1980

State of Utah v. Robert James Salmon And Tommy Lee Benwel : Reply To Brief of Respondent

Utah Supreme Court

THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 16591 (and No. 16723)
ROBERT JAMES SALMON and TOMMY LEE BENWELL,	:	
Defendants-Appellants	:	

REPLY TO BRIEF OF RESPONDENT

ROBERT J. SCHUMACHER and
SHELDEN R. CARTER,
Utah County Legal Defender Assoc.
107 East 100 South, Room 29
Provo, Utah 84601

Attorneys for Appellants

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 16591 (and No. 16723)
ROBERT JAMES SALMON and TOMMY LEE BENWELL,	:	
Defendants-Appellants	:	

REPLY TO BRIEF OF RESPONDENT

ROBERT J. SCHUMACHER and
SHELDEN R. CARTER,
Utah County Legal Defender Assoc.
107 East 100 South, Room 29
Provo, Utah 84601

Attorneys for Appellants

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

TABLE OF CONTENTS

CASES CITED

STATUTE CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 16591
ROBERT JAMES SALMON and TOMMY LEE BENWELL,	:	(and No. 16723)
Defendants-Appellants.	:	

REPLY TO BRIEF OF RESPONDENT

ARGUMENT

POINT I.

TO PROVE ENTRAPMENT, IT IS NOT NECESSARY FOR THE DEFENDANT TO ALLEGE THAT THE ENTRAPPING PARTY WAS AN "AGENT" OF THE POLICE.

It is clear that under any circumstances and under any test of entrapment currently in use in the United States, there is no entrapment or in other words no such defense against prosecution and conviction, when the party who dealt with the accused was a private party acting at his own initiative and not prompted or encouraged by the police. The problem arises, however, that it is unclear what degree of relationship between the government and such an individual is required before the

individual's acts are imputed to the government for the purpose of the entrapment defense. The respondent points out that there was evidence at the trial of the appellant which indicated that the informer in this case was not a "government agent" and "did not work for" the police. Respondent alleges that therefore, since the informer was not a police "agent," there could be no entrapment under either the subjective or objective test. Respondent's Brief, p.7.

For the purpose of this case, however, Section 76-2-303(1) is controlling on this issue. Though that section does not define the necessary relationship between the police and their informer, it does state that entrapment arises when the person who deals with the suspect is "a law enforcement officer or a person directed by or acting in co-operation with the officer . . ." For a person to act in cooperation with police, it is not necessary that the person be an "agent" of the police, in the sense that that word is often used. Such a person need not be acting under the direction of the police, need not be paid by the police, and need not be "working for" the police, but merely acting in cooperation with them.

It is true that the Court in State v. Taylor, 599 P.2d 496 (Utah 1979) did use the term, "agent." That would be an appropriate word in that case, since the

informer in that case was a paid employee of the government, an undercover police agent receiving direction from and compensation from the police. However, the use of that term must be qualified by the understanding that it can be used by one person to refer to someone who is a compensated employee or representative of the government, and by another person to mean someone who is merely acting in cooperation with the government for the purpose of entrapping a criminal. In this case, the evidence was sufficient to establish that the informer, Mr. Flowers, was not only acting in cooperation with the police but to a certain extent was following their directions, and was therefore an entrapping "person" for the purpose of the entrapment defense.

POINT II.

ON THIS APPEAL IT IS PROPER FOR THE COURT TO APPLY THE "OBJECTIVE STANDARD" OF ENTRAPMENT, AS EXPRESSED IN SECTION 76-2-303(1) U.C.A., TO DETERMINE WHETHER IT WAS ESTABLISHED BEYOND A REASONABLE DOUBT THAT THE APPELLANT WAS NOT ENTRAPPED.

The Respondent, in its brief, does not take issue with the manner in which the Appellant describes the posture of this case before the Utah Supreme Court. As the appellant stated in his brief, the proper question on appeal is whether it was proved beyond a reasonable doubt that the appellant was not entrapped. According to the cases cited in Appellant's brief, if it is shown that, as a matter of law, the only reasonable view of the evidence is that the

conduct of the police was such as to raise a reasonable doubt that the appellant was entrapped, then the appellant is entitled to a reversal here. See State v. Hansen, 588 P.2d 164 (Utah 1978).

The point of divergence between the appellant's and respondent's arguments is, rather, what standard of entrapment is properly applicable in this case. As both parties agree, Section 76-2-303 of the Criminal Code had never been interpreted to require the application of the "objective test" of entrapment until August 7, 1979, the date of the Taylor decision. State v. Taylor, 599 P.2d 496 (Utah 1979). Prior to that date, the Utah Supreme Court had interpreted the language of Section 76-2-303 to embody the "subjective test." Appellant in this case was arrested, tried, and convicted before the filing of the Taylor decision, and the respondent therefore argues that the ruling in Taylor should not be applied retroactively to the appellant's conviction and that the subjective test should therefore be applied by the Utah Supreme Court at this level of appeal. Appellant submits that this reading of the law is erroneous because the Taylor decision is properly applicable to all cases pending on direct appeal at the time the decision was filed, including this case. Further, even if the Taylor decision itself is not retroactive to that extent, the appellant is not precluded from making the same arguments that were made by the appellant in Taylor

and obtaining the same result without direct reliance upon the ruling of the Court in Taylor.

Concerning the retroactivity of the Taylor decision, it should first be made clear that there is no statutory or constitutional constraint upon the court to make its decision either retroactive or prospective only. From the cases, it appears that whenever the court judicially adopts a new interpretation of a constitution or construction of a statute, it is free to make the application of that new approach prospective only or retroactive to whatever extent it chooses. Johnson v. New Jersey, 384 U.S. 719, 733, 86 S.Ct. 1772, 1781, 16 L.Ed.2d 882 (1966).

The general rule, however, is that in subsequent cases a court, trial or appellate, should apply the law in existence at the time that that court itself considers the case. The rule dates back to the decision of United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801). In that case, Chief Justice Marshall stated:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied . . . It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment,

> rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside. Id. at 110.

The rule of United States v. Schooner Peggy continues to be the general rule accepted in the courts today. Bradley v. School Board of City of Richmond, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974).

The question then becomes, in what cases or circumstances should the courts deviate from the rule that each court should apply the law as it exists at the time its own decision is rendered. The Respondent argues that the Supreme Court cases of Johnson v. New Jersey, supra., Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed 2d 601, (1965), and Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) should be controlling here and require that the Taylor decision be applied prospectively only, with the result that this appellant should not have the benefit of that decision because his conviction occurred prior to its filing.

Johnson, Linkletter, and Desist, however, are cases which illustrate a specific and narrow exception from the general rule, which is not applicable to the present case. In Linkletter, the court considered the narrow question whether the exclusionary rule of Mapp, requiring the exclusion of evidence obtained in a search or seizure which violates the Fourth Amendment, should be applied

retrospectively to cases finally decided prior to the decision in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). See Linkletter v. Walker, 381 U.S. at 619, 85 S.Ct. at 1732. The Court recognized that a purely prospective treatment would not even allow the application of a new rule to the parties before the court, since even the immediate parties are always tried before the filing of the rule-setting appellate decision. Therefore, there will generally be some retroactive application, i.e, to the immediate parties to an appeal, in every case. To determine to what further extent a new rule should be retroactively applied, the Court considered the history of the retroactivity rules in the United States and came to this conclusion, based upon the chronological relationships of certain events:

> Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, United States v. Schooner Peggy, supra, and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations * * * and particular conduct * * * or rights claimed to have become vested, or status of prior determinations deemed to have finality"; and of "public policy in the light of the nature both of the statute and of its previous application." Chicot County Drainage District v. Baxter State Bank, 308 U.S., at 374, 60 S.Ct. at 319. Quoted at Linkletter v. Walker, 381 U.S. at 627, 85 S.Ct. at 1736. [Emphasis added].

Linkletter thus made a clear distinction between cases which are pending on direct review at the time of the

rule-changing decision and cases which have been finally decided and which are sought to be collaterally reversed. The Court indeed took a rather absolute stance toward cases pending on direct review, requiring that new rules and interpretations be applied to such cases, while as to cases in which the new rule is sought to be collaterally applied, whether such application is possible depends upon a number of policy questions.

The subsequent discussion in the opinion, dealing with the particular policy questions to be asked, pertains only to petitioners on collateral attack. The petitioner in Linkletter was a habeas corpus petitioner who sought to have his conviction overturned on the basis of Mapp. His conviction had become final through a judgment of the Louisiana Supreme Court, in February, 1960, while Mapp was announced in June, 1961. Though the Court recognized the general rule of retroactivity, and cited cases in which new rules had been retroactively applied even to judgments finalized before the promulgation of the rule, it felt that under the particular circumstances of the case, retroactive application was neither required by the Constitution nor expedient in terms of policy or justice. But again, its decision was limited to the case in which a final judgment is collaterally attacked on the basis of a rule promulgated after the final judgment:

> All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it. [Emphasis added] 381 U.S. at 639-640, 85 S.Ct. at 1743.

The same circumstances appear in Johnson v. New Jersey, supra. There, a criminal defendant petitioned to the United States Supreme Court for post-conviction relief after the New Jersey Supreme Court had made his conviction final in 1960. The petitioner sought to have his conviction overturned on the grounds that his confession had been used in violation of the rules later promulgated by Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, in 1964 and 1966 respectively. In citing the Linkletter case, the Court recognized the narrow limitation of that decision to collateral attacks and its non-application to direct appeals pending at the time of Mapp:

> Our holdings in Linkletter and Tehan were necessarily limited to convictions which had become final by the time Mapp and Griffin were rendered. Decisions prior to Linkletter and Tehan had already established without discussion that Mapp and Griffin applied to cases still on direct appeal at the time they were announced. 384 U.S. at 732, 86 S.Ct. at 1780.

The Court then concluded that for policy reasons, the Miranda and Escobedo decisions could not be invoked retroactively either by petitioners on collateral review or by appellants whose direct appeals were pending at the times of those decisions. The latter ruling was dictum in the

case, however, since the facts dealt only with a collateral petitioner, as indeed the Court recognized by stating:

> Of course, States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision. 384 U.S. at 733, 86 S.Ct. at 1781.

Desist v. United States, supra., is a much more difficult case to square with the general rule of United States v. Schooner Peggy, supra. Desist agreed with Johnson on the proposition that new constitutional rules affecting criminal procedure are not required by the Constitution nor by statute to be applied either prospectively or retrospectively, even in regard to cases currently pending on direct review. On the grounds of policy considerations, the Court therefore held that the exclusionary rule of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) should not be available even to appellants whose cases were pending on direct review at the time Katz was decided. Since the appellant in Desist was in fact an appellant whose case was pending on review at the time of the Katz decision, the holding of Desist was a clear departure from the general rule of Schooner Peggy and not merely dictum as in Johnson.

However, the Desist case points out additional reasons why the Linkletter, Johnson, and Desist decisions are merely exceptional cases and not relevant to the questions

in this case. First, all three cases dealt with constitutional rules for the exclusion of evidence. In determining whether they should be applied to cases pending on appeal at the time the rules were promulgated, the primary factor used by the courts to argue against retroactivity is the simple observation that the purpose of such rules is to deter police conduct, not to exonerate the defendant, and that since the rule is promulgated at a time when past police conduct has already occurred, the retroactive application of the rule would have no deterrent effect. As stated in Desist:

> Foremost among these factors is the purpose to be served by the new constitutional rule. This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule . . . "all of the cases * * * requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. * * * We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved." 381 U.S. at 636, 637, 85 S.Ct. at 1741. Quoted at 394 U.S. 249, 89 S.Ct. at 1033, 1034.

Further, Linkletter, Johnson, and Desist all dealt with the retroactivity or prospectivity of constitutional rules of criminal procedure, and not with statutory provisions defining substantive defenses and burdens of defendants. As pointed out in Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973), different considerations apply when the rules in question affect more than the procedures

to be followed at a criminal trial. In Robinson, a criminal habeas corpus petitioner, whose conviction was final before the filing of the decision of Waller v. Florida 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), sought after the decision in Waller to have his conviction overturned on the grounds that under the double jeopardy rules of Waller, his conviction constituted double jeopardy. The Court examined the Linkletter decision, together with its progeny, and concluded:

> Prior to this Court's 1965 decision in Linkletter v. Walker . . . there would have been less doubt concerning the retroactivity of the Waller holding. For, until that time, both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to limited exceptions . . . . In Linkletter, the Court, declaring that it was charting new ground (381 U.S., at 628 and n. 13, 85 S.Ct., at 1737) held that with respect to new constitutional interpretations involving criminal rights "the Constitution neither prohibits nor requires retro-spective effect." . . . We do not believe that this case readily lends itself to the analysis established in Linkletter . . . . Linkletter . . . dealt with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial. Those procedural rights and methods of conducting trials, however, do not encompass all of the rights found in the first eight Amendments. Guarantees that do not relate to these procedural rules cannot, for retroactivity purposes be lumped conveniently together in terms of analysis. Linkletter indicated, for instance, that only those procedural rules affecting "the very integrity of the factfinding process" would be given retrospective effect . . . In terms of some nonprocedural guarantees, this test is simply not appropriate. * * *

The Court then held that the guarantee against double

jeopardy is sufficiently different from the constitutional rules discussed in Linkletter to be analyzed by different methods. Since the right against double jeopardy has the effect of preventing the trial of the defendant from taking place at all, while the exclusionary rules discussed in Linkletter, Johnson, and Desist are merely procedural rules affecting the admissibility of evidence and the conduct of the trial but not giving rise to affirmative defenses or bars to prosecution, the analysis of Linkletter is not sufficient. Accordingly, the Court held that the general retroactivity rule should apply and found that the double jeopardy rule of Waller applies retroactively to judgments finalized before the rendering of that decision, and to cases pending on appeal at the time of the decision.

Respondent argues that since the entrapment defense has as its purpose the deterrence of illegal police conduct, the rules of Linkletter, Johnson, and Desist should apply here. However, that argument overlooks a number of important factors. While those cases dealt with constitutional rules regulating the procedure of criminal trials and affecting the admissibility of evidence, the entrapment defense is not merely a procedural rule. Proof of entrapment does not result merely in the exclusion of evidence which was obtained as a result of such police conduct. Rather, it results in the complete exoneration of the accused. Entrapment is not a mere procedural or

evidentiary question; it is a matter going to the criminal responsibility of the defendant. Under the subjective theory of entrapment, it could certainly not be said that the purpose of the defense was to deter improper police conduct, since as long as the defendant's predisposition was shown, any police conduct would be tolerated, no matter how unseemly. Although the focus of the objective test is directly on the conduct of the government officials, it still cannot be said that the only purpose of the rule is to deter certain police conduct, since the rule has the effect of exonerating the defendant completely and not merely of excluding tainted evidence. The entrapment defense is of such a nature that the rules and analysis of the cases above are simply not applicable.

Furthermore, even if the Taylor rule were to be analyzed on policy grounds for the purpose of determining whether it should be applied prospectively only, it is clear that the application of that rule to those cases pending on direct review at the time of its filing would work no burden or injustice upon the State. Appellant does not contend that the rule should be available to petitioners whose judgments have been finalized as of the time of the Taylor decision, since that would occasion unnecessary and difficult administrative problems. Rather, the availability of the rule to the appellant here and to others whose

appeals were pending at the time of the Taylor decision merely places their rights on a par with those of the appellant in the Taylor case itself. What justice could there be in allowing one defendant to pursue innovative arguments to a successful result and denying another defendant the benefits of that result merely because his case followed the other by a short period of time?

Cases dealing with the retroactive effect of new entrapment rules have generally held them to be available to defendants whose cases were pending on appeal. In State v. Branam, 390 A.2d 1186 (Sup.Ct.App.Div.N.J. 1978) the Supreme Court of Jew Jersey had previously adopted a rule providing that entrapment is established, regardless of the predisposition of the defendant, whenever the police furnished a defendant with narcotics for the purpose of inducing him to sell it to an undercover agent. The defendant in the instant case had engaged in unlawful acts prior to that decision, but was tried after the decision and sought to have the court instruct the jury in accordance with the new rule. The trial court refused to do so. On appeal, the Court stated:

> . . . the State herein contends that because Talbot was handed down 18 months after the commission of the instant offenses, a charge in conformity with that opinion would give to it an impermissible retroactive effect. The State asserts that Talbot merely sets forth a prophylactic rule designed to deter unacceptable police conduct and that, because the police action here is beyond deterrence,

> retroactive application of the rule would be meaningless. It adds that the police here had also relied in good faith upon the state of the law prior to Talbot which gave no indication that such conduct contravened "fundamental fairness." We disagree. Without enumerating the many considerations which may determine whether or not a decision is to have retroactive effect, and the many decisions concerning them, we determine that the Talbot rule applies to all cases then pending for trial or on direct appeal. 390 A.2d at 1189.

Thus, the court recognized that the new entrapment rule should apply to cases pending on appeal at the time the new rule was promulgated, in spite of the fact that the police conduct in any particular case might be beyond the reach of any deterrent effect that the new rule might have. Since the reasons for making the entrapment rule retroactive to that extent do not depend upon the date of the alleged police conduct but rather upon the date of the promulgation of the new rule, the retroactivity would include cases pending on appeal as well as cases currently awaiting trial.

Similarly, the State of Michigan has held that even though the adoption of a new entrapment rule was to be given prospective application only, such prospective application included application to cases pending on appeal at the time of the promulgation of the new rule. In People v. Turner, 210 N.W.2d 336 (Mich. Sept. 18, 1973), the Supreme Court of Michigan adopted the objective test of entrapment. Later cases established that the decision of that case was to have prospective application only. People v. Auer, 227 N.W.2d 528 (Mich. 1975). Nonetheless, in

People v. Alford, 251 N.W.2d 314 (Ct.App.Mich. 1977), the court held that appellants whose offenses had occurred prior to the date of the Turner decision were entitled to the new rule in all proceedings held after the date of that decision, including the appellate hearings. Such application is literally "prospective," but is also "retroactive" in the sense that cases pending on appeal at the time of the decision would be included, although some of the "proceedings" in any particular case might already have occurred.

Finally, a similar approach was taken in United States v. Hart, 546 F.2d 798 (9th Cir. 1976) in which the Ninth Circuit Court held that the adoption of a new rule allowing a defendant in the federal courts to allege entrapment without first admitting the alleged offense would be applicable to all cases pending on direct appeal at the time the new rule was promulgated.

In light of these cases and arguments, the Appellant concedes that the application of the Taylor rule to this hearing on appeal is not mandated by statute, constitution, or the Taylor opinion itself or by any later decision construing it. However, it is clear that considering these cases and this particular entrapment rule, it is entirely proper for the Utah Supreme Court to give Taylor effect to all cases pending on direct appeal at the time that decision was rendered. Whether such treatment is "prospective" or "retrospective" is merely a matter of semantics, the

important factor being that justice is best served by this Court applying today the rule of law that exists today.

POINT III

EVEN IF TAYLOR IS NOT HELD APPLICABLE TO THIS APPELLATE HEARING, THIS APPELLANT MAY STILL ACHIEVE THE SAME RESULT WITHOUT RELYING UPON THE TAYLOR DECISION.

The Respondent, in its brief, p. 8, stakes its argument on the assumption that the Appellant has sought the retroactive application of Taylor. Appellant, however, did not in his brief rely upon retroactive application of Taylor. Although it is shown above that such application of Taylor to this case would be entirely proper and desirable, the Appellant in his brief recognized that the Taylor opinion was void of language making its application either prospective or retrospective. Appellant therefore sought to rely upon the entrapment statute itself, Section 76-2-303, and other statutes and decisions to show that the applicable standard to be applied is the objective standard of entrapment. In other words, Appellant sought to make the same arguments which the defendant made in the Taylor case itself. As a matter of logic and policy, there is no reason why arguments which were successful in Taylor should not also be successful here, six months after Taylor. Since the adoption of the objective test in Taylor was based primarily upon an enlightened and correct reading of the applicable statutes, and not upon changes in

circumstances or in policy, there is no reason why the Appellant today cannot point to the same statutes and receive the same response as the defendant in Taylor. For that reason, Taylor is cited in the Appellant's brief only for the purpose of referring to the applicable statutes and their relevance to the issue here. See Appellant's Brief, p. 8.

Nor is the Appellant, having not relied in his Brief directly upon the effect of Taylor on this case, which was pending on direct appeal at the time of the Taylor decision, precluded from enjoying the effect of that decision now. For an appellant to have his case fall under the scope of a prior judicial decision, it is not necessary for him to rely directly upon that decision in his brief. The tribunal hearing his appeal is required to apply the law existing at the time of its hearing, to the extent allowable, regardless of whether or not the appellant directly cites such law. In this case, since the Brief of the Respondent and the Appellant's Reply have now adequately discussed the issue of the relevance of Taylor here, the Appellant therefore submits that he is entitled to a judgment based upon the "objective" standard of Section 76-2-303, either by reason of the holding in the Taylor case or by reason of the same arguments made by the defendant in the Taylor case.

POINT IV

APPELLANT'S TESTIMONY CONCERNING THE STATEMENTS OF THE INFORMER WAS RELEVANT AND ADMISSIBLE, REGARDLESS WHETHER THE INFORMER WAS TELLING THE TRUTH WHEN HE MADE SUCH STATEMENTS TO THE APPELLANT.

In Point II of the Brief of the Respondent, there is a hodge-podge of confusing language concerning the nature and admissibility of second-hand statements offered into evidence by a witness at trial. The question arises over the admissibility, and erroneous exclusion by the trial court, of the appellant's testimony concerning statements made to him by the informer which the appellant contends constituted inducement to commit the offense. Respondent contends that if such statements were offered for anything but their truth, they would be irrelevant and excludable, but if offered for their truth, they would still be hearsay and excludable. The Respondent then alleges that unless the statements were true, they could not show that the appellant had been entrapped. His argument creates confusion, however, as to what "statements" he is referring to: the statements of the informer to the appellant, or the testimony of the appellant at trial as to the fact that those statements were made.

For the purpose of clarity, Appellant submits this explanation of the proper rules applicable here. First, whether the statements made by the informer to the Appellant were true or not is irrelevant. If the informer had

said to the Appellant, "Rob that store or I'll kill you," and the Appellant had testified to his making of that statement, it would be irrelevant for the purpose of the entrapment defense whether the informer had spoken truthfully, i.e., whether the informer really would have killed the Appellant for not robbing the store. The importance of the Appellant's testimony would lie, not in the truth of the informer's statement, but in the truthfulness of the Appellant's testimony that such statements were actually made and in the effect that such statements, truthful or not, would have had on the Appellant in causing him to obey the order. Therefore, for the purpose of relevance, it is not necessary for the informer's statement to have been true, but only that it had been made.

Second, it is clear here that the Appellant did not wish to prove that what the informer had stated to him was true, but rather he only wished to testify that the informer had made certain statements which, true or not, had induced the Appellant to commit the offense. If the Appellant's testimony is accepted as true, it proves the making of those statements, and is crucial to the issue of entrapment, regardless whether the informer, when he made the statements, was telling the truth or merely trying to induce the Appellant to commit a crime by telling him lies. Thus, it might be said that the Appellant, when testifying of the informer's statements, was offering his own testimony

as true, i.e, that the statements were made. But at the same time he was not offering the statements themselves as true, i.e., that the informer was being truthful when he tried to induce the appellant to commit the crime.

Finally, then, it is clear that the statements offered by the Appellant in his testimony were not hearsay, since he offered them not to prove their truthfulness but to prove their existence. Whether or not the statements were true is irrelevant, since the crucial factor is the truthfulness of the testimony that they were made and their influence on Appellant's behavior. Thus, contrary to the Respondent's statement, it is not necessary that the informer's statements be true before they would be relevant here, and it is proper that the Appellant could testify to the fact that those statements were made without affirming the truth of those statements.

RESPECTFULLY SUBMITTED,

SHELDEN R. CARTER
Utah County Legal
Defender Assoc.
107 East 100 South
Provo, Utah 84601

ROBERT J. SCHUMACHER
Utah County Legal Defender
Assoc.
107 East 100 South
Provo, Utah 84601

Attorneys for Appellants