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## Ninth Circuit Review—The Use of Hearsay Evidence in Entrapment Cases: *United States v. McClain*

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VI. THE USE OF HEARSAY EVIDENCE IN ENTRAPMENT CASES:  
UNITED STATES V. McCLAIN

A. Introduction

In *United States v. McClain*,<sup>1</sup> the Ninth Circuit held that in entrapment cases hearsay is not admissible to prove the defendant's predisposition to commit the offense charged.<sup>2</sup> The court reasoned that hearsay statements that the defendant was a dealer in narcotics were relevant only for purposes of proving predisposition, not the government agent's good faith, and as such, did not fit any recognized exception. In so holding, the court has seemingly rectified confusion within the Ninth Circuit.

B. The Defense

An agent of the Drug Enforcement Administration, with the assistance of two informants, set up a sale of cocaine with McClain, who was allegedly selling cocaine in kilogram lots. The agent had one of the men flown to San Diego to effect the sale. While the agent negotiated the sale with McClain at the airport, the informant was sent to a nearby parking lot to determine whether the cocaine was in fact in McClain's car. Upon the informant's affirmative report, the parties left the building in which the meeting was held so that the agent could obtain money needed for the sale. On a signal from the informant, McClain was arrested by waiting officers. They then conducted a warrantless search of McClain's car and obtained the cocaine, which formed the basis for the charge of possession of over a kilogram of cocaine with the intent to distribute it.<sup>3</sup> Because the informant's fare to San Diego was paid by

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1. 531 F.2d 431 (9th Cir. 1976).

2. *Id.* at 437.

3. *Id.* at 432. On appeal defendant also asserted the error of the trial court in denying a motion to suppress the cocaine as having been obtained from defendant's car without a warrant in violation of the fourth amendment. The Ninth Circuit affirmed the lower court. There being no dispute that the agent had probable cause to search, the court reached the issue of whether this warrantless search was proper in light of Supreme Court decisions.

In *Carroll v. United States*, 267 U.S. 132 (1925), a warrantless search of an automobile was upheld where there was no arrest of its occupants because of the possibility that the automobile could be driven away before the procurement of a warrant. Similarly, in *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court upheld a search of an automobile which had been impounded at the police station after the arrest of its occupants on the open highway. Because the police had probable cause to search the auto-

the government, the defendant raised the entrapment defense. The trial court submitted the issue to the jury. In order to rebut the defendant's contention, the court allowed the government, over objection by the defendant,<sup>4</sup> to present the testimony of two witnesses that an acquaintance of McClain had reported that McClain was a good source of cocaine. The testimony was permitted on the theory that such hearsay was admissible to show predisposition of the defendant to commit the crime, thereby rebutting the defense of entrapment. On appeal, the Ninth Circuit rejected this theory, but found the error harmless since "the

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mobile on the highway without a warrant, the Court found no greater intrusion upon fourth amendment rights by a later warrantless search at the station.

*McClain* involved a search of the automobile at the place of arrest rather than after impound, but the court nevertheless found the *Chambers* rationale applicable. The defendant was not arrested while driving on a public highway; rather, his automobile was in a nearby parking lot at the time of arrest. The court found this difference immaterial, reasoning that the automobile was in a public place at a late hour of the night within access of possible accomplices who might seek to reach it or the \$35,000 contraband which it contained. *Chambers* did not mandate that the automobile be impounded. Furthermore, the court noted that the officers were unsure as to which of two automobiles described by the informant contained the contraband; thus, the procurement of a warrant before search would not have been possible.

*McClain* did not fit the circumstances or lack thereof which *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) found inappropriate to justify a warrantless search. In that case none of the exigencies of *Carroll* and *Chambers* were found present to justify a search without a warrant. While the court in *McClain* expressed concern over the statement in *Coolidge* suggesting that the possibility that an accomplice could obtain access to and move the automobile was insufficient to invoke the *Carroll* rationale, it nevertheless found the search appropriate both in light of United States Supreme Court cases subsequent to *Coolidge* and lower court decisions which have tended to rebut any limitation by *Coolidge* of *Chambers*.

The last issue reached by the court was whether McClain had been coerced by governmental activity to commit a crime which he was not predisposed to commit. The only evidence found by the court was testimony by McClain that the two informants prior to the contact with the government agent beat him, stopping only when he agreed to commit the offense. 531 F.2d at 438. The court recognized coercion by a government agent could be a form of entrapment, but because it found that the mere payment of travel expenses to an informant did not render his activity governmental, the court determined that this was not the case. The court then stated that coercion by a third party may also establish entrapment which could not be defeated by evidence of predisposition. But the court found the present case did not present such a situation because "[t]he threat must be 'of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done.' In addition, there must be a showing that ' . . . there was no reasonable opportunity to escape.'" *Id. citing* United States v. Gordon, 526 F.2d 406, 407 (9th Cir. 1975).

4. The fact that the defense counsel objected to this testimony is critical in view of this court's decision as to the hearsay. The *McClain* court points out that earlier decisions may have turned on the absence of appropriate objections. 431 F.2d at 437. See text accompanying notes 32 & 33 *infra*.

evidence against McClain [was] so strong, and the hearsay testimony [was] so small a part of the record, as to be harmless."<sup>5</sup>

### C. *Two Theories of Entrapment and the Implications*

The use of subterfuge and deception by law enforcement agencies in undercover work to combat crimes otherwise difficult to detect, such as the manufacture and distribution of narcotics, sex offenses, and gambling, led to the development of the entrapment defense.<sup>6</sup> This was designed to protect against overreaching by law enforcement officials who in effect initiate and help implement the crime committed by the defendant.<sup>7</sup> The defense of entrapment was first recognized by the Supreme Court in *Sorrells v. United States*<sup>8</sup> and subsequently reaffirmed in *Sherman v. United States*.<sup>9</sup> Although the Court has recognized the need for the defense, there has been sharp division over its underlying rationale.

Writing for the majority in *Sorrells*, Chief Justice Hughes reasoned that Congress did not intend to convict persons under a prohibition statute "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . . ."<sup>10</sup> Thus, the majority opinion sought to protect innocent persons from being lured into crime by government agents. On the other hand, protection was not afforded persons predisposed to commit the crime. As Chief Justice Warren said in *Sherman*, "a line must be

5. *United States v. McClain*, 531 F.2d 431, 438 (9th Cir. 1976).

6. See generally DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243 (1967); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. OF PA. L. REV. 245 (1942); Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39; Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 889-993 (1963); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORD. L. REV. 399 (1959).

7. The first cohesive definition of entrapment by the Supreme Court was enunciated by Justice Roberts in his concurring opinion in *Sorrells v. United States*, 287 U.S. 435 (1932):

Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

*Id.* at 454.

8. 287 U.S. 435 (1932). The first circuit court case to deal with entrapment was *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915). The doctrine was well-received and spread quickly. See DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 249 (1967).

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

10. 287 U.S. at 442.

drawn between the trap for the unwary innocent and the trap for the unwary criminal."<sup>11</sup> The government, then, may respond to the defendant's entrapment claim by introducing evidence to prove that the defendant would have committed the offense regardless of the government's inducement. This approach has been labeled the "subjective" test in recognition of the emphasis it places on the defendant's conduct, predisposition, and intent.

In contrast to this is the "objective" test which focuses on the conduct of the government agents rather than the defendant's predisposition. In a separate opinion in *Sorrells*, Justice Roberts rejected the "legislative intent" argument of the majority and based his justification of entrapment on considerations of public policy and judicial integrity—on "the inherent right of the court not to be made the instrument of wrong."<sup>12</sup> Under this theory, "[t]he 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 conviction cannot be countenanced."<sup>13</sup> This "objective" approach does not focus on the defendant's predisposition. Rather, to establish entrapment the defendant must show that the government agents (1) originated the crime and induced the defendant to commit it, and (2) used methods of inducement such as would cause an ordinary person who normally would not commit the crime, to engage in criminal activity.<sup>14</sup>

In *United States v. Russell*<sup>15</sup> and *Hampton v. United States*,<sup>16</sup> the Court has reaffirmed the majority approach of *Sorrells* and *Sherman* in holding that the entrapment defense is not available to the defendant even though the government agent supplies ingredients necessary to manufacture drugs.<sup>17</sup> The Court focused singularly on the intent or

11. 356 U.S. at 372.

12. 287 U.S. at 456 (Roberts, J., concurring).

13. *Sherman v. United States*, 356 U.S. 369, 380 (Frankfurter, J., concurring).

14. See W. LAFAYE & A. SCOTT, JR., *CRIMINAL LAW* § 48, at 371 (1972).

15. 411 U.S. 423 (1973).

16. 96 S. Ct. 1646 (1976).

17. There existed a basic factual difference between *United States v. Russell*, 411 U.S. 423 (1973), and *Hampton v. United States*, 96 S. Ct. 1646 (1976):

In *Russell* the ingredient supplied by the government agent was a legal drug which the defendants demonstrably could have obtained from other sources besides the Government. Here the drug which the government informant allegedly supplied to petitioner was both illegal and constituted the *corpus delicti* for the sale of which the petitioner was convicted. The Government obviously played a more significant role in enabling petitioner to sell contraband in this case than it did in *Russell*.

*Hampton v. United States*, 96 S. Ct. 1646, 1649 (1976). Hampton's counsel had conceded on appeal that the defendant was predisposed to commit the crime. *United States v. Hampton*, 507 F.2d 832, 836 n.5 (8th Cir. 1974). Therefore, Hampton's defense of

predisposition of the defendant. The objective test, which looks to the conduct of the government officials, was explicitly rejected whenever the predisposition of the defendant to commit the crime was established.<sup>18</sup>

The Ninth Circuit has adopted a slight variation of the standard enunciated in *Russell*. The courts have conducted separate inquiries into whether the government induced the defendant to commit the offense alleged, and whether the defendant was predisposed to commit the crime.<sup>19</sup> However, it is clear that the Ninth Circuit conforms with *Russell* in finding predisposition dispositive of the entrapment issue.<sup>20</sup>

The procedural implications of a subjective approach are far-reaching. When the entrapment defense is raised, the defendant "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."<sup>21</sup> Thus, normally inadmissible evidence becomes admissible to prove state of mind. The defendant's predisposition has been shown by prior convictions for similar conduct, by prior similar conduct, and by hearsay statements.<sup>22</sup> Because the Supreme Court has not specifically delimited the permissible scope of evidence admissible to rebut the defense of entrapment, federal courts have adopted varying opinions on the admissibility of hearsay evidence to prove predisposition.<sup>23</sup> The problem lies in hearsay

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entrapment was, by necessity, pegged to the question left open in *Russell*:

[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, cf. *Rochin v. California*, 342 U.S. 165 (1952) . . . .

United States v. *Russell*, 411 U.S. 423, 431-32 (1973).

The *Hampton* Court, however, was impressed neither with the factual distinction ("the difference is one of degree, not of kind") nor with the due process claim. Since the government agents were merely acting "in concert" with Hampton, and predisposition was either found by the jury or conceded on appeal, Hampton's predisposition to commit the crime charged "rendered [the entrapment] defense unavailable to him." *Hampton v. United States*, 96 S. Ct. 1646, 1649 (1976).

18. *Id.*; *United States v. Russell*, 411 U.S. 423, 436 (1973).

19. *United States v. Ladley*, 517 F.2d 1190, 1193 (9th Cir. 1975); *United States v. Pena-Ozuna*, 511 F.2d 1106, 1107-08 (9th Cir. 1975); *United States v. Payseur*, 501 F.2d 966, 970-71 (9th Cir. 1974).

20. In *United States v. Payseur*, 501 F.2d 966 (9th Cir. 1974), the court stated: "[t]he record indisputably shows that Payseur was predisposed to commit the crime and the court therefore had a duty to rule on the issue of entrapment as a matter of law." *Id.* at 971.

21. *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

22. See Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 59; Comment, 1 U.S.F. L. REV. 177, 179 (1966).

23. The Fifth Circuit commonly admits hearsay statements to prove predisposition.

“statements” made by faceless informants to government agents, to which the latter testify. Justice Stewart pinpointed the dangers in the use of this type of evidence in his dissent in *Russell*:

[A] test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove defendant’s predisposition.<sup>24</sup>

#### D. *An Attack on Hearsay Statements to Prove Predisposition*

In support of its conclusions that the hearsay was inadmissible, the *McClain* court severely criticized a series of Fifth Circuit cases which upheld the admission of hearsay to prove defendant’s predisposition once the entrapment defense had been raised.<sup>25</sup> The basis of the Fifth

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United States v. Fink, 502 F.2d 1, 4-5 (5th Cir. 1974); United States v. Simon, 488 F.2d 133 (5th Cir. 1973); United States v. Brookes, 477 F.2d 453 (5th Cir. 1973); United States v. Robinson, 446 F.2d 562, 563-64 (5th Cir. 1971); Thompson v. United States, 403 F.2d 209, 210 (5th Cir. 1968); Rocha v. United States, 401 F.2d 529, 530 (5th Cir. 1968); Washington v. United States, 275 F.2d 687, 690 (5th Cir. 1960). In accord is the Eighth Circuit, Seigal v. United States, 16 F.2d 134 (8th Cir. 1926), as well as the Ninth Circuit prior to *McClain*. Pulido v. United States, 425 F.2d 1391 (9th Cir. 1970); Trice v. United States, 211 F.2d 513 (9th Cir. 1954).

In at least two circuits such evidence had been explicitly rejected. United States v. Ambrose, 483 F.2d 742 (6th Cir. 1973); Whiting v. United States, 296 F.2d 512 (1st Cir. 1961).

24. 411 U.S. at 443 (Stewart, J., dissenting). In *Sherman v. United States*, 356 U.S. 369 (1958), Justice Frankfurter addressed the prejudice likely to attend the admission of hearsay evidence to show predisposition, even with a limiting instruction:

The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged.

*Id.* at 382 (Frankfurter, J., concurring).

*McClain* does not completely resolve the problem raised by Justice Frankfurter. Only hearsay statements are eliminated as evidence of predisposition. Other evidence, such as reliable reputation evidence, similar bad acts, and a criminal record are still admissible to show predisposition of a defendant who has raised the entrapment defense. See note 22 *supra*. This is still unacceptable to those who, like Justice Frankfurter, desire a test that examines only the conduct of the officers and agents. As he stated: “a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment.” *Sherman v. United States*, 356 U.S. 369, 382 (1958). However, in light of *United States v. Russell*, 411 U.S. 423 (1973), and *Hampton v. United States*, 96 S. Ct. 1646 (1976), the subjective test seems firmly entrenched. See text accompanying notes 15-18 *supra*.

25. *United States v. Fink*, 502 F.2d 1, 4-5 (5th Cir. 1974); *United States v. Simon*, 488 F.2d 133 (5th Cir. 1973); *United States v. Brookes*, 477 F.2d 453 (5th Cir. 1973);

Circuit's holding was that the defendant's character was relevant to prove the reasonableness of the government agent's good faith conduct.<sup>26</sup> At the time the leading case in the Fifth Circuit was decided,<sup>27</sup>

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United States v. Robinson, 446 F.2d 562, 563-64 (5th Cir. 1971); Thompson v. United States, 403 F.2d 209, 210 (5th Cir. 1968); Rocha v. United States, 401 F.2d 529, 530 (5th Cir. 1968); Washington v. United States, 275 F.2d 687, 690 (5th Cir. 1960).

26. This theory arose with the case of Washington v. United States, 275 F.2d 687 (5th Cir. 1960), in which evidence of the defendant's reputation as a narcotics dealer, based on information given to the government-agent witness by several unnamed people, was allowed to be introduced "only for the limited purposes of determining if (the government agent involved) had good cause to believe that Washington was trafficking in narcotics." *Id.* at 690. This was predicated on the statement that:

Once the defense of entrapment has been raised, it is proper to inquire into the reputation of the defendant to determine his predisposition to commit the offense or to inquire into the reasonableness of the officer's conduct. *Sherman v. United States*, supra; *Sorrells v. United States*, supra; *Accardi v. United States*, [257 F.2d 168 (5th Cir. 1958)]; *Mitchell v. United States*, 10 Cir., 1944, 143 F.2d 953.

*Id.* However, neither *Sorrells* nor *Sherman* dealt with the admissibility of hearsay evidence. In *Sherman* there is a reference to previous narcotics convictions. 356 U.S. at 375. In *Sorrells* the Court merely said that the defendant cannot complain about an examination into his predisposition. 287 U.S. at 451. But in neither of these cases did the Court rule upon the admissibility of the evidence. In the words of the *McClain* court: "[f]his hardly amounts to the creation of a brand new exception to the hearsay rule!" 531 F.2d at 436.

Other authorities cited by the court in *Washington* do not deal with the admissibility of hearsay, or admissibility of any evidence at all. There is some evidence of reputation in *Mitchell* showing the reasonableness of the agent's actions to legally entrap the defendant, but the defendant did not object to any evidence admitted. The court in *Mitchell* did say that this evidence in addition to the circumstances of the transaction "amply sustains the government's contention that the government through its agents had reasonable cause to believe that appellant was violating the law." 143 F.2d at 957. In *Accardi* the defendant merely raised the issue of whether there was entrapment as a matter of law. The court looked only to the defendant's actions at the time the crime was committed and not the hearsay reputation evidence in determining whether the defendant was predisposed to commit the crime.

The evidence in *Washington* was admitted as nonhearsay since it was not intended to establish the defendant's predisposition, but only to show the reasonableness of the government's conduct. This distinction is predicated on the use of both the subjective and objective tests because they consider the agents' conduct (objective test) as well as the defendant's predisposition (subjective test). Today, in light of *Russell v. United States*, 411 U.S. 423 (1973), and *Hampton v. United States*, 96 S. Ct. 1646 (1976), such evidence could not be admitted as nonhearsay because only the predisposition of the defendant is relevant to the issue of entrapment. Such evidence would therefore be relevant only for its truth. There would be no exception to make it admissible. See text accompanying notes 34-38 *infra*. Thus, the basic reason for admissibility has been undercut, but the rule was (and is) still being applied.

The rationale of *Washington* was carried further by the Fifth Circuit in *Rocha v. United States*, 401 F.2d 529 (5th Cir. 1968), which extended the rule of admissibility. There, a narcotics agent testified that he had information from a number of sources, including an unnamed informant that the defendant dealt in narcotics. The defendant objected to this testimony on grounds of hearsay; the court disagreed, citing *Washington*



the conduct of the government agent was at least arguably relevant since the outcome of the "subjective-objective" struggle was undecided.<sup>28</sup> The out-of-court statements were then not offered to prove the truth of the defendant's prior conduct but rather to show the "reasonableness" of the conduct of the agent. *Russell* effectively disposed of this objective view<sup>29</sup> and thus the relevancy of out-of-court statements would only be for their truth. Yet, even after *Russell*, the Fifth Circuit has continued to admit this type of evidence without any accompanying rationale.

But, as accurately perceived by the *McClain* court:

[S]ubsequent Fifth Circuit cases slide from . . . holding that hearsay is admissible to show the government agent's good faith to holding it admissible to show the defendant's predisposition without any apparent realization that the slide is inappropriate. A government agent's good faith belief that the defendant is a dealer, like probable cause, can rest upon hearsay which may or may not be true. But a hearsay statement that the defendant is a dealer can rationally be accepted as a basis for an inference that defendant is predisposed to deal only if the hearsay statement is true. *This is a classic example of the improper use of hearsay.*<sup>30</sup>

*McClain* also revealed the confused state of affairs within the Ninth Circuit. Two cases permitted the prosecution to introduce the defendant's prior criminal record.<sup>31</sup> Others allowed hearsay of the type admitted by the trial court in *McClain*.<sup>32</sup> However, these are complicated by

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and stating: "As to entrapment, prior disposition to commit an offense is a vital element. Reputation in this regard, once the issue is raised, is competent." 410 F.2d at 530. On this reasoning the court allowed the reputation evidence, which is arguably mere opinion evidence, for the truth of the matter stated, without establishing the necessary exception to the hearsay rule. See text accompanying notes 36-37 *infra*.

On this doubtful premise, the Fifth Circuit continued to admit hearsay evidence of reputation without any further rationale, but merely citing *Washington*. See *United States v. Fink*, 502 F.2d 1, 5 (5th Cir. 1974); *United States v. Simon*, 488 F.2d 133 (5th Cir. 1973); *United States v. Brooks*, 477 F.2d 453 (5th Cir. 1973); *United States v. Robinson*, 446 F.2d 562, 563-64 (5th Cir. 1971); *Thompson v. United States*, 403 F.2d 209, 210 (5th Cir. 1968).

27. *Washington v. United States*, 275 F.2d 687 (5th Cir. 1960).

28. *Washington v. United States*, 275 U.S. 687 (5th Cir. 1960), predated the Supreme Court's definitive ruling in *United States v. Russell*, 411 U.S. 423, 436 (1973). See text accompanying notes 15-18 *supra*.

29. See text accompanying notes 15-18 *supra*.

30. 531 F.2d at 436 (emphasis added).

31. *Pulido v. United States*, 425 F.2d 1391 (9th Cir. 1970) (prior arrest); *Carlton v. United States*, 198 F.2d 795 (9th Cir. 1952) (convictions).

32. *United States v. Walton*, 411 F.2d 283 (9th Cir. 1969); *Trice v. United States*, 211 F.2d 513 (9th Cir.), *cert. denied*, 348 U.S. 900 (1954); *cf. Pulido v. United States*, 425 F.2d 1391 (9th Cir. 1970).

the fact that defense counsel never objected to its introduction on grounds of hearsay.<sup>33</sup>

In *McClain* the out-of-court declarant was a friend of the defendant. This was not a case in which "a government agent had been told by an unknown number of unknown informants that McClain was dealing in narcotics."<sup>34</sup> Still, upon analysis, the court appears correct in rejecting the hearsay testimony and the line of Fifth Circuit cases.

The out-of-court statement might assume the form of opinion or reputation evidence. In *McClain*, the proffered evidence seems to be merely the declarant's opinion, based on personal knowledge, rather than evidence of the defendant's reputation in the community.<sup>35</sup> Whichever form it assumes, the statements are properly excluded under the *Federal Rules of Evidence*.

If the statement is considered to be opinion evidence of character, the *Federal Rules* contain no hearsay exception which would overcome its presumptive inadmissibility.<sup>36</sup> Obviously, opinion testimony is reliable only if the opinion-giver is in court to render it, where the basis for it can be tested under cross-examination. If the evidence takes the form of community reputation, the *Federal Rules of Evidence* do contain a hearsay exception for reputation used to show a person's character.<sup>37</sup> It must be questioned, however, whether an entrapment situation presents a usage of reputation evidence envisioned by the drafters of that provision. In the typical situation a witness testifying as to reputation is a member of the defendant's community.<sup>38</sup> In fact, the witness must have

33. *United States v. McClain*, 531 F.2d 431, 437 (9th Cir. 1976).

34. *Id.* at 438.

35. The *McClain* court recounted the evidence as follows:

[Witness] Cobb testified that Dusty, a friend of McLain, told him that he had a friend in San Diego who was a good outlet for cocaine . . . . [Witness] Peterson testified that Dusty said that he had a friend in San Diego . . . who was a good outlet for cocaine.

531 F.2d at 438. The testimony does not assess McClain's reputation. Rather, it is merely hearsay statements of Cobb and Peterson that in their opinion McClain was a good source of cocaine. While Cobb and Peterson were subject to extensive cross-examination, the prosecution did not attempt to call "Dusty," the declarant, as a witness. *Id.*

36. Fed. R. Evid. 802.

37. Rule 803(21) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

Fed. R. Evid. 803(21).

38. In *United States v. Whiting*, 296 F.2d 512 (1st Cir. 1961), the court spelled out the proper foundation for reputation evidence:

personal knowledge of the community opinion regarding the defendant's character, for he is deemed to be an expert on matters known by the community<sup>39</sup> and may be cross-examined by defense counsel as to his knowledge of the defendant's activities. When an "expert" in community affairs does not occupy the witness stand but is an out-of-court declarant, the result is multiple levels of hearsay. The first level is the community's opinion of the defendant as known by the declarant; the second is the transmission of that consensus to the government agent-witness. While the first level qualifies as a hearsay exception, the second level does not. However, this is the situation a court creates by admitting reputation evidence to prove predisposition if the witness is not a member of the community but is a government agent. The defendant is deprived of the opportunity to examine the basis of that reputation in the community or the declarant's knowledge of it. At best, he can merely discover whether the alledged reputation was in fact transmitted.

In *McClain* the prosecution did not attempt to argue<sup>40</sup> that the hearsay statements fit within the newly-created "catch-all" provision in Federal Rule 803(24),<sup>41</sup> but undoubtedly the attempt will be made in the future. However, it would seem that prosecutors will be hard-pressed to demonstrate the high degree of trustworthiness required under this provision on the issue of predisposition in entrapment cases.

### E. Conclusion

Since *Russell*, predisposition of the defendant to commit the crime charged is the central inquiry in entrapment cases. As in *McClain* the

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It is fundamental that to qualify a witness as competent to give testimony concerning a defendant's character and reputation in the community it is usually required that there be a showing that the statements uttered by the witness are representative. It is generally required that the witness must show that he lives or works in a given community and is familiar with the reputation of the defendant. In short, there must be some demonstrable basis evincing the competence of the witness to give his opinion.

*Id.* at 517.

39. 3 J. WIGMORE, WIGMORE ON EVIDENCE §§ 691, 692 (3rd ed. 1940).

40. 431 F.2d at 437.

41. Rule 803(24) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . .

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it; including the name and address of the declarant.

Fed. R. Evid. 803(24).

government often attempts to prove predisposition by putting agents on the witness stand who testify that an out-of-court source said that the defendant was a good source of narcotics or, that the defendant was considered by the community to be a good source of narcotics. These out-of-court statements are relevant only to prove predisposition and, as such, they are hearsay. Because they do not fit a recognized exception to the hearsay rule, they are properly excluded in entrapment cases.

*Anita E. Ruud*