody of a refrigerator, Mitchell v W. T. Grant Co. 416 US 600, 40 L Ed 2d 406, 94 S Ct 1895; the temporary suspension of a public school student, Goss v Lopez, 419 US 565, 42 L Ed 2d 725, 95 S Ct 729; or the suspension of a driver's license, Bell v Burson, 402 US 535, 29 L Ed 2d 90, 91 S Ct 1586. Although it may be true that the Fourth Amendment's "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases," ante, at 125 n 27, 43 L Ed 2d, at 72, this case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person. Accordingly, I cannot join the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention.

It is the prerogative of each State in the first instance to develop pretrial procedures that provide defendants in pretrial custody with the fair and reliable determination of probable cause for detention required by the Constitution. Cf. Morrissey v Brewer, 408 US 471, 488, 33 L Ed 2d 484, 92 S Ct 2593. The constitutionality of any particular method for determining probable cause can be properly decided only by evaluating a State's pretrial procedures as a whole, not by isolating a particular part of its total system. As the Court recognizes, great diversity exists among the procedures employed by the States in this aspect of their criminal justice systems. Ante, at 123–124, 43 L Ed 2d, at 71.

There will be adequate opportunity to evaluate in an appropriate future case the constitutionality of any new procedures that may be adopted by Florida in response to the Court's judgment today holding that Florida's present procedures are constitutionally inadequate.

Attachment #13
2-7-84

Attachment # 13

No. 55,116

STATE OF KANSAS,
Appellant,

v.

RICHARD T. SHERRY,
and
EUGENE A. FINLEY,
Appellees.

SYLLABUS BY THE COURT

1.

K.S.A. 1982 Supp. 22-2902a does not contravene significant constitutional or inherent rights of individuals. The classification on which it is based is reasonable; it is within the scope of the police powers of the state, and is appropriately related to a proper purpose of such police power.

2.

The Constitution of the United States does not require an adversary determination of probable cause.

3.

In Kansas the preliminary examination affords the person arrested as a result of a complaint an opportunity to challenge the existence of probable cause for further detention or for requiring bail. The preliminary examination apprises the accused about the nature of the crime charged and the sort of evidence he or she will be required to meet when subjected to final prosecution.

Atch. 13

4.

A preliminary examination is not a trial of the defendant's guilt; it is rather an inquiry whether the defendant should be held for trial. State v. Jones, 233 Kan. 170, Syl. ¶ 1, 660 P.2d 965 (1983).

5.

The requirement that the rules of evidence apply at the preliminary examination was incorporated by our legislature and not mandated by the Constitution of the United States. The Constitution does not forbid the states from authorizing the use of hearsay evidence in determining probable cause at the preliminary examination.

6.

Acts done or declarations made before, during or after the happening of the principal occurrence may be admissible as part of the res gestae where the acts or declarations are so closely connected with it as to form in reality a part of the occurrence.

7.

Where it appears that two or more persons have entered into an agreement to commit a crime -- and hence are guilty of conspiracy -- any act or declaration of a conspirator during such conspiracy, and relevant to the conspiracy is admissible in a prosecution for the target crime as substantive evidence against any coconspirator on trial. The theory of admissibility is that each party to an agreement to commit a crime has become an "agent" for the other and has,

in effect, entered into a "partnership" in crime. State v. Roberts, 223 Kan. 49, 59, 574 P.2d 164 (1977).

Appeal from Sedgwick district court, NICHOLAS W. KLEIN, judge. Opinion filed July 15, 1983. Reversed and remanded with directions.

R. Michael Jennings, assistant district attorney, argued the cause, and Robert T. Stephan, attorney general, and Clark V. Owens, district attorney, were with him on the brief for the appellant.

David Michael Rapp, of Moore, Rapp & Schodorf, P.A., of Wichita, argued the cause and was on the brief for Richard T. Sherry, appellee.

Daniel E. Monnat, of Shultz, Fisher, Monnat & Shultz, of Wichita, argued the cause and was on the brief for Eugene A. Finley, appellee.

Paul J. Morrison, of Olathe, was on the amicus curiae brief for the Kansas County and District Attorneys Association.

The opinion of the court was delivered by

LOCKETT, J.: This is an appeal by the prosecution from an order of the court dismissing the information and discharging the defendants. The State contends the trial court erred by (1) declaring K.S.A. 1982 Supp. 22-2902a unconstitutional, and (2) determining that the evidence was insufficient to establish probable cause as to the defendant Finley.

On June 29, 1982, Detective Garcia of the Wichita Police Department, working as an undercover narcotics detective, purchased a small amount of marijuana from Brian Creekmore. After discussing the possibility of Garcia purchasing cocaine, Creekmore gave Garcia his telephone number. On July 1, 1982, Creekmore and Garcia discussed the sale of a gram of cocaine and several pounds of marijuana. The price of the marijuana was discussed, but Creekmore was unable to state the price of cocaine. Creekmore told Garcia that he and a friend, Brian McCoy, were attempting to contact McCoy's man, Richard, to determine cocaine prices. Creekmore and McCoy would attempt to obtain a sample of the cocaine so Garcia could test it.

July 2, 1982, Garcia telephoned Creekmore and made arrangements to purchase additional marijuana. At the sale Creekmore told Garcia he was still checking on the price of cocaine. Later, on the evening of July 2, 1982, Creekmore called Garcia and told him "they" had the cocaine, 1/2 gram, and Garcia could buy it. At an agreed meeting place, Creekmore sold Garcia 1/2 gram of cocaine for $75.00. Garcia told Creekmore he would take the cocaine to Chris (an undercover narcotics detective) and if Chris liked the cocaine they would get back to Creekmore in a few days. Creekmore had arrived and departed the meeting place in a car driven by McCoy.

July 9, 1982, following several days of discussion and other small sales, Creekmore met with Garcia in an attempt to sell Garcia an ounce of cocaine. McCoy was with Creekmore. McCoy assured Garcia that it would be safe for Garcia to front his buy money to them since they had a shotgun and a .22 if somebody tried to rip off Garcia's money. Garcia refused to make payment before the drugs were delivered and no sale was completed. The parties agreed to get back in touch.

July 12, 1982, Garcia called Creekmore and discussed the purchase of cocaine. Creekmore attempted to allay any fears Garcia had about fronting his money. Creekmore told Garcia that Richard was all right, Garcia could trust Richard and that Creekmore had done business with Richard for a long time. The price of the cocaine was $2,200.00 an ounce. Garcia stated he wanted to purchase two ounces of cocaine. Creekmore called Garcia a few minutes later and told him that an unnamed individual would supply the cocaine to Richard and that Richard would be at the sale. The transaction would be at McCoy's house and only those involved in the sale would be present. Creekmore assured Garcia the cocaine was of the same quality as that purchased on July 2, 88% to 90% pure. Richard would be obtaining the larger quantity in the same manner as the sample purchased July 2, 1982, by Garcia.

In a subsequent call, Creekmore stated he could not reach Richard by phone. Creekmore and McCoy were waiting to hear from Richard and when they reached him they would call Garcia if the deal would go through or not. About an hour later Creekmore called Garcia and told him Richard could only get one ounce and that it would cost $2,250.00. Creekmore further stated that he could get the additional cocaine Garcia wanted the next night or the following week. Garcia could then purchase as much as he wanted because five kilograms were involved. The deal would go down that night at McCoy's house as planned.

Garcia drove to an area near McCoy's house, met Creekmore, and followed him in his car to McCoy's house. As they drove up, Garcia saw a car with several people and children in it leaving through the alley that ran behind McCoy's house. Garcia asked Creekmore who the people were. Creekmore told him they were all right, they were the ones that furnished opium that Creekmore had previously sold Garcia. Creekmore told Garcia he could leave his money in the car if he felt more comfortable doing that. Garcia put the money in the trunk of his car and locked it.

While walking to the back door, Creekmore advised Garcia that the only people that were going to be in the house were Garcia, Creekmore, McCoy, Richard, and one other man. McCoy opened the door and told Garcia to come in, they had the stuff. The three men went through the kitchen into the living room where, in addition to Garcia, there were four other people - Creekmore, McCoy, Richard Sherry and Eugene Finley. Finley and Sherry were seated on the couch across from Garcia. Creekmore and McCoy sat on the same side of the room as Garcia. No one else was in the house. Richard then got up, removed a clear plastic bag with white powder in it from a purple Royal Crown bag. Sherry took the white powder over to Garcia, put it on the coffee table by Garcia's chair, and said, "Here's the stuff." Garcia asked Sherry to cut him a line so he could snort some of the cocaine to determine the quality prior to paying his money. McCoy retrieved a small mirror, Sherry took some powder out of the plastic bag and placed it on the mirror in front of Garcia.

At this point, Garcia asked if the powder on the mirror was the same stuff that he had gotten the last time. Sherry said, yeah, he thought it was. Finley said, "Yes, it is." Finley got off the couch, came over to Garcia's location, and watched Sherry cut a line

of powder. Garcia then asked for a straw to snort the powder into his nostril. Sherry took a dollar bill and gave it to Garcia, saying, "Here, use this." Creekmore reached and took the bill from Sherry and rolled it into a straw and handed it to Garcia. Hesitating in snorting the powder, Garcia asked if he was going to be able to get some more cocaine either tomorrow night or later in the week. Finley stated, "Yeah." Sherry said he could get as much as he wanted. Police officers then arrived on the scene arresting the four defendants.

On July 14, 1982, a complaint was filed charging Creekmore with Count I, sale of marijuana on June 29; Count II, sale of marijuana on July 2; Creekmore, Finley, Sherry and McCoy were charged in Count III with the sale of cocaine on July 2; and Count IV, possession with intent to sell cocaine on July 12, 1982.

On September 2, 1982, a preliminary examination was held. The State offered Wichita Police Department laboratory reports on each of the four counts. The defendants all objected to the State's reliance on Chapter 143, 1982 Session Laws of Kansas because it denied them their right of cross-examination. The court ruled that the officers' testimony identifying the report with the contraband covered by such report was not sufficient proof of the chain of custody and dismissed the complaint as to the defendants. September 3, 1982, the State filed a complaint identical to the one dismissed by the court for insufficient proof of the chain of custody.

October 22, 1982, the court held a second preliminary examination on the complaint. The parties agreed to stipulate to the record of the previous preliminary hearing held on September 2, 1982. The State supplied the chain of custody proof and corrected some prior testimony. The defendant Finley moved to dismiss. The court, as

magistrate, overruled the motion and bound the defendants over, Finley on Count IV only. The court conducted the arraignment and then as the trial judge sustained Finley's motion to dismiss for the reason that the State did not prove a conspiracy, therefore, the statements of Creekmore were not admitted against Finley, and the evidence to show Finley was acting as an aider and abettor was insufficient since it consisted of only the "two" utterances of the defendant Finley. The court then sustained Sherry's motion to dismiss for the reason that Chapter 143 of the 1982 Session Laws was unconstitutional. The State appeals. Although the trial judge bound the defendants over for trial, in effect he made a finding that no probable cause existed. The standard of review is whether there was probable cause to bind the defendants over for trial. The trial court stated in dismissing the information against Richard Sherry:

> "With respect to the defendant Richard T. Sherry, the Court finds that, except for the application of the statute Chapter 143 of the laws of 198-- Session Laws of 1982, the evidence is insufficient and the Court finds that that statute is constitutionally deficient under the Constitution of the State of Kansas, and the United States. It lacks procedural safeguards in that no scene is set forth for assuring that the chemists employed by the three agencies mentioned in the statute are qualified for their positions; that they are incumbent in the position that they might be certifying as, and a number of other matters with respect to the matter -- to the statute, all of which were raised at preliminary hearing -- the right of confrontation, the denial of effective assistance of counsel,

and denial of equal protection and due process. On that basis, the Court finds that the evidence is insufficient in the preliminary hearing of Richard T. Sherry and dismisses that case for that reason."

Chapter 143 of the 1982 Session Laws amended K.S.A. 22-2902a. The new statute provides:

"At any preliminary examination in which the results of a forensic examination, analysis, comparison or identification prepared by the Kansas bureau of investigation, the secretary of health and environment, the sheriff's department of Johnson county or the police department of the city of Wichita are to be introduced as evidence, the report, or a copy of the report, of the findings of the forensic examiner shall be admissible into evidence in the preliminary examination in the same manner and with the same force and effect as if the forensic examiner who performed such examination, analysis, comparison or identification and prepared the report thereon had testified in person." K.S.A. 1982 Supp. 22-2902a.

The new statute replaced K.S.A. 22-2902a and 22-2902b, which provided:

"On motion of any party prior to any preliminary examination in which the results of a forensic examination, analysis, comparison or identification prepared by the Kansas bureau of investi-

gation, the secretary of health and environment, the sheriff's department of Johnson county or the police department of the city of Wichita are to be introduced as evidence, the report, or a copy thereof, of the findings of the forensic examiner shall be admissible into evidence in such preliminary examination in the same manner and with the same force and effect as if the forensic examiner who performed such examination, analysis, comparison or identification and prepared the report thereon had testified in person, unless the party adverse to the movant shall demand the presence of such forensic examiner at the time such motion is heard by the court.

"Such motion shall be made and a hearing held thereon at least five (5) days prior to the date of the preliminary examination."

"Upon the filing of such a motion, a copy of each report of the findings of the forensic examiner shall be delivered to the adverse party, together with a statement advising the adverse party of his right to demand the presence of such forensic examiner pursuant to the provisions of K.S.A. 22-2902a. Failure to receive the said copies of said reports at least three (3) days prior to the hearing of said motion shall be grounds for a continuance."

The procedure for admission of the forensic examiner's report, of specified agencies, is to insure a more efficient use

of the forensic examiner's time. Kansas is a state large in size and small in population compared to our sister states. A major portion of the population and those qualified as forensic examiners are located in three geographic areas -- Kansas City, Topeka and Wichita. The Legislative Research Department's summary of the bill containing the new statute supplies an explanation, and the background, of the statute (Supp. Note, H.B.No. 3037 [1980 Session]):

> "Brief of Bill
>
> "H.B. 3037 amends K.S.A. 22-2902a to no longer require the prosecution to file a motion if it intends to introduce a forensic examiner's report at a preliminary hearing. Such reports would be admissible at the hearing and would have the same force and effect as if the forensic examiner who prepared the report had testified in person. Under current law, the prosecution must file the necessary motion at least five days prior to the preliminary examination. The defendant may demand the presence of the forensic examiner at the hearing of such motion.
>
> "Background
>
> H.B. 3037 was introduced at the request of the Kansas Bureau of Investigation as an economy measure. Testimony presented to the House Committee indicated that the majority of the forensic examiner's time was spent traveling throughout the state and waiting to testify at a hearing while only 5 percent was actually spent testifying at a court proceeding. This bill would reduce the amount of travel time by not requiring the presence of the forensic examiner at the preliminary examination.

"It was noted that a defendant could compel the attendance of the forensic examiner at the preliminary hearing by the use of the subpoena power if the defendant so desired."

See Vernon's Kansas Stat. Annot. § 22-2902b (1983 Supp.)

Prior to considering the specific challenges to the statute, we should review the guidelines used to determine whether or not a statute is constitutional. City of Baxter Springs v. Bryant, 226 Kan. 383, 385-86, 598 P.2d 1051 (1979), sets forth those guidelines:

"'The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. [Citations omitted.]

"'In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. [Citations omitted.]

"'Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt. [Citations omitted.]

. . . .

"'The propriety, wisdom, necessity and expedience of legislation are exclusively matters for legislative determination and courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute in the

public interest of the state, since, necessarily, what the views of members of the court may be upon the subject is wholly immaterial and it is not the province nor the right of courts to determine the wisdom of legislation touching the public interest as that is a legislative function with which courts cannot interfere. [Citations omitted.]' State ex rel. Schneider v. Kennedy, 225 Kan. 13, 20-21, 587 P.2d 844 (1978).

"The general rule for reviewing statutes or ordinances enacted pursuant to the police power is stated in City of Wichita v. White, 205 Kan. 408, 469 P.2d 287 (1970), as follows:

"'In reviewing statutes such as these, the court begins with the proposition that all presumptions are in favor of their validity. (State, ex rel., v. Fairmont Foods Co., 196 Kan. 73, 77, 410 P.2d 308; and Tilley v. Keller Truck & Implement Corp., 200 Kan. 641, 438 P.2d 128.) The court does not sit in judgment on the merits of such legislation. If the statute here challenged does not contravene significant constitutional or inherent rights of individuals, if the classification on which it is based is reasonable, if it is within the scope of the police powers of the state, if it is appropriately related to a proper purpose of such police power, the statute is not to be invalidated by the judicial arm of government.' (p. 409.)

"In State, ex rel., v. Fairmont Foods Co., 196 Kan. 73, 76-77, 410 P.2d 308 (1966), we said:

"'Once a subject is found to be within the scope of the state's police power, the only limitations upon the exercise of such power are that the regulations must have reference in fact to the welfare of society and must be fairly designed to protect the public against the evils which might otherwise occur. Within these limits the legislature is the sole judge of the nature and extent of the measures necessary to accomplish its purpose. [Citations omitted.]

. . . .

"'The reasonableness of restrictions imposed by the legislature by the exercise of the police power is a judicial matter, and all presumptions are in favor of constitutionality of the act. Within the zone of doubt and fair debate legislation is conclusive upon the court and must be upheld. [Citations omitted.]'"

The constitutionality of K.S.A. 1982 Supp. 22-2902a is directly related to what procedure the Constitution of the United States requires in a preliminary examination, and the nature and purpose of the preliminary examination in Kansas.

The United States Supreme Court discussed the constitutional requirements of a preliminary examination in Gerstein v. Pugh, 420 U.S 103, 112-13, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975). They stated:

"To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the

existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in Johnson v. United States, 333 U. S. 10, 13-14 [92 L.Ed. 436, 68 S.Ct. 367 (1948)]:

"'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'"

The court held the Fourth Amendment, incorporated into the Fourteenth Amendment, requires the states afford a defendant in a criminal case a timely judicial determination of probable cause as a prerequisite to detention. 420 U.S. at 126. An adversarial hearing is not constitutionally required and the court recognized the potential diversity in procedures among the states:

"Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth

Amendment, we recognize the desirability of flexibility and experimentation by the States." 420 U.S. at 123.

The legislature of each state has the power to create a procedure for preliminary examinations. In Kansas, K.S.A. 22-2902 (1) requires that every person arrested on a warrant charging a felony shall have a right to a preliminary examination before a magistrate, unless such warrant has been issued as a result of an indictment by a grand jury. The preliminary examination affords the person arrested as a result of a complaint an opportunity to challenge the existence of probable cause for further detention or for requiring bail. State v. Boone, 218 Kan. 482, 485, 543 P.2d 945 (1975), cert. denied 425 U.S. 915, reh. denied 425 U.S. 985 (1976). The preliminary examination apprises the accused about the nature of the crime charged and the sort of evidence he or she will be required to meet when subjected to final prosecution. State v. Boone, 218 Kan. at 485.

The preliminary examination is an important part of Kansas criminal procedure. It is protection for an accused and an instrument for justice. If probable cause is not established at the preliminary examination, no person may be prosecuted for a felony in Kansas, except by grand jury indictment. Although the preliminary examination is very significant, the source of the right to a full adversarial proceeding is statutory. State v. Boone, 218 Kan. 482; State v. Smith, 225 Kan. 796, 594 P.2d 218 (1979). See 1 Wharton's Criminal Procedure § 144 (12th ed. 1974).

This court reviewed the preliminary examination in Kansas in State v. Jones, 233 Kan. 170, Syl. ¶¶ 1, 2, 660 P.2d 965 (1983), stating:

"A preliminary examination is not a trial of the defendant's guilt; it is rather an inquiry whether the defendant should be held for trial.

"The principal purpose of a preliminary examination is the determination of whether there appears (probable cause) a crime has been committed and there is probable cause to believe the defendant committed the crime. The State need not establish guilt beyond a reasonable doubt."

At the preliminary examination the defendant must be present represented by an attorney unless that right is waived, and the witnesses examined in the defendant's presence. The defendant has the right to cross-examine witnesses against him and introduce evidence on his behalf. K.S.A. 22-2902. This testimony, if preserved, may be used at the trial of the defendant, thus the requirement that the rules of evidence apply at this stage of the procedure. The quality of the evidence to obtain the complaint/information is not sufficient for the preliminary examination. Only evidence admissible in the trial of the defendant is to be considered by the magistrate. See State v. Zimmerman & Schmidt, 233 Kan. 151, 660 P.2d 960 (1983); State v. Hunter, 232 Kan. 853, 658 P.2d 1050 (1983). K.S.A. 1982 Supp. 22-2902a, and the constitutional flaws the defendant Sherry alleges are inherent in the statute, must be viewed in light of these principles.

The trial court was incorrect when it ruled that K.S.A. 1982 Supp. 22-2902a violated the defendant's constitutional right of confrontation at the preliminary hearing. There is no constitutional right to allow the accused to confront witnesses against him at the preliminary hearing. Gerstein v. Pugh, 420 U.S. at 121-22. The Sixth Amendment right of confrontation is a protection that exists at the

trial of the defendant. If the defendant wishes to examine the qualifications of the forensic examiner, the procedure followed in testing the substance, or the results of the test, he may do so by subpoena, bringing the forensic examiner into court pursuant to K.S.A. 22-3214. A defendant may request discovery pursuant to K.S.A. 22-3212 and 22-3213. Defendants also have the right to have similar or other tests performed by their own experts.

Neither is the Sixth Amendment right to counsel devitalized by the new statute. See Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963), 93 A.L.R. 2d 733; Schoonover v. State, 2 Kan. App. 2d 481, 582 P.2d 292 (1978). Counsel may use the methods outlined above to effectively represent a defendant. K.S.A. 1982 Supp. 22-2902a does not deny counsel the opportunity to effectively represent a defendant at the preliminary examination or at trial. See Coleman v. Alabama, 399 U.S. 1, 26 L.Ed.2d 387, 90 S.Ct. 1999 (1970).

Defendant Sherry next claims that K.S.A. 1982 Supp. 22-2902a violates the equal protection clause of the Fourteenth Amendment. An equal protection challenge was made to the use of nonlawyer magistrates in certain counties of this state based on the population of the county. This court in State v. Boone, 218 Kan. at 489, stated the relevant principles:

> "Principles respecting the equal protection clause were outlined in Reed v. Reed, 404 U.S. 71, 30 L.ed 2d 225, 92 S.Ct. 251, in this fashion:
>
> "'. . . [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes

of persons in different ways.' [Citations.] The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."' (pp. 75-76.)

. . . .

"'Legislative classification as to treatment and procedure within a state judicial system according to factors such as geographical area, population, or other relevant considerations, does not deny equal protection of the laws unless such classification is shown to be palpably arbitrary and without a sound basis in reason.' (p. 370.)"

There is a sound basis for allowing the introduction of the forensic examiner's report into evidence at the preliminary hearing. The legislative treatment and procedure within the state does not deny equal protection of the laws. Defendants, in whose prosecution forensic tests are used, must subpoena the examiner to assure an appearance at their preliminary examination. Other defendants will be able to cross-examine the witnesses against them at their preliminary examination, if a witness' testimony is necessary in establishing probable cause. The classification created by K.S.A. 1982 Supp. 22-2902a rests upon the different types of evidence re-

quired to prove probable cause. The object of the statute is a more efficient administration of criminal justice. The statutory classification is reasonable and directly related to the object of the legislation.

The defendant contends K.S.A. 1982 Supp. 22-2902a violates the due process clause of the Fourteenth Amendment. Due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated. Wesley Medical Center v. McCain, 226 Kan. 263, 265, 597 P.2d 1088 (1979). A basic requirement of due process is the right to a fair trial in a fair tribunal. State v. Boone, 218 Kan. 482, Syl. ¶ 2. K.S.A. 1982 Supp. 22-2902a does not deny the defendant a fair trial. Neither does the statute deny the defendant the opportunity to challenge the existence of probable cause at the preliminary examination. K.S.A. 1982 Supp. 22-2902a does not violate the defendant's right to due process. The statute does place the burden on the defendant if he wishes to challenge the test results, but it does not frustrate the purpose of the preliminary examination or deny constitutionally protected rights.

Finally, the defendant Sherry argues the qualifications of the expert forensic examiner are not established when K.S.A. 1982 Supp. 22-2902a is utilized. See K.S.A. 60-456 (b).

The requirement that the rules of evidence apply at the preliminary examination was incorporated by our legislature, and not mandated by the Constitution of the United States. The Constitution does not forbid the states from authorizing the use of hearsay evidence in determining probable cause at the preliminary examination. Gerstein v. Pugh, 420 U.S. at 120. In effect the legislature has required the

magistrate at a preliminary examination to take judicial notice of the qualifications of certain forensic examiners, the procedure followed by examiners in performing the test, and the results of that test. The report of the forensic examiner is admitted into evidence at the preliminary examination without the presence of the forensic examiner. The doctrine of judicial notice is based upon obvious reasons of convenience and expediency, and operates to save trouble, expense and time which would be lost in admitting evidence in the ordinary way. Usually such facts do not admit of contradiction.

The federal rules of criminal procedure provide a defendant with the right at the preliminary examination to cross-examine the witness against him. The usual rules of evidence are not applied to a preliminary examination in federal court, and the finding of probable cause may be based on hearsay in whole or in part. 1 Wright, Federal Practice and Procedure: Crim. § 85, pp. 183-84 (2d ed. 1982).

The Iowa Supreme Court in State v. Kramer, 231 N.W.2d 874, 880 (Iowa 1975), ruled Iowa Code § 749A.2 (1977) constitutional. The statute, now § 691.2 (1983), is much broader than K.S.A. 1982 Supp. 22-2902a. The statute provides:

> "It shall be presumed that any employee or technician of the criminalistics laboratory is qualified or possesses the required expertise to accomplish any analysis, comparison, or identification done by him in the course of his employment in the criminalistics laboratory. Any report, or copy thereof, or the findings of the criminalistics laboratory shall be received in evidence in any

court, preliminary hearing, and grand jury proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. An accused person or his attorney may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the proper county attorney at least ten days before the date of such criminal trial."

K.S.A. 1982 Supp. 22-2902a is constitutionally valid. It does not deny a defendant the right to challenge the existence of probable cause, or the opportunity to be apprised of the nature of the crime charged and the sort of evidence he or she will be required to meet when subjected to final prosecution.

The State also appeals the dismissal of the charge against Eugene A. Finley. The trial court dismissed the charge against Finley finding that the threshold required to show conspiracy or acting in concert was not shown by the preliminary hearing evidence. Finley's participation in the crime of possession with intent to sell was based entirely on two utterances of the defendant.

The judge found the evidence at the preliminary examination insufficient to establish probable cause. The prosecution relies heavily upon the testimony of Detective Garcia. He testified concerning the drug sales which occurred on June 29, and July 2, 1982.

He testified about the involvement of the defendant Creekmore in those sales, and the negotiations between Creekmore and himself in planning the larger July 12, 1982, sale. He then related the events of July 12, preceding the arrests of Finley, Sherry, Creekmore and McCoy.

The statements dealing directly with the proposed drug sale made at the house preceding the arrests, and testified to by Detective Garcia, are admissible evidence. They are a part of the res gestae. Acts done or declarations made before, during or after the happening of the principal occurrence may be admissible as part of the res gestae where the acts or declarations are so closely connected with it as to form in reality a part of the occurrence. State v. McDaniel & Owens, 228 Kan. 172, 176, 612 P.2d 1231 (1980). Here the principal occurrence is the intended drug sale. An example of such a declaration in this case is defendant Sherry's statement "here' the stuff," when bringing the cocaine to Garcia.

Chief Justice Schroeder discussed res gestae declarations in State v. Rider, Edens & Lemons, 229 Kan. 394, 404, 625 P.2d 425 (1981)

> "Unsworn declarations received as part of the res gestae do not depend for their effect on the credibility of the declarant, but derive probative force from their close connection with the occurrence which they accompany and tend to explain. They are admissible as original evidence, although it is frequently stated that they are received as an exception to the hearsay rule."

See State v. Roberts, 223 Kan. 49, 60, 574 P.2d 164 (1977).

Finley does not challenge the admissibility of his two statements at the house on July 12. Finley responded affirmatively to two questions asked by Detective Garcia; the first, if the cocaine was of the same quality as purchased on July 2, and the second, if Garcia could purchase additional cocaine at a later time.

Taking into consideration Detective Garcia's testimony, including Finley's statements and res gestae statements by the other defendants, we find earlier statements by the defendant Creekmore in planning the proposed cocaine sale admissible pursuant to K.S.A. 1982 Supp. 60-460 (i) (2). The hearsay exception provides:

> "As against a party, a statement which would be admissible if made by the declarant at the hearing if
>
> . . . .
>
> "[T]he party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination."

Justice Fromme analyzed the theory behind the exception:

> "The purpose of the statute is to let in testimony by a third person concerning declarations of a defendant's fellow conspirator to prove the defendant's involvement in a crime. However, before such third party statements can be used as evidence against a defendant there must be evidence a conspiracy between the out

of court declarant and defendant actually did exist. The section deals with vicarious admissions included in agency relationships. Wharton's Criminal Evidence in discussing the section states:

> "'Where it appears that two or more persons have entered into an agreement to commit a crime -- and hence are guilty of conspiracy -- any act or declaration of a conspirator during such conspiracy, and in furtherance thereof, is admissible, in a prosecution for the target crime, as substantive evidence against any co-conspirator on trial. The theory of admissibility is that each party to an agreement to commit a crime has become an "agent" for the other and has, in effect, entered into a "partnership in crime." . . .' (3 Wharton's Criminal Evidence, § 642, pp. 321-327.)" State v. Roberts, 223 Kan. at 59.

K.S.A. 1982 Supp. 60-460 (i) (2) requires only that the statement be relevant to the plan and be made while the plan was in existence. The statute does not specifically require the statement to be in furtherance of the conspiracy. See Gard, Kansas C. Civ. Proc. Annot. 2d § 60-460 (i) (1979); Vernon's Kansas Stat. Annot. § 60-460 (i) (1983 Supp.).

A conspiracy may be established by direct proof, or circumstantial evidence, or both. The conspiracy should first be established prima facie, but it is not always possible when using a great amount of circumstantial evidence. However, the whole of the evidence, without

the hearsay statements, must show that a conpiracy actually existed. State v. Borserine, 184 Kan. 405, Syl. ¶ 4, 337 P.2d 697 (1959); State v. Marshall & Brown-Sidorowicz, 2 Kan. App. 2d 182, 198, 577 P.2d 803 (1978). A conspiracy may be inferred from other facts proven. The Court of Appeals has stated:

> "To establish a conspiracy it is not necessary that there be any formal agreement manifested by formal words, written or spoken; it is enough if the parties tacitly come to an understanding in regard to the unlawful purpose and this may be inferred from sufficiently significant circumstances.
>
> "While an agreement is a necessary element of a conspiracy, the existence of the agreement need not be proved directly but may be inferred from other facts proved. If one concurs in a conspiracy, no proof of an agreement to concur is necessary to establish his guilt." State v. Small, 5 Kan. App. 2d 760, Syl. ¶¶ 2, 3, 625 P.2d 1 (1981).

The evidence introduced at the preliminary examination was sufficient to establish a conspiracy, one in which Finley was a participant. Detective Garcia was about to purchase the cocaine [illegible] questions involving the quality of the cocaine, and future purchases of the drug. Earlier statements by defendant Creekmore planning the sale are admissible pursuant to K.S.A. 1982 Supp. 60-460 (i) (2) for use against the defendant Finley. See Annot., 46 A.L.R.3d 1148, § 22.

We conclude the evidence produced at the preliminary examination establishes probable cause to believe Finley possessed cocaine with intent to sell. Possession requires having control over the cocaine with knowledge of and the intent to have such control. Control would mean exercising a restraining or directing influence over the cocaine. State v. Flinchpaugh, 232 Kan. 831, Syl. ¶¶ 1, 2, 659 P.2d 208 (1983). Finley did not actually handle the cocaine in Garcia's presence, but from the circumstances and his own statements Finley's possession with intent to sell may be inferred from the evidence presented, or alternatively that Finley was aiding and abetting Sherry.

The evidence need not prove guilt beyond a reasonable doubt, only probable cause. The trial court must draw the inferences favorable to the prosecution from the evidence presented at the preliminary examination. State v. Jones, 233 Kan. 170. A judge reweighing the preliminary examination evidence after arraignment and prior to trial, must follow the standard for weighing the evidence as required for the preliminary examination. We conclude probable cause was shown.

The case is reversed and remanded with directions to reinstate the complaint against both defendants and for further proceedings in conformity with this opinion.