

ENTRAPMENT

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I. STATUTE

777.201. Entrapment *enacted in 1987*

(1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he or she induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

(2) A person prosecuted for a crime shall be acquitted if the person proves by a preponderance of the evidence that his or her criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

II. JURY INSTRUCTION

3.04(c)(2) ENTRAPMENT *Standard Jury Instructions 723 So.2d 123 at 142 (Fla. 1998)*

The defense of entrapment has been raised. Defendant was entrapped if

1. He was, for the purpose of obtaining evidence of the commission of a crime, induced or encouraged to engage in conduct constituting the crime of crime , and
2. He engaged in such conduct as direct result of such inducement or encouragement, and
3. The person who induced or encouraged him was a law enforcement officer or a person engaged in cooperating with or acting as an agent of a law enforcement officer, and
4. The person who induced or encouraged him employed methods of persuasion or inducement which created a substantial risk that the crime would be committed by a person other than one who was ready to commit it, and

5. Defendant was not a person who was ready to commit the crime.

It is not entrapment if defendant had the predisposition to commit the particular crime. The defendant had the predisposition if before any law enforcement officer or person acting for the officer persuaded, induced, or lured defendant, he had a readiness or willingness to commit the particular crime if the opportunity presented itself.

It is also not entrapment merely because a law enforcement officer in a good faith attempt to detect crime:

- a. provided the defendant with the opportunity, means and facilities to commit the offense, which the defendant intended to commit and would have committed otherwise.
- b. used tricks, decoys or subterfuge to expose the defendant's criminal acts.
- c. was present and pretending to aid or assist in the commission of the offense.

On the issue of entrapment, the defendant must prove to you by the greater weight of the evidence that a law enforcement officer or agent induced or encouraged the crime charged. Greater weight of the evidence means that evidence which is more persuasive and convincing. If the defendant does so, the State must prove beyond a reasonable doubt that the defendant was predisposed to commit the particular crime. The state must prove defendant's predisposition to commit the crime existed prior to and independent of the inducement or encouragement.

An informant is an agent of law enforcement for purposes of the entrapment defense.

If you find that the defendant was entrapped, you should find the defendant not guilty of the crime charged. If, however, you find that the defendant was not entrapped, you should find the defendant guilty if all of the elements of the charge have been proved.

III. CASE LAW

A. Florida Cases

Munoz v. State, 629 So.2d 90 (Fla. 1993)

This is the landmark Florida Supreme Court opinion which once and for all acknowledged that Florida was abandoning the objective entrapment standard set forth in Cruz v. State, 465 So.2d 516 (Fla. 1985) and adopting the subjective standard utilized in the federal courts.. The old objective standard focused on the conduct of the police, but the subjective standard focuses primarily on the predisposition of the defendant. The Cruz case utilized a two pronged threshold test for an entrapment defense. The first prong was whether police activity had as its end the interruption of a specific ongoing criminal activity. The second prong was whether police activity utilized means reasonably tailored to apprehend those involved in the ongoing criminal activity. This objective standard has been rejected, but an objective test can still be used, however, when a defendant's constitutional due process rights are involved. For instance, when the government pays an informant a contingency fee for his testimony, the conduct is considered so outrageous that the defendant's propensity is not relevant and the case will be dismissed on due process grounds.

In brief, the holding of Munoz states that “defendant asserting statutory defense of entrapment initially has burden to establish lack of predisposition, but as soon as defendant produces evidence of no predisposition, burden shifts to prosecution to rebut this evidence beyond reasonable doubt, which it may do by making appropriate and searching inquiry into conduct of defendant and presenting evidence of defendant's prior criminal history, even though such evidence would normally be inadmissible.”

When we investigate cases of computer pornography, it is important to note that the Munoz court relies heavily on federal law in its opinion. As the court noted:

Given the history of the entrapment defense, we find that the legislature, in establishing a legislatively-created entrapment defense through section 777.201, codified the subjective test delineated by the United States Supreme Court as the means

for determining the application of that defense. As indicated under the federal cases discussed above, the application of the subjective test is the test articulated by Judge Hand in Sherman, as further explained by the United States Supreme Court in Jacobson. Munoz at 99.

The significance of this reliance on federal precedent is that almost all of the existing case law on this subject as it relates to pornography stings is federal and most of it is favorable to the government. In fact, the first several pages of the Munoz opinion simply trace the federal evolution of the entrapment defense. Fortunately, Jacobson v. United States, 112 S.Ct. 1535 (1992), the landmark United States Supreme Court case on the entrapment issue, dealt with a child pornography sting. The Munoz opinion takes several quotations from the Jacobson opinion in formulating the Florida entrapment defense. One such quotation is particularly helpful:

Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use *because the ready commission of the criminal act amply demonstrates the defendant's predisposition.*

Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner--who must be presumed to know the law--had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. Jacobson at 1540-41

It should be noted that the Munoz Court ruled that the conduct of law enforcement in that case constituted entrapment as a matter of law. The police sent a minor into a video store to rent an adult video. The minor was provided with false identification and appeared older than she was. She was also instructed to lie about her age. When the proprietor rented her a movie he was arrested. That particular video store had never received any complaints about renting adult movies to minors and there was no evidence concerning any predisposition of the defendant or any other employee to do so. The store was randomly targeted and the juvenile was very persistent.

As we will see throughout this topic, randomly targeting individuals can be dangerous.

The current jury instruction was written to conform to the Munoz case.

Holiday v. State, 753 So. 2d 1264 (Fla. 2000)

This is the most recent Florida Supreme Court case to discuss entrapment. The trial court gave a faulty instruction on entrapment without objection for the state or defense. The court ruled, “Although the jury instruction did not accurately reflect the burden of proof analysis on entrapment, it was not fundamental error, because the instruction went only to a defense, and not to an element of the offense.”

This case provides a nice history of the entrapment defense and the burden of proof.

Bist v. State, 35 Fla. L. Weekly D803 (Fla. 5th DCA 2010):

Law enforcement team's actions in using an independent nonprofit organization to set up sting operation consisting of supposed meeting of defendant and 13-year-old girl for sexual activity which would be filmed for television did not amount to objective entrapment in violation of due process; there was no prejudicial financial incentive present, law enforcement did not induce or otherwise manufacture the instrumentalities for the crime to occur, there was no suggestion of impropriety by organization, and the recording and storage of all communications between defendant and the decoy girl insured the integrity of the investigation.

The mere failure of law enforcement to supervise or monitor participant in a sting operation does not violate due process.

Defendant's entrance into what he thought was a 13-year-old girl's home, in possession of flowers, chocolate, lubricant, and condoms, amounted to an overt act sufficient to establish attempt to commit lewd and lascivious battery, where defendant had conducted sexually explicit online conversations with the supposed girl, who was an online decoy, defendant had arranged to meet decoy in the home, and defendant had driven over 200 miles to the home.

Madera v. State, 31 Fla. L. Weekly D3062 (Fla. 4th DCA 2006):

Conduct of confidential informant (CI) was egregious and thus constituted entrapment as a matter of law with respect to drug charges; record demonstrated that CI encouraged a romantic relationship with defendant involving sexual activity, that CI played on defendant's sympathy, indicating that she needed his help in obtaining drugs so she could cope with the pain and the stress of cancer, and at time defendant was approached by CI, he was gainfully employed at a lawful occupation, had no prior criminal history, and was not even suspected of criminal activity.

Farley v. State, 28 Fla. L. Weekly D1479 (Fla. 4th DCA 2003):

Facts: Law enforcement agencies in Dallas, Texas, arrested the owners of a Texas Internet site who were commercially distributing child pornography. While examining the company's computers, they found a customer list. They subsequently forwarded the customer lists to law enforcement agencies across the country. Broward detectives decided to conduct a reverse sting operation with the information. Detectives "sent spam e-mail to every address on the list with an advertisement in excess of 300 words soliciting patrons for a fictitious business, "providers4you.com." The email indicated the business could assist adult customers in obtaining taboo, over-the-edge, extreme, intense, and hard-to-find, sexual material. The email also contained repeated assurances that communications and transactions with the business would be protected from governmental interference."

Farley responded to the email and was advised to list his preferences. He said he was interested in pictures of teenage boys. Detectives then sent Farley an additional email asking him to give further details about his preferences. After several exchanges narrowing Farley's preferences, he was emailed an order form. He eventually ordered three VHS cassettes to be paid C.O.D. Law enforcement conducted a controlled delivery and arrested Farley after he accepted the package.

Holding:

- The defendant was entrapped as a matter of law.
- What began as a plan to possibly uncover an offender from the Texas list, became a concerted effort to lure Farley into committing a crime, therefore, inducement was present.
- There was no evidence that Farley was predisposed to possess child pornography and no evidence was adduced that he had ever purchased such pornography nor were any pornographic materials found in his home. Prior to receiving the spam e-mail from the government, there is not indication that Farley had any inclination to purchase and possess child pornography. Therefore, Farley was

not predisposed to commit the crime.

- The trial court erred in denying defendant's motion to dismiss based upon substantive due process/objective entrapment.
- The fact that detectives manufactured child pornography by creating tapes promised the defendant protection from government interference and targeted Farley even though he was not involved in an existing criminal undertaking in need of detection by law enforcement led to the finding of a due process violation.

Discussion: Although this was not my case, I am familiar with the reverse sting operation. I don't know whether the State failed to present all of the relevant facts or the appellate court chose to ignore them, but the facts of this opinion do not accurately reflect the nature of the sting operation. In any event, this is the law with which we are stuck. The court relied heavily on the *Beattie* decision. That is unfortunate because *Beattie* is a flawed decision as noted in my discussion of that case below. The case also seems to fly in the face of the *U.S. v. Jacobson* decision where the Supreme Court said that if you make somebody an offer and they immediately accept it, their predisposition can be shown by the ready acceptance of the offer. If you learn nothing else from this case, please note that cases referred from other jurisdictions often require continuing assistance from that jurisdiction. Had the Dallas authorities who examined the computer in Dallas testified at this hearing about the nature of this customer list, a different result would most likely have been achieved. You can't assume that just because someone provides their name and credit card number to a child porn site, that they actually have an interest in obtaining child porn.

Marreel v. State, 28 Fla. L. Weekly D862 (Fla. 4th DCA 2003):

No unlawful inducement by state occurred where defendant made contact with officer in Internet chatroom for "Married Wants Affair," officer immediately represented that he was 15-year-old girl, and defendant upon learning purported age, continued to engage "girl" in the idea of having an affair involving oral sex, touching, and possibly more.

By the end of first chat, defendant had already shown predisposition and that, independent of government's actions, he was "ready and willing, without persuasion" to commit offense.

No error in denying motion to dismiss charge on grounds of entrapment.

Discussion: This is an excellent trap on entrapment issues in online investigations. Yours truly argued this motion at the trial level. It was an interesting case in that the FDLE agent pursued the defendant quite aggressively for several months before the defendant eventually showed up for a meeting. Since the defendant showed his predisposition in the very first chat, the fact that the agent repeatedly initiated communications after that was not inducement. As the appellate court noted, “There were no coercive tactics or “arm-twisting” on the part of law enforcement; appellant was already on the iniquitous path.” “The fact that “Kelly” helped to keep the idea of an affair going by initiating some of the later contacts with the appellant is of no moment. By the end of the first chat, appellant had already shown that he was predisposed and that, independent of the government’s actions, he stood ready and willing, without persuasions, to commit the offense.” We must keep in mind, however, that a jury may come up with a different interpretation of entrapment. We must also keep in mind that the State has to prove that the defendant did the inducing and enticing, not the officer.

Jackson v. State, 810 So.2d 545 (Fla. 4th DCA 2002):

Facts: An undercover officer stood outside a convenience store in an effort to purchase crack in a sting operation. The defendant approached her and said, “What’s up.” The officer responded that she was looking for “a twenty,” and subsequently showed him the money. The officer bought him a beer and then accompanied him while he tried to find cocaine for her.

Holding: The officer’s actions were not entrapment as a matter of law.

Beattie v. State, 636 So.2d 744 (Fla. 2d DCA 1993):

This is the only Florida case that specifically applies the entrapment defense to a child pornography reverse sting. Unfortunately, it is a poor decision which does not accurately reflect the majority of federal cases. The Beattie opinion ruled that the following fact pattern was entrapment as a matter of law.

U.S. Customs placed an ad in a free shopping publication listing a distributor of “hard to find Foreign videos/magazines in Miniature & Young Love.” Beattie responded to the ad and said he was interested in movies “with very young people and with Black men, white women.” After an exchange of ten letters concerning the available products and prices etc. a customs agent telephoned Beattie and arranged a meeting to sell Beattie a child pornography videotape called “Sexy Lolita,” that customs had previously seized. Beattie was arrested when he went to pick up the movie.

In ruling that this was entrapment, the court noted that law enforcement did not know Beattie for any deviant activity or involvement with child pornography until he responded to the advertisement. The facts of the case are not detailed in the opinion, so it is difficult to determine what sort of facts we could use to enhance such a similar situation. For instance, it would be nice to know if the defendant outlined his preferences in the exchange of letters.

In any event, this opinion seems to be in conflict to the Munoz court's reference to Jacobson in which the United States Supreme Court ruled that, "had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner--who must be presumed to know the law--had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. Jacobson at 1540-41

It may help to understand the Beattie opinion by looking at the history. In Beattie v. State, 595 So.2d 249 (Fla. 2d DCA 1992), the court ruled that this same conduct was entrapment as a matter of law, but in so doing, they relied on the old objective entrapment law. The Florida Supreme Court quashed that opinion and remanded the case for reconsideration in light of the ruling in the Munoz case. Surprisingly enough, the Second District reassessed the situation under the correct law and came to the same conclusion. Neither Jacobson, nor any other federal cases were cited in this opinion. It is a poorly written opinion, but it is the only one we have. The primary lesson for law enforcement here is that it is best to target individuals with a known propensity.

B. Federal Cases

Note: The Florida Supreme court has specifically rejected the Federal Courts' narrow construction of Due Process violations based upon outrageous government misconduct, therefore, we must be careful how involved we are in creating the crime we are trying to prosecute. Therefore, even if a defendant has a predisposition to commit the crime, the case can still be dismissed on Due Process grounds. *See State v. Glosson*, 462 So.2d 1082 (Fla. 1985):

Jacobson v. United States, 112 S.Ct. 1535, 503 U.S. 540 (1992)

This is the landmark case on entrapment which was previously mentioned under the discussion of the Munoz opinion. The facts of the case and the general holding are found in the opinion's syllabus:

FACTS

At a time when federal law permitted such conduct, petitioner Jacobson ordered and received from a bookstore two Bare Boys magazines containing photographs of nude preteen and teenage boys. Subsequently, the Child Protection Act of 1984 made illegal the receipt through the mails of sexually explicit depictions of children. After finding Jacobson's name on the bookstore mailing list, two Government agencies sent mail to him through five fictitious organizations and a bogus pen pal, to explore his willingness to break the law. Many of those organizations represented that they were founded to protect and promote sexual freedom and freedom of choice and that they promoted lobbying efforts through catalog sales. Some mailings raised the specter of censorship. Jacobson responded to some of the correspondence. After 2 1/2 years on the Government mailing list, Jacobson was solicited to order child pornography. He answered a letter that described concern about child pornography as hysterical nonsense and decried international censorship, and then received a catalog and ordered a magazine depicting young boys engaged in sexual activities. He was arrested after a controlled delivery of a photocopy of the magazine, but a search of his house revealed no materials other than those sent by the Government and the Bare Boys magazines.

HELD

The prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that Jacobson was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails. In their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. Sorrells v. United States, 287 U.S. 435, 442, 53 S.Ct. 210, 212, 77 L.Ed. 413. Jacobson was not simply offered the opportunity to order pornography, after which he promptly availed himself of that opportunity. He was the target of 26 months of repeated Government mailings and communications, [503 U.S. 541] and the Government has failed to carry its burden of proving predisposition independent of its attention. The

preinvestigation evidence--the Bare Boys magazines--merely indicates a generic inclination to act within a broad range, not all of which is criminal. Furthermore, Jacobson was acting within the law when he received the magazines, and he testified that he did not know that they would depict minors. As for the evidence gathered during the investigation, Jacobson's responses to the many communications prior to the criminal act were at most indicative of certain personal inclinations and would not support the inference that Jacobson was predisposed to violate the Child Protection Act. On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited Jacobson's interest in material banned by law but also exerted substantial pressure on him to obtain and read such material as part of the fight against censorship and the infringement of individual rights. Thus, rational jurors could not find beyond a reasonable doubt that Jacobson possessed the requisite predisposition before the Government's investigation and that it existed independent of the Government's many and varied approaches to him. Pp. 1540-1543.

The government made several mistakes that resulted in this case being reversed. The first mistake was by hounding the suspect for 2 1/2 years. The government contacted him through several fictitious organizations, businesses and pen pals. The problem here is that the government ran the risk of planting an idea in his mind that did not otherwise exist. It's like telling an attractive fifteen year old to repeatedly throw herself at a man you know subscribes to Teen Magazine just to see if he will eventually fondle her. If you can't get the suspect to bite quickly, try moving on to another target.

The second mistake involved enticing the suspect to participate in prohibited activity for reasons other than a predisposition to purchase child pornography. For instance, the government sent out the following information to the suspect:

- A Postal Inspector sent the suspect a letter supposedly from the American Hedonist Society, which in fact was a fiction organization. The letter included a membership application and stated the Society's doctrine: that members had the "right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the

right to seek pleasure without restrictions being placed on us by outdated puritan morality."

- The defendant was subsequently contacted by another government creation called "Heartland Institute for a New Tomorrow" (HINT), which proclaimed that it was "an organization founded to protect and promote sexual freedom and freedom of choice. We believe that arbitrarily imposed legislative sanctions restricting your sexual freedom should be rescinded through the legislative process." In response to the questionnaire submitted by the government, the defendant wrote: "Not only sexual expression but freedom of the press is under attack. We must be ever vigilant to counter attack right wing fundamentalists who are determined to curtail our freedoms."

HINT replied, portraying itself as a lobbying organization seeking to repeal "all statutes which regulate sexual activities, except those laws which deal with violent behavior, such as rape. HINT is also lobbying to eliminate any legal definition of 'the age of consent.' " These lobbying efforts were to be funded by sales from a catalog to be published in the future "offering the sale of various items which we believe you will find to be both interesting and stimulating."

The Supreme Court criticized the government's use of this type of appeal to issues other than predisposition by noting, "On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights." *Id.* at 1542.

- The government sent the defendant numerous questionnaires concerning his sexual preferences in an effort to get him to acknowledge he likes to look at pictures of naked boys. The Supreme Court held that the defendant's "responses to the many communications prior to the ultimate criminal act were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails. Furthermore, a person's

inclinations and "fantasies ... are his own and beyond the reach of government...." Id. at 1542.

One discrete, yet telling observation by the Supreme Court is its choice of facts to include in this opinion. The very first sentence starts "In February 1984, petitioner, a 56-year-old veteran-turned farmer who supported his elderly father in Nebraska, ordered two magazines and a brochure from a California adult bookstore." Id. at 1537. Obviously, this man does not fit the image envisioned by the Supreme Court as one who is a danger to society. The government simply targeted a lonely old American Gothic sort of old guy who fought for his country and now just wants to care for his aging father. Looks like the prosecution was starting in a hole on this one.

Finally, it should be noted that the Munoz court cited one long segment of this case and suggested it be used as guidance in Florida sting cases.

Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.

Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition.

Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner--who must be presumed to know the law--had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction.

But that is not what happened here. By the time petitioner finally placed his order, he had already been the target of 26

months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner since January 1985. Munoz at 99-100

U.S. v. Brand, (2d Cir. 2006)

Even if government induced defendant to commit offense of traveling in interstate commerce for purpose of engaging in illicit sexual conduct with a minor, evidence was sufficient to prove beyond reasonable doubt that defendant was predisposed to commit offense, as required to defeat defense of entrapment; defendant made contact with adults posing as 13-year-old girls in Internet chat room entitled "I Love Older Men," he admitted to engaging in sexually explicit Internet communications with underage girls, and to receiving child pornography over Internet, and when undercover agent posing as 13-year-old broached topic of sexual activity with defendant, he promptly responded with offers to engage in sexual contact, planned meeting with agent, and went to arranged meeting place.

Evidence of child pornography images found on defendant's computer was admissible to show defendant's predisposition to commit offense after defendant raised affirmative defense of entrapment, since child pornography images were near enough in kind to support inference that defendant's purposes included sexual offenses against children.

United States v. Poehlman, 217 F.3d 692 (9th Cir. 2000):

"Mark Poehlman, a cross-dresser and foot-fetishist, sought the company of like-minded adults on the Internet. What he found, instead, were federal agents looking to catch child molesters. We consider whether the government's actions amount to entrapment." Id. at 692.

Facts: The facts of this case are so interesting; they are included in their entirety.

After graduating from high school, Mark Poehlman joined the Air Force, where he remained for nearly 17 years. Eventually, he got married and had two children. When Poehlman

admitted to his wife that he couldn't control his compulsion to cross-dress, she divorced him. So did the Air Force, which forced him into early retirement, albeit with an honorable discharge.

These events left Poehlman lonely and depressed. He began trawling Internet "alternative lifestyle" discussion groups in an effort to find a suitable companion. Unfortunately, the women who frequented these groups were less accepting than he had hoped. After they learned of Poehlman's proclivities, several retorted with strong rebukes. One even recommended that Poehlman kill himself. Evidently, life in the HOV lane of the information superhighway is not as fast as one might have suspected.

Eventually, Poehlman got a positive reaction from a woman named Sharon. Poehlman started his correspondence with Sharon when he responded to an ad in which she indicated that she was looking for someone who understood her family's "unique needs" and preferred servicemen. Poehlman answered the ad and indicated that he "was looking for a long-term relationship leading to marriage," "didn't mind children," and "had unique needs too."

Sharon responded positively to Poehlman's e-mail. She said she had three children and was "looking for someone who understands us and does not let society's views stand in the way." She confessed that there were "some things I'm just not equipped to teach [the children]" and indicated that she wanted "someone to help with their special education."

In his next e-mail, also set out in the margin, (FN4) Poehlman disclosed the specifics of his "unique needs." He also explained that he has strong family values and would treat Sharon's children as his own. Sharon's next e-mail focused on the children, explaining to Poehlman that she was looking for a "special man teacher" for them but not for herself. She closed her e-mail with the valediction, "If you understand and are interested, please write back. If you don't share my views I understand. Thanks again for your last letter."

Poehlman replied by expressing uncertainty as to what Sharon meant by special man teacher. He noted that he would teach the children "proper morals and give support to them where it is needed," and he reiterated his interest in Sharon. (FN5)

Sharon again rebuffed Poehlman's interest in her: "One thing I should make really clear though, is that there can't be anything between me and my sweethearts special teacher." She then asked Poehlman for a description of what he would teach her children as a first lesson, promising "not to get mad or upset at anything written. If I disagree with something I'll just say so. I do like to watch, though. I hope you don't think I'm too weird." *Id.*

Poehlman finally got the hint and expressed his willingness to play sex instructor to Sharon's children. (FN6) In later e-mails, Poehlman graphically detailed his ideas to Sharon, usually at her prompting. Among these ideas were oral sex, anal sex and various acts too tasteless to mention. The correspondence blossomed to include a phone call from Sharon and hand written notes from one of her children. Poehlman made decorative belts for all the girls and shipped the gifts to them for Christmas.

Poehlman and Sharon eventually made plans for him to travel to California from his Florida home. After arriving in California, Poehlman proceeded to a hotel room where he met Sharon in person. She offered him some pornographic magazines featuring children, which he accepted and examined. He commented that he had always looked at little girls. Sharon also showed Poehlman photos of her children: Karen, aged 7, Bonnie, aged 10, and Abby, aged 12. She then directed Poehlman to the adjoining room, where he was to meet the children, presumably to give them their first lesson under their mother's protective supervision. Upon entering the room however, Poehlman was greeted by Naval Criminal Investigation Special Agents, FBI agents and Los Angeles County Sheriff's Deputies.

Poehlman was arrested and charged with attempted lewd acts with a minor in violation of California law. He was tried, convicted and sentenced to a year in state prison. Two years after his release, Poehlman was again arrested and charged with federal crimes arising from the same incident. A jury convicted him of crossing state lines for the purpose of engaging in sex acts with a minor in violation of 18 U.S.C. § 2423(b). He was sentenced to 121 months.

Holding:

- The government induces a crime, for purposes of the entrapment defense, when it creates a special incentive for the defendant to commit the crime; this incentive can consist of anything that materially alters the balance of risks and rewards bearing on defendant's decision whether to commit the offense, so as to increase the likelihood that he or she will engage in the particular criminal conduct.
- Government induced defendant to commit crime of crossing state lines for purpose of engaging in sex acts with minor, and government thus was required to prove predisposition to overcome entrapment defense, where government agent, posing as mother seeking "sexual mentor" for her three daughters, engaged in e-mail correspondence with defendant, resulting in meeting between defendant and agent, and where agent drew him into committing offense by playing on his obvious need for adult relationship, acceptance of his sexual proclivities, and family.
- Evidence was insufficient to support finding that defendant was predisposed to commit crime of crossing state lines for purpose of engaging in sex acts with minor, and government thus failed to overcome his entrapment defense; his willingness to commit offense could have been result of government inducement in form of e-mails from agent posing as mother seeking "sexual mentor" for her three daughters, defendant seemed to be seeking adult relationship initially when he responded to agent's advertisement, and there was no indication of pre-existing interest in children other than one statement that he had "always looked at little girls."

Discussion: This case points out the fact that you cannot capitalize on matters other than the crime at hand to induce a suspect to commit a crime. The detectives in this case capitalized on the defendant's desperation to hook up with a cross-dressing foot fetish-loving adult to pressure the defendant into agreeing to establish a certain relationship with children. If you have to try that hard, it's probably not going to succeed.

United States v. Gamache, 156 F.3d 1 (1st Cir. 1998):

There was a jury question whether a defendant was entrapped into crossing a state line with the intent to engage in sexual activities with minors; when the defendant first answered a personal advertisement

in a newspaper, placed by police as part of a "sting" operation, he expressed an interest in having sex with the adult female purportedly placing the advertisement, and stated he would assume a nonsexual "mentor" relation to her , and agreed to perform sex with them only after the "mother" made repeated requests that he do so, and his prior history showed no pedophilic tendencies.

A "sting" operation is not improper inducement, for purposes of establishing the defense of entrapment, if it merely provides an opportunity to commit a crime, but proof of an opportunity provided by the sting plus "something else" may be adequate to meet a defendant's burden of showing entrapment.

Factors to be considered by a court in assessing whether a defendant was predisposed to commit the crime charged, so as to preclude an entrapment defense, are (1) the character or reputation of the defendant, (2) whether the initial suggestion of criminal activity was made by the Government, (3) whether the defendant was engaged in the criminal activity for profit, (4) whether the defendant showed reluctance to commit the offense, which was overcome by the governmental persuasion, and (5) the nature of the inducement or persuasion offered by the Government.

Discussion: This case originated when a New Hampshire detective, as part of a sting operation aimed at uncovering child exploitation, placed a classified advertisement in the personal section of the *Tri-State Swingers* magazine, which read as follows: *FEMALE-TROY, NH; F.F.-female, 31; Single mom, two girls, one boy, seeks male as partner and mentor, seeks fun, enjoys travel and photography, FF P.O. Box 771, Troy, New Hampshire, 03465.* The defendant responded by saying how interested he was in outdoor activities like hunting and fishing. He expressed absolutely no interest in children. Numerous correspondences are included in the opinion that show how the detective kept escalating the content of the letters toward supplying a sexual education for the detective's children. A careful reading of these letters tends to show the defendant showed no interest in the children and only developed one several letters later when the detective repeatedly brought up the subject. The appellate court simply ruled that the judge erred in failing to read the entrapment instruction, but it is clear that the appellate court is gravely concerned about the detective's methods. This is a good case to read in order to see the extensive dialogue between the defendant and detective and how it was inappropriate.

The government obtained a pornography distributor's mailing list which showed many customers were interested in child pornography. Customs agents decided to use this list for a sting operation. A flier was mailed to the people on the list, offering to supply "extremely hard to obtain erotica. Out of the 5700 customers, 300 specifically requested information about child pornography and 160 ordered child pornography. The defendant responded to the initial flier by requesting a general catalogue. The government sent him a letter requesting that he specify his interests. The defendant wrote back and saying he wanted "sex acts with very young participants." In his letter, he explained that he would "be interested in any way we can expedite receipt of your literature and any way we can expedite orders." The government then mailed a child pornography catalogue to the defendant. He ordered two videos, "Her First Sex" and "Wet Dream." The catalog listed the ages of the video performers as eleven years old for "Her First Sex" and twelve and fourteen years old for "Wet Dream", and detailed the sexual acts that the children performed in the two movies. The postal inspector delivered the ordered videos and ten minutes later, government agents executed a search warrant at his home.

Holding:

- Because the government established that the defendant quickly and independently inquired about the availability of child pornography, ordered such material as soon as he could, and placed his order without being pressured to campaign against censorship, the court was convinced that the defendant was independently predisposed to order child pornography through the mail.
- Because the defendant first mentioned child pornography enthusiastically requested it to be sent in an expedited manner, the court ruled that he was not induced by the government.

Discussion: The appellate court went to great lengths to distinguish this fact pattern from Jacobson. The court seemed to be influenced strongly by the way the defendant jumped at the first opportunity to purchase child pornography.

In ruling the Postal Inspector's child pornography sting operation was not entrapment, the court approved of the following aspects of the sting operation:

- The Inspector gave defendant an option to purchase either child pornography or adult pornography.
- The order form check list contained an option for "not interested."
- At each stage of the ordering process, the defendant was given the opportunity to withdraw or state "not interested."
- The defendant signed a disclaimer acknowledging the material was illegal.

A postal inspector placed an ad in an adult magazine under the heading "Bizarre for Sale." The ad read: "Looking for something different, something special, something rare? If so, let me hear from you." It included a return address from the Virgin Islands. After Barber replied, the Postal Inspector sent him a formal letter and a customer interest check list. The form letter said "if exotic erotica isn't your thing, please just return the checklist marked not interested and we will purge your name entirely from our files." Barber checked the block indicating that he was interested in video, color photos sets, and photo magazines. He also checked a preference for female models in both adult and juvenile age ranges. He also checked the various type of sex he was interested in viewing. He also signed a disclaimer acknowledging, among other things, that he was aware some of the material he was ordering was illegal. Upon receiving the check list, the Postal Inspector sent Barber a catalog and price list. This general information pamphlet contained a "notice" stating that Barber had expressed an interest in receiving sexually explicit material featuring teens and/or preteens, and if Barber did not wish to receive such lists in the future, he should notify the company and his name would be deleted from the mailing list. It also said "If you are offended by youthful sex activity, do not order these items." Barber subsequently ordered 11 videos, three photo sets and one magazine, all involving young girls.

This trial court properly refused defendant's request for a jury instruction on entrapment. The appellate court noted:

"The government merely ran an open-ended and vague ad which did not mention child pornography. Barber responded to this ad and was sent a checklist allowing him to indicate his interests. The checklist included child pornography, as well as other types of pornographic materials. Barber could have checked the box indicating he was not interested. He also could have selected

pornographic material that did not involve children. However, he specifically selected child pornography, signing the checklist above a disclaimer indicating that he was an adult and acknowledging the material was illegal. After being sent an order form, he was given another opportunity to state he was not interested. At this point, Barber selected only child pornography. Like the defendant in Osborne, at each stage of the government's operation, Barber was given an opportunity to withdraw. Instead, Barber pressed on until he received the material he requested. Under these facts, the district court correctly found that there was no entrapment as a matter of law."

Finally, the appellate court noted "the law is settled that when a defendant promptly responds to an opportunity to order child pornography in the mail, the defendant is not entitled to a jury instruction on entrapment."

United States v. Osborne, 935 F.2d 32 (4th Cir. 1991):

In ruling the Postal Inspector's child pornography sting operation was not entrapment, the court approved of the following aspects of the sting operation:

- Each successive transaction with the government required an affirmative decision on the defendant's part to continue and at each stage he was provided the opportunity to withdraw.
- The agents never met face to face with the suspect, thus minimizing the coercive effect.

A Postal Inspector placed an ad in a publication entitled "A & B Video." The ad read: "BR-1001 TN. will convert 8 mm to video. Also will buy, sell or trade for bizarre videos (B/D, S/M, Young Girls, etc.) Osborne responded to the ad indicating his interest in purchasing "XXX young girl (teenagers) videos." The Inspector then mailed Osborne a cover letter, questionnaire, and printed sheet identifying available film services. The questionnaire provided an option by which the recipient who was not interested could instruct his name be removed from the mailing list. Osborne completed questionnaire and returned it. Osborne's response indicated he had a special interest in explicit material featuring teenage girls ages 13-17. The Inspector then mailed Osborne a cover letter and video catalog which offered five adult and five child pornographic videos for sale. Osborne subsequently ordered two child pornography videos and a controlled delivery was performed.

In response to the defendant's Due Process claim, the court held that the government need not have reasonable grounds to suspect illegal conduct before offering the opportunity to commit a crime. The court noted that at each stage of the sting, the government provided Osborne with the opportunity to withdraw from his course of action. The court also held that the government's conduct was not so outrageous that it violated Due Process. The court recognized that the government is given some leeway in this area because it is one of the only ways to uncover the trade of child pornography. The court also place weight on the fact that the government never met the defendant face to face, thus minimizing the coercive nature of the sting.

In reference to the claim of entrapment, the court noted "the fact that a defendant has not previously committed any related crime is not proof of lack of predisposition. Rather predisposition is found from the defendant's ready response to the inducement offered. It is sufficient if the defendant is of a frame of mind such that, once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion."

The court noted that "solicitation by itself is not the kind of conduct that would persuade an otherwise innocent person to commit a crime, or that would be 'so inducive to a reasonably firm person as likely to displace means rea.'" Simply placing an ad does not constitute an inducement.

United States v. Gifford, 17 F.3d 462 (1st Cir. 1994):

A postal inspector, John Dunn, using the alias of "Gatewood," sent a letter to appellant in February of 1986 (after culling his name from the mailing list of a company reputed to distribute child pornography). Gatewood wrote that, while abroad, he had "developed what others might consider forbidden interests." He claimed that his "publisher friends" had given him "a few Stateside addresses," presumably including appellant's, and asked if appellant had an interest in pursuing the matter. Appellant responded promptly, specifying a post office box as his return address. His letter stated:

"I don't know who you are, but would like to know anyway. Please let me know who you are (Mr. or Mrs.) and what you would like to correspond about. Let me hear from you, as I don't know anything about your given address!"

Gatewood replied to this letter in June, writing that he had a "very strong appreciation of a varied sexual life," a "love for the much younger generation," and a "decent collection" of films and photographs. He

remarked that he had a group of friends with whom he exchanged such baubles. Appellant answered this missive in early July, inquiring about "Scandinavian publishing material" that might be available for purchase. Gatewood did not reply.

From this point forward, the Postal Inspector continued to contact the defendant through various fictitious suppliers of child pornography, each time suckering the defendant into placing an order, but failing to fill the order. After this cat and mouse game went on for about 4 years, the Postal Inspector finally filled one of the defendant's many orders and government agents arrested him. For a very entertaining and detailed account of this bizarre sting operation, please refer to the case.

The court noted that the entrapment defense is comprised of two elements: (1) government inducement of the accused to engage in criminal conduct, and (2) the accuser's lack of predisposition to engage in such conduct."

Inducement:

Neither mere solicitation nor the creation of opportunities to commit an offense comprises inducement as that term is used in entrapment jurisprudence. Rather, inducement refers to government conduct that persuades a person to turn "from a righteous path to an iniquitous one."

Inducement can be found only when the government has ventured beyond a simple offer, say, by pleading with a defendant, or by using inherently coercive tactics such as threats or promises of reward, or by arm-twisting based on need, sympathy, friendship, or the like.

In ruling that the government's actions did not constitute unlawful inducement, the court found that "a reasonable jury easily could have found that the government's overtures to appellant, though prolonged, amounted to no more than open-ended solicitations, all of which, at least implicitly, invited uninterested recipients to pay no heed. The postal inspectors made no appeal to the "sympathy of an obviously reluctant person." The opposite seems true: the solicitations were unsophisticated, erratic in their timing, and not designed to exert pressure of any sort. By like token, the solicitations held out no promise of tempting rewards (apart from whatever satisfaction could be derived from the erotica itself). Just the reverse: appellant was required to pay in advance to join the

American Sensuality Society and to obtain any material that he deigned to order.”

Lack of Predisposition:

The government is not required to furnish direct evidence that a defendant had been violating (or at least, trying to violate) the law prior to the government’s intercession, rather, ready commission of the criminal act can itself adequately evince an individual’s predisposition.

Just as ready commission of a crime can demonstrate the defendant’s predisposition, so, too, demonstrated readiness to commit a potential crime can suffice to prove disposition.

The government’s failure to fill the early orders for pornography did not undercut the inference of readiness that appellant’s conduct conveyed.

Finally, the court responded to the defendant’s argument that the case should be dismissed on due process grounds based upon outrageous government misconduct by noting the court has never found a sting operation to be so outrageous and the government would be given wide latitude in such matters. The court also noted that fundamental fairness is not compromised in a child pornography case merely because the government supplies the contraband.

DUE PROCESS VIOLATIONS

Due process becomes an issue regardless of the defendant’s predisposition, if the actions of the law enforcement agent are so egregious that those acts themselves violate the defendant’s due process rights under Article 1, Section 9 of the Florida Constitution. A due process determination can be made at any point after the defendant has established inducement. Due process is a rather vague standard and is similar to the definition of pornography: “I’ll know it when I see it.” Basically, it is outrageous government conduct which offends judicial notions of fairness and justice. The Federal courts rarely ever find that police conduct violates due process, but the Florida Supreme Court has specifically rejected this narrow application of the due process defense. State v. Glosson, 462 So.2d 1082 (Fla. 1985) Therefore, federal cases will be of little value in this area.

The majority of cases finding due process violations based upon egregious government conduct fall into three categories.

- The improper use of confidential informants.

- When informants are paid contingency fees based upon their testimony a due process violation will likely occur.
- When informants are given so much leeway by the police that the credibility of the investigation is compromised a due process violation will also occur.

- Illegal government conduct.
 - When the Sheriff's office manufactures its own crack cocaine in order to sell to suspects near schools, a due process violation will occur.

- Excessive government involvement in orchestrating crime.
 - When the government comes up with the criminal plan, trains the suspect how to do it and supplies its instrumentalities, a due process violation will occur.

- Manufacture of false documents by police for use in obtaining confession from defendant.
 - When detectives fabricated laboratory reports from official agencies that showed that source of semen on victim's underwear matched defendant, a due process violation occurred.

Case Law:

State v. Glosson, 462 So.2d 1082 (Fla. 1985)

Agreement to pay informant contingent fee conditioned on his cooperation and testimony in criminal prosecutions violated due process.

The informant received ten percent of all civil forfeitures arising out of successful criminal investigations he completed in Levy County.

Mendel v. State, 30 Fla. L. Weekly D1495 (Fla.4th DCA 2005)

Law enforcement's use of untrained, unmonitored confidential informant (CI) without verifying defendant's prior drug involvement did not constitute outrageous conduct implicating defendant's due process rights, where defendant testified he felt CI was "pushing" him but admitted that motivating factor was his financial situation, defendant's denial of any involvement in drug transactions with CI was disputed by CI's testimony, law enforcement monitored initial discussion between CI and defendant as to potential transaction, defendant had prior felonies, and CI was instructed to approach only persons he had previously had drug business with or who were known to deal in drugs.

Dial v. State, 26 Fla. L. Weekly D2688 (Fla. 4th DCA 2001):

Defendant's due process rights were violated where informant targeted defendant, an innocent person under her supervision, and exploited defendant's weaknesses without any efforts from law enforcement to avoid entrapment or monitor informant's activities.

Informant, defendant's acquaintance and employment supervisor created crime where none existed where informant, knowing that defendant had serious medical condition which caused chronic pain and that defendant had little income and wanted to work extra hours to save money for Christmas, told defendant she had sick friend who needed additional pain medication, insisted that defendant sell hydrocodine tablets despite defendant's offer to give some of her prescribed medication to friend, and set price and arranged sale to undercover officer.

State v. Finno, 643 So.2d 1166 (Fla. 4th DCA 1994)

An informant notified the police that Sheriff Nick Navarro's political rival was plotting to kill him. After months of investigation, the police could not build a case against the Finno brothers, so they decided to build a cases against them for loansharking instead. The Finnos had no prior history of loansharking, but Finno once told an undercover detective that when he was a law enforcement officer he had no real problem with prostitution, loansharking and other such victimless crimes. It was based upon that comment that the reverse sting was initiated.

Where government supplies all of instrumentalities of crime, controls all of its aspects, and teaches intended target how to commit crime for purpose of arresting him, there is no crime at all without government involvement, and conduct of law enforcement is so egregious as to constitute due process violation.

Conduct of law enforcement was so egregious as to violate due process, and defendants could not be prosecuted for loansharking, where idea of loansharking operation originated with police, Department of Law Enforcement provided defendants with money, money was loaned to agents of department, and crime was totally and completely orchestrated by government.

Defendants were not predisposed to commit crime of loansharking which was induced by police, and were entitled to defense of entrapment to loansharking charges as matter of law, where idea of loansharking operation originated with police who had investigated defendants for several months and found no criminal activity, defendant's total ignorance of activity was shown by fact that government informants had to show them how to conduct loansharking operation, and state presented no evidence of predisposition to commit crime.

Nadeau v. State, 683 So.2d 504 (Fla. 4th DCA 1995)

Law enforcement conduct with respect to reverse sting operation involving drugs was so outrageous as to constitute denial of defendant's due process rights; agents and officers did

not actively monitor convicted felon's repeated contacts with defendant nor did they prepare any notes on their contact with convicted felon, defendant had no criminal history, and officers acknowledged that they knew of no drug activity prior to defendant's involvement in reverse sting operation.

But see:

Quesada v. State, 707 So.2d 808 (Fla. 4th DCA 1998)

Using confidential informant to make from twenty to thirty unmonitored telephone calls to defendant in attempt to arrange drug sale to undercover officer was not "outrageous police conduct" and, therefore, did not entrap defendant in violation of due process clause, even though informant faced second-degree murder charge and allegedly had ulterior motive to entice defendant; defendant admitted active involvement in cocaine trade, and informant had no further contact with defendant after undercover officer contacted him.

Repeated calls alone do not necessitate a finding of entrapment.

The fact that the police have no direct knowledge of what was said during CI conversations does not constitute outrageous police conduct.

State v. Williams, 623 So.2d 462 (Fla. 1993):

Illegal manufacture of crack cocaine by law enforcement officials for use in a reverse-sting operation within 1,000 feet of a school constituted governmental misconduct which violated due process clause of the Florida Constitution.

"Therefore, we find that the Broward County Sheriff's Office acted illegally in manufacturing the crack cocaine it used it used in the reverse-sting operation."

"Further, we are alarmed that a significant portion of the crack cocaine manufactured for use in reverse-sting operations was lost."

Note: It is important to note the Supreme Court's concern with the fact that law enforcement produced contraband and then lost it into the community. This same concern could apply to our reverse sting operations. When we copy child pornography to a disk or tape and then deliver it to the suspect, we risk losing control of the contraband. Once we lose control, the suspect can reproduce what we gave him and e-mail it to an infinite number of other people. If this should happen in one of our cases, it may outrage the court enough to evoke a due process issue. It is also important to note the Williams court commented that the illegality of BSO's manufacture of cocaine was in part based upon the fact that there is no statutory authorization to manufacture cocaine. Section 893 sets out provisions for the police to possess and distribute narcotics pursuant to their investigations,

but does not allow them to manufacture it. In a similar vein, there is no statutory authorization to possess, deliver or duplicate child pornography. The obvious defense argument is that creating copies of child pornography to deliver to suspects violates the law and there is no statutory provision authorizing it, thus a due process violation.

State v. Cayward, 552 So.2d 971 (Fla. 2d DCA 1989):

During the interrogation of defendant for sexually assaulting and smothering his five-year-old niece, the detectives fabricated reports from the FDLE and a private testing laboratory purporting to show that the source of semen on the victim's underwear matched the defendant. The ploy induced the defendant to convict. The court held that verbally deceiving a defendant is usually okay, but fabricating documents is outrageous government conduct and a due process violation.

- See Burch v. State, 343 So.2d 831 (Fla. 1977) where detectives gave defendant a pretend polygraph test and then told him the test showed he was lying when he denied the killing. The procedure was found to be proper with no violation of defendant's rights.

U.S. v. Christie, --- F.3d ----, 2010 WL 4026817 (C.A.3 (N.J.))

Attorney General's guidelines on use of confidential informants did not themselves create rights for criminal defendant, and even if guidelines were violated in government's handling of informant who advised them of internet website that featured child pornography and provided them with information thereon, that would not mean, in itself, that user of website convicted of child-pornography-related offenses would be entitled to relief.

Any violation of guidelines promulgated by the Attorney General on utilizing confidential informants, in connection with government's handling of fugitive who, acting through his attorney, provided government with information about internet website that featured password-protected forum where users could access child pornography, did not rise to level of outrageous government conduct, of kind violating the due process rights of site user charged with child-pornography-related offenses; while government benefited from information and site access that this individual provided, it did nothing to create or encourage criminal acts, and there was no evidence that information which it received from fugitive was untrustworthy.