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Criminal Law - Entrapment - If Defendant is Predisposed to Commit the Offense, No Defense of Entrapment Exists, Even if Government Agent Supplies the Contraband

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seeking it[44] and that, without this assurance of confidentiality, patients might repress violent thoughts with tragic consequences.[45] However, the dissent seems to have overlooked the most significant consideration involved—the lives of possible victims that may be saved by the creation of a duty to warn.

The incidence of mental illness in North Dakota is not as widespread as in California. Nevertheless, the import of *Tarasoff* cannot be completely overlooked by psychiatrists in North Dakota.

A question similar to the one posed in *Tarasoff* has been addressed by the federal courts in North Dakota. In *Merchants National Bank & Trust Co. v. United States*,[46] a psychologist treating a dangerous mental patient at a veteran's hospital was held to be negligent in failing to bring evidence of the patient's mental condition to the attention of the hospital personnel.[47] With such notice they could have evaluated the evidence and presumably could have refused to allow the patient to leave, thus possibly preventing the murder that the patient committed shortly after his departure from the hospital. While the court did not specifically rely upon a duty to warn for its finding of liability, a fair reading of this decision does indicate a possible basis for future rulings on this issue.

Violence is an ever-increasing and tragic consequence of mental illness. Society has a right to demand protection from this violence and the mentally ill have a concomitant right to psychotherapeutic treatment. The therapist, however, is caught in the middle of this struggle of rights. Since he is involved with potentially dangerous individuals and is given the power to detain those suspected of being dangerous,[48] the public may tend to perceive him as an agent of society whose duty is to protect society from the hidden danger confided to him by his patients. The therapist is similarly seen as a confidant by the patient in whom he can confide his deepest secrets. By imposing a duty to warn on the therapist only when the patient's confidences reveal a preventable danger to a third person, the California Supreme Court has provided a fair and equitable solution to the therapist's dilemma.

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CRIMINAL LAW—ENTRAPMENT—IF DEFENDANT IS PREDISPOSED TO COMMIT THE OFFENSE, NO DEFENSE OF ENTRAPMENT EXISTS, EVEN IF GOVERNMENT AGENT SUPPLIES THE CONTRABAND.

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44. *Id.* at 459-60, 551 P.2d at 359-60, 131 Cal. Rptr. at 39-40.
45. *Id.* at 459, 551 P.2d at 359, 131 Cal. Rptr. at 39. *See also In re* Lifschutz, 2 Cal. 3d 415, 426, 467 P.2d 557, 564, 85 Cal. Rptr. 829, 836 (1970).
46. 272 F. Supp. 409 (D.N.D. 1967).
47. *Id.* at 418.
48. N.D. CENT. CODE § 25-03-08 (1970).

Charles Hampton was convicted in the United States District Court for the Eastern District of Missouri for distribution of heroin.[1] The heroin was allegedly[2] supplied to defendant by a paid government informer, and defendant subsequently sold the drug to the authorities pursuant to a plan arranged by the informant. The United States Court of Appeals for the Eighth Circuit affirmed the conviction,[3] denying defendant's claim that the due process clause of the fifth amendment forbid the conviction if the contraband had been supplied by the government.[4] The United States Supreme Court affirmed.[5] *Hampton v. United States,* ——U.S.——, 96 S. Ct. 1646 (1976).

"Entrapment, as it is now recognized in the federal system, is not a matter of statutory prescription, nor has it ever been. . . ."[6] The origin of the entrapment doctrine[7] and its current status derives from three opinions of the United States Supreme Court: *Sorrells v. United States,*[8] *Sherman v. United States,*[9] and *United States v. Russell.*[10] Although it is generally agreed that entrapment

1. Hampton's conviction was based upon a violation of 21 U.S.C. § 841(a)(1) (1972).

2. Although the facts concerning who had provided the heroin were disputed, the court of appeals did consider defendant's "entrapment instruction" on the merits. The requested instruction provided in part:

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

Hampton v. United States, 96 S. Ct. 1646, 1648 (1976).

3. United States v. Hampton, 507 F.2d 832, 833 (1974). Judge Heaney dissented on the grounds that entrapment should be established as a matter of law to a charge of possessing contraband, where such contraband was supplied by a government agent. *Id.* at 836-37.

4. In view of the Court's earlier holdings in Sorrells v. United States, 287 U.S. 435 (1932), Sherman v. United States, 356 U.S. 369 (1958), and United States v. Russell, 411 U.S. 423 (1973) defendant did not request a standard entrapment instruction, but instead contended that the policy of the law forbade conviction. United States v. Hampton, 507 F.2d 832, 833 (8th Cir. 1974). The court of appeals rejected that argument, since it believed that *Russell* foreclosed it from considering any theory of entrapment founded on something other than defendant's lack of predisposition, *id.* at 835, and since it was conceded by defendant's counsel that he was predisposed to commit the offense, he was entitled to no other entrapment instruction, *id.* at 836 & n.5.

5. Justice Rehnquist wrote for the plurality of the Court and was joined by Chief Justice Burger and Justice White. Justice Rehnquist also wrote for the majority in United States v. Russell, 411 U.S. 423 (1971), and was there jointed by Justices Burger, White, Blackmun, and Powell. Justice Powell wrote a concurring opinion in *Hampton* in which Justice Blackmun joined. Justice Brennan filed a dissenting opinion in *Hampton* in which Justices Stewart and Marshall joined. Justices Stewart, Brennan, and Marshall had also dissented in *Russell,* as did Justice Douglas, who retired in November 1975. Justice Douglas was replaced by Justice Stevens, who took no part in the consideration or decision of *Hampton.*

6. 1 NATIONAL COMMISSION ON THE REFORM OF THE FEDERAL CRIMINAL LAWS, WORKING PAPERS, 303 (1970) [hereinafter cited as WORKING PAPERS].

7. It was not until 1915 that a federal court gave recognition to the entrapment doctrine. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). Although the United States Supreme Court first applied the entrapment doctrine in Sorrells v. United States, 287 U.S. 435 (1932), it had earlier considered the entrapment defense in Grimm v. United States, 156 U.S. 604 (1895), and Casey v. United States, 276 U.S. 413 (1928), but failed to find government inducement in either case. For a study on the early developments of the doctrine of entrapment, *see* Murchison, *The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine,* 47 MISS. L.J. 211 (1976).

8. 287 U.S. 435 (1932).

9. 356 U.S. 369 (1958).

10. 411 U.S. 423 (1973).

includes the "planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. . . ,"[11] the majority and minority[12] opinions of the three leading cases have disagreed on whether the defendant must be an "innocent" person or whether his predisposition to commit the crime is immaterial in view of the police conduct in question.

In *Sorrells v. United States*,[13] defendant was convicted for possessing and selling liquor during Prohibition.[14] A government informer had made repeated attempts upon defendant to procure liquor, "taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War."[15] The Supreme Court reversed the conviction, finding "that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen . . . otherwise innocent. . . ."[16] The Court thus focused on the character of the particular defendant and established what has become generally known as the subjective test.[17] The Court in *Sorrells* found the entrapment defense to be based on an "implied exception" in the statute, stating: "[T]he question is whether the defense . . . takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose."[18] Thus, an entrapped person not being covered by the statute, was not guilty of the crime in question, and his entrapment defense was raised by a not-guilty plea.[19] Furthermore, under this approach, the defendant's past criminal record becomes important since the jury is to assess the defendant's pre-disposition to commit the crime.[20]

Justice Roberts, concurring in the result in *Sorrells*, advanced

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11. Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., concurring).
12. The minority approach was first articulated by Justice Roberts in *Sorrells*. *Id.* at 453-59. It was endorsed by Justice Frankfurter's concurring opinion in Sherman v. United States, 356 U.S. 369 (1958) and Justice Stewart's dissent in United States v. Russell, 411 U.S. 423 (1973).
13. 287 U.S. 435 (1932).
14. *Id.* at 438-39.
15. *Id.* at 441.
16. *Id.*
17. In differentiating the subjective and objective tests it has been said that:
> The words 'subjective' and 'objective' are commonly used labels for the two standard formulations of the entrapment doctrine. The words are meant to refer to the circumstance that the 'objective' approach considers whether the conduct of police agents would have tempted a hypothetical person, while the 'subjective' approach considers whether the defendant himself was led astray by the government's conduct.

Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 165n.2 (1976).
18. Sorrells v. United States, 287 U.S. 435, 452 (1932).
19. *Id.*
20. The Court stated:
> [I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.

Id. at 451.

what has become generally known as the objective test of entrapment.[21] The objective approach emphasizes police conduct[22] and "[t]he applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents."[23] Justice Roberts felt that the entrapment defense was not based upon an implied exception to the statute,[24] but "rather on a fundamental rule of public policy."[25] Under this approach, the entrapment defense is raised by a motion to dismiss and the court, rather than the jury, decides the question of the propriety of the law enforcement agents' behavior.[26]

The majority approach was affirmed in *Sherman v. United States*.[27] The court reasoned that to adopt the objective approach espoused by Justice Roberts would "entail both overruling a leading decision [*Sorrells*] of this court and brushing aside the possibility that we would be creating more problems than we would supposedly be solving."[28]

Due to the holdings in *Sorrells* and *Sherman*, the distinction between the majority and minority views seemed to be largely of academic interest.[29] The Court, however, reconsidered the theory of

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21. *Id.* at 459. Justice Roberts was also joined by Justices Brandeis and Stone.

22. Under the objective approach, the question is asked:

> [W]as that conduct, objectively considered, such that it involved a substantial risk of inducing persons to engage in forbidden conduct who would not ordinarily engage in that sort of conduct?

W. LAFAVE & A. SCOTT, CRIMINAL LAW 371 (1972).

23. Sorrells v. United States, 287 U.S. 435, 459 (1932).

24. Justice Roberts stated:

> This amounts to saying that one who with full intent commits the act defined by law as an offense is nevertheless by virtue of the unspoken and implied mandate of the statute to be adjudged not guilty by reason of someone's else [sic] improper conduct.

Id. at 456.

25. *Id.* at 457. Justice Frankfurter concurring in Sherman v. United States, 356 U.S. 369 (1958), stated:

> The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the government to bring about the conviction cannot be countenanced.

Id. at 380.

26. "It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." Sorrells v. United States, 287 U.S. 435, 457 (1932).

27. 356 U.S. 369 (1958). The facts in *Sorrells* and *Sherman* were very similar. In *Sherman*, defendant was convicted for selling narcotics to a government informer. While defendant and informer were both being treated for narcotics addiction, the informer repeatedly asked defendant to supply him with drugs as he was not responding to treatment. The Supreme Court reversed the conviction emphasizing the continuous pleadings by the informant and the fact that defendant had been "induced" to return to the use of narcotics. Sherman v. United States, 356 U.S. 369, 373, 376 (1958).

28. *Id.* at 377-78.

29. In both *Sorrells* and *Sherman*, the minority view was set forth in concurring opinions that entrapment had been proved. Justice Frankfurter, concurring in *Sherman*, felt that Justice Robert's approach should be adopted or at least considered by the majority.

> The fact that since the *Sorrells* case the lower courts have either ignored its theory and continued to rest decisions on the narrow facts of each case, or have failed after penetrating effort to define a satisfactory generalization . . . is proof that the prevailing theory of the *Sorrells* case ought not to be deemed the last word.

Sherman v. United States, 356 U.S. 369, 379 (1958). Due to the controversy involved, this

entrapment in *United States v. Russell*[30] on the contention that the entrapment defense should rest on constitutional grounds.

In *Russell*, defendant was convicted of the manufacture and distribution of methamphetamine, more commonly called "speed".[31] A government undercover agent had provided defendant with an essential ingredient[32] in the manufacture of the drug. Defendant contended that the Court should adopt a rigid constitutional rule,[33] "that would preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent 'supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels.' "[34] The Court declined to adopt such a rule, emphasizing that the ingredient provided to defendant was legal and that defendant had continued making the drug after the ingredient had been depleted.[35] However, the Court added this caveat: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[36]

Thus, the "predisposition" approach apparently controlled in *Russell*, since defendant did not fit within his own proposed rule. The Court left open for a case by case adjudication the question of what types of law enforcement conduct might be sufficiently outrageous to bar prosecution,[37] and several courts responded to this cue.[38]

In *United States v. Bueno*,[39] the Fifth Circuit found entrapment

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area of the law has sparked a wealth of material on the subject. The overwhelming majority of commentators have favored the minority approach. *See* Park, *supra* note 17, at 167n.13. The fact that scholarly opinion favors the objective test is reflected in United States v. Russell, 411 U.S. 423 (1973). In *Russell* the majority opinion relied solely upon case law, *id.* at 428-36, whereas the dissenting opinion claimed the support of a majority of commentators, *id.* at 445n.3.

30. 411 U.S. 423 (1973).

31. *Id.* at 424.

32. *Id.* at 426. Although the ingredient was legally obtainable, it was very difficult to obtain.

33. Defendant conceded that he may have harbored a predisposition to commit the offense, but contended that the government was so involved in the manufacture of the drug that a criminal prosecution violated the fundamental principles of due process. *Id.* at 430.

34. *Id.* at 431.

35. *Id.* at 431-32.

36. *Id.*

37. *See* Peitioner's Brief for Certiorari at 5, United States v. Hampton, 96 S. Ct. 1646 (1976).

38. *See, e.g.*, United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); United States v. Dillett, 254 F. Supp. 980 (S.D.N.Y. 1966); State v. Bocelli, 105 Ariz. 405, 467 P.2d 740 (1970); State v. Powell, ——N.C. App.——, 181 S.E.2d 754 (1971).
On the basis of these cases defendant in *Hampton* argued:

> [B]oth prior and subsequent to *Russell*, there has been a growing body of authority that universally condemned one particular law enforcement practice—that of supplying the very contraband to the defendant that was the subject of the offense with which he was charged.

Petitioner's Brief for Certiorari at 5, United States v. Hampton, 96 S. Ct. 1646 (1976).

39. 447 F.2d 903 (5th Cir. 1971).

as a matter of law, regardless of predisposition, when a government informer furnished the drugs to defendant for sale to a government agent.[40] The Third Circuit agreed and followed the Fifth Circuit approach in *United States v. West*.[41]

However, most circuit courts of appeal that have considered the matter have concluded that the mere supplying of contraband does not constitute entrapment or otherwise bar the defendant's prosecution.[42]

The Eighth Circuit chose this latter approach in *Hampton v. United States*[43] and the Supreme Court granted certiorari[44] to resolve the conflict among the circuits. The Court, in affirming the appellate court's opinion, appeared to enunicate a *per se* rule:[45] "[In *Russell*] [w]e ruled out the possibility that the defense of entrapment could *ever* be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established."[46] The Court further held: "The remedy of the criminal defendant with respect to the acts of government agents, which . . . are encouraged by him, lies *solely* in the defense of entrapment."[47] The Court rejected defendant's argument involving a violation of his due process rights, finding that defendant's case differed from *Russell* only in degree, not in kind.[48] Although the government played a more significant role in *Hampton* by supplying the contraband, rather than just a legal ingredient as in *Russell*, defendant conceded that he was predisposed to commit the crime for which he was convicted, and this was found to render the defense of entrapment unavailable to him.[49]

Justice Brennan, in dissent, found that *Hampton* was distinguishable from *Russell* on two grounds: The chemical supplied in *Russell* was not contraband, and the defendant in *Russell* was an active participant in the enterprise both before and after the government agent appeared on the scene.[50] Justice Brennan felt that entrapment under the subjective approach was only one possible defense[51] and would

40. The Fifth Circuit held that where the government had provided the contraband, there was entrapment as a matter of law. *Id.* at 905-06. The Fifth Circuit has also held that *Bueno* was unaffected by *Russell*. *See, e.g.*, United States v. Mosely, 496 F.2d 1012 (5th Cir. 1974); United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974).

41. 511 F.2d 1083 (3d Cir. 1975).

42. *See, e.g.*, United States v. Spivey, 508 F.2d 146 (10th Cir. 1975); United States v. McGrath, 494 F.2d 562 (7th Cir. 1974); United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973); United States v. Johnson, 484 F.2d 165 (9th Cir. 1973).

43. 507 F.2d 832 (8th Cir. 1974).

44. 420 U.S. 1003 (1975).

45. Although concurring in the result, Justice Powell felt that *Russell* controlled and there was no need to enunciate such a rule. Hampton v. United States, 96 S. Ct. 1646, 1650 (1976).

46. *Id.* at 1649 (emphasis added).

47. *Id.* (emphasis added).

48. *Id.*

49. *Id.*

50. *Id.* at 1653.

51. *Id.* at 1654. Justice Brennan agreed with the suggestion in Justice Powell's con-

have held that "conviction is barred as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by a Government agent."[52]

The test of entrapment in North Dakota is the objective or minority approach. The North Dakota statute[53] provides:

> Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.[54]

Thus, in North Dakota "[t]he question is not whether the agent's behavior actually caused the specific individual to commit the offense but whether such behavior would be likely to cause a 'normally law abiding person' to commit it."[55] The National Commission on Reform of Federal Criminal Laws has stated that under the objective approach to entrapment, "[t]he defense is treated primarily as a curb upon improper law enforcement techniques, to to which the predisposition of the particular defendant is irrelevant."[56]

The plurality's holding in *Hampton* appears to extend the line of entrapment decisions to the following proposition: "[T]he concept of fundamental fairness inherent in the guarantee of due process would *never* prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances."[57] Although the plurality reasoned that *Hampton* was governed by the *Russell* decision, their opinion extended permissible police behavior beyond the boundaries of *Russell*. *Russell* was based on a limited fact situation and was further clouded by the Court's caveat concerning due process.[58] The plurality in *Hampton* re-affirmed the "pre-disposition" approach and, in so doing, overturned a substantial number of federal decisions.[59]

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curring opinion that, where police conduct is outrageous, a defendant can either argue that there was a violaton of due process or appeal to the Court's supervisory power to bar the conviction. *Id.* at 1651.

52. *Id.* at 1654. This is the Fifth Circuit approach, which was announced in United States v. Bueno, 447 F.2d 903 (5th Cir. 1971).

53. N.D. CENT. CODE § 12.1-05-11 (1976). The new criminal code became effective on July 1, 1975. Although the old code did not statutorily authorize entrapment, there is a North Dakota Supreme Court decision that has recognized it. State v. Currie, 13 N.D. 655, 102 N.W. 875 (1905).

54. N.D. CENT. CODE § 12.1-05-11(2) (1976).

55. *A Hornbook to the North Dakota Criminal Code*, 50 N.D.L. REV. 639, 680-81 *quoting* N.D. CENT. CODE § 12.1-05-11(2) (1976).

56. NATIONAL COMMISSION ON THE REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT, § 702 Comment (1971).

57. Hampton v. United States, 96 S. Ct. 1646, 1651 (1976), (Powell, J. concurring) (emphasis added).

58. *See* text accompanying note 36 *supra*.

59. *See* text accompanying notes 38-42 *supra*.

The effect of the decision in *Hampton* may be to hasten legislatures[60] into adopting entrapment statutes.[61] The advantage of an entrapment statute is that it "can organize and define the subject of all entrapment without regard to the specific factual circumstances that often restrict the generality of a judicial opinion."[62]

The controversy concerning entrapment which began with the Court's opinion in *Sorrells* is still prevelant today. Although it is generally agreed that "criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer,"[63] there is still dispute as to when stealth and strategy become the "manufacturing of crime."[64]

BRUCE QUICK

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—COURT AUTHORIZED, UNANNOUNCED, BREAKING AND ENTERING TO INSTALL ELECTRONIC SURVEILLANCE DEVICE FOUND TO BE CONSTITUTIONAL.

Pursuant to court authorization,[1] federal officers made an unannounced forcible intrusion into Salvatore Agrusa's place of business,[2] while it was vacant and closed to the public. The federal officers entered for the purpose of installing an electronic surveillance device. Upon termination of the court authorized surveillance,[3] the officers again forcibly entered the vacant premises, this time to remove the device. The evidence secured in this fashion was subsequently admitted at trial and aided in Agrusa's conviction for violation of the federal firearms statute.[4] On appeal, Agrusa contended

60. The Court noted in *United States v. Russell*, 411 U.S. 423 (1973) that "since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." *Id.* at 433.

61. Despite support from the commentators, only a few states have adopted the minority approach. *See* Park, *supra* note 17, at 167n.3.

62. WORKING PAPERS, *supra* note 6, at 304.

63. Sherman v. United States, 356 U.S. 369, 372 (1958).

64. *Id.*

1. The government's application for authorization to conduct electronic surveillance was submitted to the Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri on February 28, 1974.

2. Agrusa operated an auto body shop in Independence, Missouri.

3. The authorization was issued by Judge Hunter the same day as applied for, February 28, 1974. The authorization was issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1971).

4. 18 U.S.C. § 922(a)(1) (1971), dealing in firearms without a license, however, is not one of the offenses for which the court may authorize electronic interception of oral communications under 18 U.S.C. § 2516 (1971). The application for authorization to conduct electronic surveillance was made stating that probable cause existed that Agrusa was, in fact, in violation of 18 U.S.C. §§ 659, 2315, and 371 (1971) for which 18 U.S.C. § 2516 (1971) authorized the admission of evidence obtained through court authorized electronic surveillance. The government obtained a supplemental order, required under 18 U.S.C. § 2517 (1971), which authorized the use of the intercepted communications before the grand