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CRIMINAL LAW- Entrapment Defense- Jury Entitled to Disbelieve a Defendant's Unrebutted Test

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CRIMINAL LAW—Entrapment Defense—Jury Entitled To Disbelieve a Defendant's Unrebutted Testimony Concerning Entrapment. *United States v. Townsend,* 555 F.2d 152 (7th Cir.), *cert. denied,* 98 S. Ct. 277 (1977).

Special Agent William Lukowski of the Bureau of Alcohol, Tobacco, and Firearms, arrested Jonathan Townsend in November, 1974, and charged him with knowing and unlawful possession of two firearms.[1] At defendant Townsend's subsequent trial, Special Agent James Warren of the Illinois Bureau of Investigation testified that he visited informant Ulysees "Ted" Core on January 24, 1974.[2] Warren stated that Core subsequently admitted Townsend who lived in the adjoining apartment.[3] During a discussion about firearms, Townsend offered a sawed-off shotgun for sale.[4] Warren related that both Core and Townsend then left the apartment to retrieve the firearm and that when they returned, Core was carrying the gun.[5] The agent testified that Townsend requested eighty dollars for the weapon, and a sale took place.[6] Agent Warren added that a second sale took place six days later.[7]

The prosecution did not charge Townsend with the illegal transfers of the firearms, but with possession of the weapons prior to the sales.[8] The defense admitted the unlawful possession, but claimed

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1. United States v. Townsend, 555 F.2d 152, 154 (7th Cir.), *cert. denied,* 98 S. Ct. 277 (1977). The defendant was charged with two counts of possession of a firearm without registration in violation of 26 U.S.C. §§ 5861(c) and 5861(d) (1970), and two counts of knowing possession of a firearm without payment of the making tax as required by 26 U.S.C. §§ 5821(a) and 5861(c). Two additional counts charging knowing transfer of a firearm without payment of the making tax were dismissed on the defendant's motion before trial. 555 F.2d at 153 n.1.

2. *Id.* at 154. Special Agent Robert Biby of the Illinois Bureau of Investigation later testified that informer Core was probably paid one hundred dollars for his work in each of the sales. He added that although the Illinois Bureau had no charges pending against Core, other organizations did. The agent acknowledged that the Bureau would assist Core with regard to these charges because of his cooperation. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* The United States Code defines and regulates "firearms". For convenience, the terms "firearms", "weapons", and "guns" will be used interchangeably.

6. *Id.*

7. *Id.* The price of the second firearm purchased by Warren was ninety dollars. *Id.* (Swygert, J., dissenting). The dissent adds that Core was present at the second sale. *Id.* at 159.

8. Special Agent William Lukowski, who arrested the defendant, testified that neither of the firearms were registered with the National Firearms Registration and Transfer Record.

that informer Core entrapped Townsend into possessing the firearms.[9]

On cross-examination, Agent Warren admitted that he visited Core's apartment on the days of the sales with the intention of purchasing a shotgun from the defendant.[10] He also conceded that Townsend refused to accept payments directly from him, but required him to hand the money to Core, who then handed it to Townsend.[11]

To show the circumstances of his alleged entrapment, defendant Townsend testified at the trial. He recounted that he had known Core for eleven years and that Core, relying on their friendship, asked him to take possession of the firearms because he was having problems with his "old lady".[12] The defendant stated that prior to the first sale, Core had told him the price to ask for the gun, and that both men had previously discussed the selling price of the second firearm purchased by Agent Warren.[13]

On cross-examination, Townsend admitted receiving about sixty-five dollars from the sales.[14] He also conceded that he had been involved with firearms all of his life, and that he had prior convictions for armed robbery and burglary.[15]

The defendant's motion for acquittal at the close of the evidence was denied.[16] The jury rejected the entrapment claim and found

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Id. at 154. The parties stipulated that both firearms involved were manufactured without payment of the making tax. *Id.* at 154 n.2.

9. *Id.* at 155. A defendant who claims entrapment must admit to committing the offense charged. United States v. Pickle, 424 F.2d 528 (5th Cir. 1970); Sylvia v. United States, 312 F.2d 145, 147 (1st Cir.), *cert. denied,* 374 U.S. 809 (1963); United States v. Carter, 326 F.2d 351, 353 (7th Cir. 1963); Ware v. United States, 259 F.2d 442, 445 (8th Cir. 1958); Eastman v. United States, 212 F.2d 320, 322 (9th Cir. 1954).

10. 555 F.2d at 154.

11. *Id.*

12. *Id.* at 155. The defendant stated that he had heard rumors that Core was an informant for the Illinois Bureau, but that Core had specifically denied this. *Id.*

13. *Id.*

14. Defendant Townsend admitted receiving forty dollars from the first sale and twenty-five or thirty dollars from the second sale. He claimed that Core had previously owed him forty dollars. Townsend also testified that he did not receive any money from Core until they had both returned to the defendant's apartment. *Id.*

15. *Id.* The defendant further admitted holding the first shotgun sold to Agent Warren for two or three days prior to the sale, knowing that it was a sawed-off shotgun. He also admitted holding the second shotgun for twenty-three or twenty-four hours prior to the second sale. *Id.*

16. *Id.*

Townsend guilty of knowing and unlawful possession of the firearms.[17]

The Court of Appeals for the Seventh Circuit affirmed the jury's verdict.[18] The issue contested on appeal was whether the Government satisfied its burden of proving Townsend guilty beyond a reasonable doubt. Although neither side had called the informer to testify at the trial,[19] the majority held that the testimony of agents Warren and Lukowski, along with Townsend's own admissions, was sufficient evidence of the defendant's guilt to uphold the jury's findings.[20] It also suggested that the Government did not have the burden of rebutting the defendant's testimony concerning his alleged entrapment.[21] The majority stated that the jury could have disbelieved the defendant's testimony and convicted him solely on its view of his credibility.[22]

Judge Luther Swygert, in his dissent, argued that the Government must rebut the defendant's testimony concerning entrapment.[23] He noted that the defendant's predisposition, or initial willingness to commit the offense charged, is the central issue in entrapment cases.[24] Judge Swygert concluded that the Government could not prove Townsend guilty beyond a reasonable doubt without the testimony of informer Core concerning the defendant's initial solicitation.[25]

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17. *Id.* With regard to the first firearm which the defendant had in his possession, he received five-year concurrent imprisonment sentences. For possession of the second firearm, the defendant was placed on five years' probation to be served consecutively to his imprisonment sentence. *Id.* at 153.

18. *Id.* at 159.

19. *Id.* at 155.

20. *Id.* at 158.

21. *Id.* at 155-56.

22. *Id.* at 158.

23. *Id.* at 165.

24. *Id.* at 161. This was first indicated by the Supreme Court in Sorrells v. United States, 287 U.S. 435 (1932). The Court stated that the government could legitimately provide an opportunity for the commission of a crime, but held that entrapment was a valid defense where a person otherwise innocent was induced by the government to commit the offense. *Id.* at 451. This position was affirmed in Sherman v. United States, 356 U.S. 359 (1958), in which Chief Justice Warren stated that in determining whether entrapment occurred, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Id.* at 372.

25. 555 F.2d at 165. The dissent stated: "[i]t was the Government's duty to call Core as its rebuttal witness if it was to raise the issue of predisposition to one of credibility sufficient to go to the jury to decide whether it had discharged its burden of proof." *Id.*

Where a defendant claims entrapment, the Government must prove beyond a reasonable doubt that he was predisposed to commit the offense.[26] Under the Supreme Court's recent holding in *Hampton v. United States*,[27] the defense of entrapment is unavailable regardless of the degree of government misconduct if the predisposition of the defendant is established.[28]

While predisposition is the central issue in entrapment cases, there is much confusion over the burden of proof placed on the respective parties. At one time, a defendant had the burden of proving his claim of entrapment by a preponderance of the evidence.[29] However, the courts' instructions to the jury on the Government's burden of proving the defendant guilty beyond a reasonable doubt, and the defendant's burden of proving entrapment by a preponderance of the evidence, resulted in confusion for both the trial judge[30] and the jury.[31] To remedy this situation, the courts have imposed a much lighter burden on the defendant—that of going forward with the evidence in support of his claim of entrapment.[32] Once a defendant has satisfied his burden, the prosecution must prove beyond a reasonable doubt that government agents did not entrap the defendant.[33]

The evidence sufficient to meet this burden has been the subject of much litigation,[34] centering around the Supreme Court's holding

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26. United v. Spivey, 508 F.2d 146, 151 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975); United States v. Conversano, 412 F.2d 1143, 1149 (3d Cir.), *cert. denied*, 396 U.S. 905 (1969); Garcia v. United States, 373 F.2d 806, 809 (10th Cir. 1967); United States v. Landry, 257 F.2d 425 (7th Cir. 1958).

27. 425 U.S. 484 (1976).

28. *Id.* at 490.

29. Gorin v. United States, 313 F.2d 641 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963). The *Gorin* court stated:

> Since by the defense the accused is asking to be relieved of the consequences of his guilt, if found or admitted, by objecting to the tactics of the representatives of the government, we think that one who raises the defense should be required not only to come forward with evidence but should also be required to establish inducement by a preponderance of the evidence.

313 F.2d at 654.

30. United States v. Pugliese, 346 F.2d 861, 863 (2d Cir. 1965).

31. Waker v. United States, 344 F.2d 795, 796 n.3. (1st Cir. 1965).

32. Sagansky v. United States, 358 F.2d 195, 203 (1st Cir.), *cert. denied*, 385 U.S. 816 (1966).

33. *See* text accompanying note 26 *supra*.

34. *See, e.g.*, Estrella-Ortega v. United States, 423 F.2d 509 (9th Cir. 1970); United States v. Draper, 411 F.2d 1106 (7th Cir. 1969), *cert. denied*, 397 U.S. 906 (1970); United States v.

in *Masciale v. United States*.[35] In that case, defendant Frank Masciale appealed from a Second Circuit decision[36] affirming his conviction of selling narcotics.[37] He claimed that an informer named Kowel, using the lure of easy income, entrapped him into arranging the sales. The facts showed that Kowel had introduced Masciale to Agent Marshall, who posed as a narcotics buyer.[38] Marshall and Masciale then arranged the narcotics sale that was the basis of the conviction.[39] At the trial, Marshall testified that upon first meeting Masciale, the defendant had boasted that he knew someone who was influential in the narcotics field from whom Marshall could obtain "88 per cent pure heroin."[40] In his defense, Masciale alleged that he spoke with Marshall to assist Kowel in making an impression on Marshall.[41]

The Supreme Court affirmed the trial court's submission of the entrapment issue to the jury, stating that Masciale had not established entrapment as a matter of law.[42] In so holding, the Court stated: "While petitioner [Masciale] presented enough evidence for the jury to consider, they were entitled to disbelieve him in regard to Kowel and so find for the Government on the issue of guilt."[43]

Many lower courts have cited *Masciale* as holding that a jury is free to disbelieve a defendant's testimony of his entrapment, and decide that there was no entrapment, even in cases where the prosecution has offered no evidence to rebut the defendant's testimony.[44] Under this interpretation, although the Government has the burden

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Haynes, 398 F.2d 980 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969); Enciso v. United States, 370 F.2d 749 (9th Cir. 1967); Jordan v. United States, 348 F.2d 433 (10th Cir. 1965); United States v. Orza, 320 F.2d 574 (2d Cir. 1963); Matysek v. United States, 321 F.2d 246 (9th Cir. 1963); Washington v. United States, 275 F.2d 687 (5th Cir. 1960); United States v. Santore, 270 F.2d 949 (3d Cir. 1959); Roth v. United States, 270 F.2d 655 (8th Cir. 1959).

35. 356 U.S. 386 (1958).

36. 236 F.2d 601 (2d Cir. 1956).

37. 356 U.S. at 388.

38. *Id.* at 387.

39. *Id.* at 387-88.

40. *Id.* at 387.

41. *Id.*

42. *Id.* at 388.

43. *Id.*

44. United States v. Gurule, 522 F.2d 20, 24 (10th Cir.), *cert. denied*, 425 U.S. 976 (1975); United States v. Jett, 491 F.2d 1078, 1080 (1st Cir. 1974); United States v. Johnson, 495 F.2d 242, 244 (10th Cir. 1974); United States v. Workopich, 479 F.2d 1142, 1146 (5th Cir. 1973).

of proving no entrapment beyond a reasonable doubt, it need not contradict a defendant's testimony as to the circumstances of the alleged entrapment. The *Townsend* court relied upon the *Masciale* holding in deciding that the jury could properly find predisposition in the defendant without the testimony of informer Core.[45]

In *United States v. Bueno,*[46] the Fifth Circuit stated that where a defendant claims entrapment, the *sale itself* would be sufficient evidence of the defendant's predisposition to allow submission of the entrapment issue to the jury: "In such cases where the issue is willingness or unwillingness of the defendant, the defense becomes a jury question because the sale itself constitutes evidence of willingness contrary to the defense of unwillingness."[47]

In *United States v. West,*[48] however, the Third Circuit rejected the view first put forth in *Masciale,* and expanded upon in *Bueno,* that the Government need not rebut a defendant's testimony of entrapment.[49] The court undermined *Masciale* by stating that the prosecution in that case *did* contradict the defendant's claim of entrapment.[50] The Third Circuit pointed to the testimony of Agent Marshall regarding Masciale's boast that he knew someone from whom Marshall could obtain "88 per cent pure heroin" as rebutting Masciale's entrapment claim.[51]

The *West* court also distinguished *Masciale* from the facts presented before it. In *West,* the defendant was convicted of two counts of unlawful distribution of heroin and one count of knowing possession of narcotics with intent to distribute.[52] The prosecution's evidence centered on the testimony of Officer Laguins, who had posed as an undercover narcotics buyer. He testified that Robert Chieves, an informer, and Gary West, the defendant, had arranged to sell

45. 555 F.2d at 157-58.

46. 447 F.2d 903 (5th Cir. 1971).

47. *Id.* at 906. The Government's charges stemmed from two sales of narcotics by David Bueno to undercover agents. The *Bueno* court found that the government did not merely purchase heroin from the defendant but also supplied it to him. *Id.* As this case was decided on the issue of government misconduct, the court's statement regarding predisposition is dictum. For a discussion of the viability of *Bueno* after United States v. Hampton, 425 U.S. 484 (1976), *see* United States v. Graves, 556 F.2d 1319 (5th Cir. 1977).

48. 511 F.2d 1083 (3d Cir. 1975).

49. *Id.* at 1087.

50. *Id.*

51. *Id.*

52. *Id.* at 1084.

heroin to him on a consignment basis.[53] The facts disclosed that West and Chieves delivered heroin to Laguins on two occasions.[54] Officers arrested the defendant enroute to the third delivery.[55] Laguins stated that he had previously arrested Chieves for selling narcotics, and that Chieves had agreed to introduce him to other narcotics sellers.[56]

Defendant West testified that he and Chieves were old friends, and that Chieves was aware of his serious need for money.[57] The defendant also stated that Chieves suggested to him that they sell fake heroin to Laguins, an acquaintance of Chieves.[58] West testified that Chieves offered to obtain the heroin, but requested that defendant West make the sales.[59] Under this arrangement, they would divide the profits.[60]

While reversing the defendant's sale convictions on other grounds, the Third Circuit stated that it would also have reversed on the predisposition issue.[61] The court decided that the relevant time frame for determining a defendant's predisposition to sell contraband material was prior to the initial solicitation by the informer.[62] Under this theory of determining predisposition, only the informer's testimony could be used to rebut a claim of entrapment offered by a defendant, and the defendant's participation in the subsequent sale of contraband articles would not be indicative of predisposition.

The *West* court stated that the government had not satisfied its burden of proving the defendant guilty beyond a reasonable doubt, because it had failed to produce informer Chieves at trial to rebut the defendant's testimony of entrapment.[63] While the court noted that the defendant's conduct reflected unfavorably upon his charac-

53. *Id.* at 1085.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. The court stated: "While we view West's case as one of intolerable conduct by government agents, one supplying and the other buying the narcotics, the same result is reached if the entrapment aspect of this case is analyzed as depending solely on the predisposition of West to engage in illicit drug traffic." *Id.* at 1086.
62. *Id.*
63. *Id.* at 1086-87.

ter, it determined that such conduct could not establish a prior inclination to engage in the sale of narcotics.[64]

The *West* court asserted that the courts are placing a burden of persuasion on a defendant rather than a burden of going forward with the evidence—the current standard—when they allow his unrebutted testimony to go to the trier of fact for determination.[65] To avoid this consequence, the Third Circuit proposed that once a defendant produced evidence sufficient on its face to prove entrapment, the Government should bear the burden of specifically rebutting the testimony of the accused.[66] The court concluded that this was not an unreasonable burden, since an informer knows and can testify to the relevant facts.[67]

In *Townsend,* the issue on appeal was whether the Government had presented sufficient evidence at trial to satisfy its burden of proving the defendant guilty beyond a reasonable doubt.[68] The defendant's testimony was sufficient to put his claim of entrapment in issue.[69] Townsend went forward with the evidence by testifying to informer Core's solicitation of him based upon their prior friendship.[70] Although the defendant claimed that Core entrapped him, neither party called the informer to testify.

The appellate court found that in viewing the evidence "most favorably to the Government . . . , the jury would find predisposition on Townsend's part."[71] The majority cited the testimony of Agents Warren and Lukowski, along with the defendant's own admissions, as the basis for this finding.[72]

The majority noted that the defendant had admitted that he was an "ex-police character" who had been involved with firearms all of his life.[73] Agent Warren's testimony concerned Townsend's partic-

64. *Id.* at 1086.
65. *Id.* at 1087.
66. *Id.*
67. *Id.*
68. 555 F.2d at 155.
69. *Id.* at 162 (Swygert, J., dissenting).
70. *See* text accompanying note 12 *supra.*
71. 555 F.2d at 156. The *Townsend* court cited Glasser v. United States, 315 U.S. 60 (1942), as authority.
72. 555 F.2d at 158.
73. *Id.* at 156. The majority also pointed out that the defendant had been convicted of armed robbery and perjury, both of which were reversed due to trial error. *Id.* at 156 n.5. The opinion adds that the defendant was arrested with a firearm twice within five years. *Id.* at 156.

ipation in the sales. This included the defendant's statement that he had planned to cut the stock of the first gun down to pistol-grip size and pour lead into the handle to give it weight and balance.[74] Agent Lukowski examined the weapons and testified to their lack of registration.[75] The appellate court found the above testimony to be sufficiently indicative of the defendant's predisposition to uphold the conviction.[76]

The *Townsend* court found further indications of the defendant's predisposition in the allegations summarized by the prosecutor in his closing arguments.[77] The prosecutor pointed out that the defendant was charged with possession of firearms on two different occasions.[78] He stated that Townsend had participated in an armed robbery, was knowledgeable as to firearms, and had been arrested a number of different times with a firearm.[79] He also noted that the defendant had the first firearm two or three days before selling it to Warren, and admittedly shared in the proceeds of the sales.[80] Finally, in response to the defendant's charge that the Government could have called Core as a witness, the prosecutor replied that the informer was equally available to defense counsel.[81]

Judge Swygert, in his dissenting opinion, argued that neither the prosecutor's allegations nor the combined testimony of the agents and the defendant could establish predisposition on the defendant's part.[82] Judge Swygert asserted that Townsend had no prior record

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74. *Id.*

75. *Id.* at 154.

76. *Id.* at 158. The majority also cited defense counsel's statements at trial as conceding the issue of predisposition. *Id.* The defense stated:

> You don't leave your common sense outside. You know as well as I do in watching that man [the defendant] testify and hearing about his background that if Mr. Core wanted him to keep a tank or a machine gun or if he had an opportunity to get a tank or a machine gun and make a few bucks, he would do it. Let's lay our cards on the table.

Id. at 158 n.9.

The dissent replied that those statements were not evidence in the case and could not therefore satisfy the prosecution's burden of proof. Judge Swygert argued that the most such a statement indicates about the defendant is that he is weak-willed, and does not show predisposition. *Id.* at 162 n.3.

77. *Id.* at 156.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 156 n.6.

82. *Id.* at 161-62.

of dealing in firearms. He concluded that there was absolutely no evidence that Townsend was dealing in illegally adapted guns at the time of his solicitation by Core, or at any time previously.[83]

Applying the *West* rationale, Judge Swygert further argued that the critical time period for determining a defendant's predisposition is the period before his solicitation.[84] He noted that the transactions testified to by Agent Warren occurred after the initial solicitation of the defendant.[85] He asserted that the majority was misplacing the relevant time period for determining predisposition by considering the agent's testimony.[86] The dissent concluded that, in this case, only the testimony of informer Core could be used to prove predisposition by the prosecution.[87]

The majority considered the argument put forth by Judge Swygert, but found that the jury could weigh the demeanor of the defendant on the stand, along with his enthusiasm and depth of involvement in the commission of the crime, in determining whether he was predisposed to commit the offense.[88] As noted, the majority interpreted the *Masciale* holding to allow a jury to find predisposition in the defendant solely on their view of his credibility.[89] The majority applied this interpretation to the *Townsend* facts and held that the jury's findings were supportable.[90]

Judge Swygert asserted that *Masciale* was clearly distinguishable.[91] He pointed to the agent's testimony in *Masciale* of the defendant's boast that he could procure "88 per cent pure heroin."[92] The dissent concluded that the testimony of Agent Warren was irrelevant because the events testified to occurred after the initial solicitation by informer Core;[93] that the prosecutor's allegations concern-

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83. *Id.* at 161. In discussing the issue of Townsend's predisposition, the dissent seems to focus on the defendant's inclination to *sell* firearms. The charges involving the transfer of the firearms were dismissed on defendant's pre-trial motion. *See* note 1 *supra.*

84. 555 F.2d at 162.

85. *Id.*

86. *Id.*

87. *Id.* at 165.

88. *Id.* at 157 n.8.

89. *See* text accompanying note 45 *supra.*

90. 555 F.2d at 157-58.

91. *Id.* at 165-66.

92. *Id.* at 166. The *West* court also found that this evidence presented by the Government indicated predisposition on the part of the defendant. *See* text accompanying note 50 *supra.*

93. *See* text accompanying note 86 *supra.*

ing Townsend's background were insufficient to establish predisposition;[94] and that because of the Government's failure to rebut Townsend's testimony, the jury's verdict must be overturned.[95]

Upon closer analysis, there seems to be an inconsistency in the arguments put forth by Judge Swygert. He dismissed Agent Warren's testimony because the events related did not occur in the relevant time period for determining a defendant's predisposition.[96] Then he distinguished the *Masciale* case on the grounds that the prosecution in that case had rebutted the defendant's testimony[97] whereas the prosecution in *Townsend* did not.[98]

Judge Swygert seems to have overlooked the similarities between the testimony of Agent Marshall in *Masciale* and Agent Warren in *Townsend.* Marshall testified to the defendant's boast that he knew someone from whom he could obtain "88 per cent pure heroin."[99] Warren testified that Townsend stated that he planned to cut the stock of the first firearm down to pistol-grip size and pour lead into the handle to give it weight and balance.[100] Both Agent Marshall and Agent Warren were testifying to statements which occurred after a defendant's initial solicitation. Yet, Judge Swygert found that Marshall's testimony rebutted the defendant Masciale's claim of entrapment, but that the prosecution in *Townsend* had failed to rebut the defendant's testimony. Moreover, the dissent dismissed Agent Warren's testimony completely.[101]

Judge Swygert argued that Townsend's enthusiasm in transferring the firearms was irrelevant to the issue of his predisposition.[102] The defendant's statement, however, not only indicated his enthusiasm with regard to the transfer of the firearms, but also his considerable experience with firearms in general. Furthermore, it clearly indicated a willingness to possess and illegally alter the weapons which were the subject of the indictment. Townsend's admission can only be viewed as properly evidencing his predisposition to

94. 555 F.2d at 161.
95. *Id.* at 166.
96. *See* text accompanying note 84 *supra.*
97. *See* text accompanying note 92 *supra.*
98. *See* text accompanying note 95 *supra.*
99. *See* text accompanying note 40 *supra.*
100. *See* text accompanying note 74 *supra.*
101. 555 F.2d at 162.
102. *Id.*

commit the offenses charged.

Although inapplicable to the facts of this case, the courts should consider the arguments put forth by Judge Swygert and the *West* court in deciding other entrapment cases. Evidence of a defendant's willingness and enthusiasm in carrying out the commission of a crime is irrelevant to the issue of whether the defendant was initially predisposed to commit the offense. Where a defendant admits to the crime charged, and his sole defense is that of entrapment, evidence of his participation in the offense, subsequent to the government's solicitation, should not be admitted at trial to prove predisposition.

However, where this evidence not only reveals the enthusiasm of a defendant, but also indicates his prior knowledge and experience in committing the offense charged, then a court may admit the evidence as indicative of predisposition. A statement made by a defendant, although occurring after his initial solicitation, may still expose a predisposition on his part. Certain conduct of a defendant may indicate a predisposition to commit the offense, while other conduct will merely show his enthusiasm in assuring its commission. The courts must draw this distinction to insure that a defendant's claim of entrapment is fairly considered.

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