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ENTRAPMENT AND AGENCY

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INTRODUCTION

In certain criminal cases (e.g., undercover drug deals) where the police take on a proactive, persistent, and sometimes aggressive role in investigating unlawful conduct, depending on how zealous they are, or where the suspect acts not as a seller but as an agent of the buyer, there may be an opportunity to assert an AFFIRMATIVE DEFENSE of ENTRAPMENT (PL § 40.05) and/or raise the DEFENSE of AGENCY.

And, in rare cases, where the police conduct is so over-the-top and underhanded as to offend notions of fundamental fairness, the charges may be subject to challenge on DUE PROCESS grounds (*People v Isaacson*, 44 NY2d 511 [1978]).

In the case of entrapment, if the People prove the elements of the crime charged (e.g., drug sale, bribery) BEYOND A REASONABLE DOUBT, the defendant must establish that he/she was entrapped by a PREPONDERANCE (i.e., greater weight) OF THE EVIDENCE. Such proof may derive from the People's own evidence or from affirmative proof put on by the defense.

With agency (which pertains only to cases of criminal sale of a controlled substance or criminal possession with intent to sell), the People must not only prove the elements of the crime, but also DISPROVE the defendant's claim of agency beyond a reasonable doubt.

Whether the defendant was entrapped or was only acting as an agent (i.e., extension) of the buyer are QUESTIONS OF FACT to be resolved by the jury or judge in a bench trial (*People v McGee*, 49 NY2d 48 [1978]), and to obtain the appropriate jury instruction, the defense must show that there is a reasonable view of the evidence (viewed in the light most favorable to the defendant) to warrant it. (*People v Brown*, 82 NY2d 869 [1993], *People v Butts*, 72 NY2d 746 [1988]).

ENTRAPMENT

Pursuant to Penal Law § 40.05, it is an AFFIRMATIVE DEFENSE to a crime that the defendant engaged in the proscribed conduct because he/she was INDUCED or ENCOURAGED to do so by PUBLIC SERVANT (typically, law enforcement) or a person acting in cooperation therewith (e.g., informant) seeking to OBTAIN EVIDENCE against him/her for purposes of CRIMINAL PROSECUTION, and when the METHODS USED to obtain such evidence were such as to create a SUBSTANTIAL RISK that the offense would be committed by a person NOT OTHERWISE DISPOSED TO COMMIT IT.

The CJI mirrors the statute and like it, points out that to constitute entrapment, the police conduct must amount to more than just affording the defendant an opportunity to commit a crime (*People v Brown*, supra; 1CJI [NY] 40.05). Instead, it must consist of the type of pressure and persuasion that induces or inveigles the defendant to engage in criminal conduct that he/she was not otherwise inclined to commit.

EXCEPTION TO THE RULE AGAINST EVIDENCE OF CRIMINAL PREDISPOSITION

It has long been the law that evidence of crimes, wrongs or other bad acts of the defendant are NOT ADMISSIBLE to prove that he/she acted in conformity therewith on a particular occasion or had a propensity to engage in such conduct (See NY Advisory Evidence Rule 4.21, *People v Molineux*, 168 NY 264 [1901]).

Similarly, when the defendant who has a criminal history wishes to testify, trial courts will confine the contours of cross examination by balancing the probative value of the evidence (of prior convictions or uncharged bad acts) against the potential for unfair prejudice arising from the risk that the jury may infer guilt of the instant crime solely from the defendant's criminal past (*People v Sandoval*, 34 NY2d 371 [1974]).

There are EXCEPTIONS, however, where the People seek to introduce such evidence to prove a relevant fact (e.g., motive, intent, common scheme, or plan) or to REBUT or DISPROVE a defense (or affirmative defense) interposed by the defendant (See, for example, *People v Calvano*, 30 NY2d 199 [1972], *People v Valentin*, 29 NY3d 150 [2017]).

THE DOOR IS OPEN

Once a defendant asserts that he/she was entrapped into committing the crime, he/she necessarily places in issue any predisposition to commit the offense charged, thereby opening the door to the introduction of prior convictions or misconduct of the same nature (*See People v Santarelli*, 49 NY2d 241 [1980]), *People v Calvano*, supra).

Therefore, any decision to claim entrapment should first consider whether the defendant's past is clear of similar behavior or is such that it could haunt him/her in rebuttal with proof that disproves his/her claim that he/she was not otherwise inclined to commit the crime.

By asserting entrapment, the defendant is essentially admitting to the commission of the crime but blaming it on undue pressure by the police which overcame his/her will to resist. Hence, absent evidence of police instigation and insistence, excessive haranguing (e.g., by inducements, threats, promises or appeals to the defendant' sympathies), mere claims of deception or facilitation by providing the defendant with the opportunity to commit the crime will generally not carry the day (*People v Thompson*, 47 NY2d 350 (1979).

AN ENTRAPMENT INSTRUCTION IS NOT ONLY AVAILABLE TO THOSE WITH A CLEAN RECORD

Just because a defendant does not have a pristine past does not foreclose the possibility of obtaining a jury instruction on entrapment if a reasonable view of the evidence would otherwise support it. In fact, it has been deemed error for a trial court to suggest that it is only available to the unwitting innocent

who are duped by cunning cops into committing crimes that are seemingly out-of-character (See *People v Byrd*, 155 AD2d 350 [1st Dept 1989], *People v Yore*, 36 AD2d 818 [1971]).

In contrast, see *People v Calderon* (201 AD2d 868 [4th Dept 1974]). Rather, a defendant's criminal history (or lack thereof) is but one of several factors that the jury can consider in deciding whether the defendant was entrapped in the case at hand or was merely afforded the opportunity to commit a crime by officers who involved themselves in ongoing criminal activity (*People v Figueroa*, 167 AD3d 1073 [3d Dept 2018]).

AGENCY

The CJI instructs that a person is NOT GUILTY of selling a controlled substance (or of possessing it with intent to sell) if he/she was acting as an agent of the buyer. An agent is someone whose SOLE CONCERN IN A DRUG TRANSACTION IS NOT THE SELLING OF DRUGS BUT THE PURCHASING/ACQUIRING OF DRUGS FOR ANOTHER (*People v Ortiz*, 76 NY2d 446 [1990], *People v Feldman*, 50 NY2d 500 [1980]).

By contrast, person is NOT an agent of a buyer if he/she participates in a drug deal for the purpose of SELLING OR AIDING ANOTHER PERSON TO SELL. Nor is a person the agent of the buyer if he participates in a drug deal for the purpose of INDEPENDENTLY BROKERING the sale between the buyer and the seller.

To determine whether the defendant was acting as agent of the buyer, the jury must examine the entirety of the circumstances leading up to and during the transaction. Some factors to consider include:

1. Whether the defendant and buyer (often an undercover police officer) were known to each other and had a relationship.
2. Whether the defendant or the buyer suggested or initiated the transaction.
3. Whether the defendant said or did anything to promote the transaction (i.e., engaged in salesmanship).
4. Whether the defendant received or stood to receive any benefit (pecuniary or otherwise) from his participation in the transaction (beyond a friendly incidental tip given in gratitude).
5. Whether the controlled substance was in the possession and under the control of someone other than the defendant.
6. Whether the defendant engaged in the sale of drugs at other times with other people.

RATIONALE

The theory behind the agency defense is that one who acts only as an agent for the buyer of drugs cannot also be acting on behalf of the seller, and therefore cannot be convicted of the crime of selling the drugs. This is so even though the act of transferring (or assisting in the transfer of) drugs falls within the statutory definition of "sell" under PL § 220.00 (1) which includes "sell, exchange, give or dispose of to another or to offer or agree to do the same" (*People v Lam Lek Chong*, 45 NY2d 64 [1978]).

This rule reflects the fact that New York State drug laws are aimed at and reserve the harshest penalties for sellers or the "tycoons of the trade" (*People v Lam Lek Chong*, supra) rather than buyers (except for those who possess at the highest levels). The agency defense is deemed to be in keeping with the legislative scheme because it provides that one who acts SOLELY AS AN AGENT FOR THE BUYER should

suffer no greater criminal liability than that of the buyer (i.e., for unlawful possession) (*People v Lam Lek Chong*, supra at 73-74, *People v Argibay*, 45 NY2d 45 [1978]).

"YOU GOTTA SERVE SOMEBODY"

As stated in *People v Andujas* (79 NY2d 13 [1992]), the agency defense recognizes that if a person is acting only in the interest of the buyer in obtaining drugs, he/she cannot, at the same time, be acting as or in the interest of the seller. (Not unlike a buyer's agent in a real estate transaction). Consequently, an agent, as noted above, can only be found guilty of unlawful possession.

Considering the above-listed factors, the question whether a defendant is entitled to a jury instruction on agency turns on whether, under all the circumstances, the defendant can be said the have acted solely on behalf of the buyer (thereby negating an intent to sell) so as to be considered an EXTENSION OR INSTRUMENTALITY OF THE BUYER (*People v Ortiz* supra, *People v Roche*, 45 NY2d 87 [1978]).

SOME CASES ON ENTRAPMENT AND AGENCY

In *People v Brown* (82 NY2d 869 [1993]), the Court of Appeals upheld the Fourth Department's affirmance of the trial court's denial of the defendant's request for a jury instruction on entrapment because there was no basis in the record to support the charge.

The People's proof established that a male undercover police officer posing as a female prostitute, stood out on a downtown street corner when the defendant's vehicle pulled up to the curb. The undercover approached the open driver's window and asked the defendant if he was looking for a date. The defendant said yes and responded that he had $25.00 for oral sex. The officer directed him to drive just around the corner where he pulled over and was arrested by back-up officers who had been monitoring the encounter.

The defendant testified that he was driving to pick up food and stopped at a stop sign when a man in drag approached and offered him oral sex for money to which he did not respond. He denied agreeing to any such transaction or that he drove around the corner at the officer's direction.

The Court held that there was no reasonable view of the evidence that would support an entrapment defense where the defendant simply denied the allegations. At most, in the Court's view, the officer merely afforded the defendant an opportunity to commit a crime rather than induce him under circumstances creating a substantial risk that one not otherwise disposed would do likewise (citing *People v Alwadish*, 67 NY2d 973 [1986]).

In *People v Jones* (107 AD2d 714 [2d Dept 2012]), the Second Department rejected the defendant's challenge to the sufficiency of the trial court's agency instruction as well its refusal to give an instruction on entrapment where there was no reasonable view of the evidence to warrant it and the defendant never requested it (citing *People v Thompson*, supra, 47 NY2d at 140).

On two occasions, the defendant, while tending bar, responded to an undercover officer's request for cocaine by obtaining some from others in the bar and handing it to the officer. On the third occasion,

the defendant initiated the transaction by inquiring whether the undercover was interested in buying some “good stuff” that he had.

The court concluded that the defendant acted like a salesman and demonstrated familiarity with drug-selling procedures and lingo. In each instance, the officer paid the money directly to the defendant before receiving the cocaine and he “tipped” him after one of the transactions.

The court also held that it was for the jury to resolve whether the defendant was acting solely as an agent of the buyer or a middleman who stood to benefit in his own right or along with others, and there was no basis to disturb its finding that he was not acting in the latter capacity (citing *People v Lam Lek Chong*, supra).

In the court’s view, while the trial court could have given more explicit instructions regarding the application of the agency factors to facts of the case, (e.g., that the receipt of a tip does not preclude an agency relationship), the defendant did not specifically object on such grounds (he only objected in connection with the possession counts), and the court saw no need to consider the argument in the interest of justice where the evidence showed that the received a full purchase price plus tip and there was no indication that the money received was handed off to a another party.

EGREGIOUS POLICE MISCONDUCT CAN VIOLATE DUE PROCESS EVEN IN THE ABSENCE OF ENTRAPMENT

In *People v Isaacson* (44 NY2d 511 [1978]), the Court of Appeals reversed the Appellate Division’s affirmance of the defendant’s Class A-2 Felony drug sale conviction and 15 years-to-life imprisonment sentence and dismissed the indictment on account of outrageous police misconduct that was deemed to have violated the defendant’s due process rights.

The misconduct included physically beating and lying to a confidential informant who, believing that he was facing lengthy imprisonment on what turned out to be unsustainable drug charges (negative lab report not disclosed until the CI’s cooperation was milked for all it was worth), and luring the defendant, a PA State College graduate student with no criminal record (who sold small amounts of drugs on the side) to New York State for a drug sale against his better judgment.

After the state police assaulted and threatened the CI, they told him that they wanted him to set up a high-level drug deal lest he face 15 years-to-life in prison. Scrambling for prospects, the CI reached out to the defendant, a casual friend from whom he had purchased small amounts of drugs in the recent past. He laid his sob story on the defendant, stressing that he needed to score a large quantity of drugs to re-sell in New York so that he could afford a good lawyer on his case (which unbeknown[1] to him amounted to nothing).

The defendant said he did not have access to large-scale suppliers, but when the CI pressed him, the defendant reached out to his ex-girlfriend/flat mate who was a legal secretary and a drug addict with

[1] *Unbeknownst* is an irregular variant of the older *unbeknown*, which derives from *beknown*, an obsolete synonym of *known*. But for a word with a straightforward history, *unbeknownst* and the now less common *unbeknown* have caused quite a stir among usage commentators. In spite of widespread use (including appearances in the writings of Charles Dickens, A. E. Housman, and E. B. White), the grammarian H. W. Fowler in 1926 categorized the two words as "out of use except in dialect or uneducated speech." The following year, G. P. Krapp called them "humorous, colloquial, and dialectal." Our evidence, however, shows that both words are standard even in formal prose (Webster's Third New International Dictionary (2002), and Webster's Third New International Dictionary, Unabridged Online [http://unabridged.merriam-webster.com/])

connections in the trade. The defendant stressed, however, that he would not come to New York because of its strict drug laws. The state police finagled a plan that had the defendant meet the CI at the Whiffle Tree Bar which the defendant mistakenly believed was in Pennsylvania (rather than Steuben County).

The defendant and his ex-girlfriend drove into New York in two vehicles, the latter of which contained cocaine. They were arrested and the girlfriend flipped in exchange for life-time probation. The CI also testified only to find out later that the leverage used to secure his cooperation was no leverage at all.

The defendant was convicted of Criminal Sale of a Controlled Substance 1st degree and was sentenced to 15 years-to-life in prison. The AD affirmed 3-2, and the Court of Appeals reversed, holding that even though this was not a case of entrapment (based on the defendant's history of low-level drug dealing), the police conduct was so egregious and violative of due process as to compel dismissal of the charges.

The Court based its decision on the State Constitution (Art. 1, Sec. 6) rather than the federal standard which is less amenable to findings of due process violations in cases where a defendant is predisposed to commit the crime charged (*see Hampton v US*, 425 US 484 [1976]).

The Court noted that due process of law guarantees respect for personal rights so rooted in the traditions and conscience of the American people as to be considered fundamental. And it imposes on the courts the duty to foster that fundamental fairness essential to the very concept of justice (citing *People v Leyra*, 302 NY 353 [1951]).

Even though the misconduct was directed at the CI, the Court concluded that such actions (in beating and lying to the CI) SET THE PATTERN of behavior that was so repugnant to a sense of justice as to result in the luring of someone who had no desire to come to New York for sole purpose of obtaining a high-level drug conviction (rather than deterring crime or protecting the public).

In short, the police used violence and falsehoods to compel a crime that most likely would never have occurred but for their persistence and misdirection. To allow such a case to stand would serve only to pay lip service to due process.

DISSENT

The dissenting Judge (Domenick L. Gabrielli) took a much less sympathetic view of the defendant, noting that he supplemented his educational pursuits by dealing drugs on the side and, when push came to shove, he found a way (through his roommate) to obtain the quantity of drugs that the CI requested. He also noted that the defendant stood to profit from the deal (about $1000.00) and, while he may have been reluctant to risk prosecution in New York State, he knew (or was led to believe) that the CI was going to re-sell the drugs in this state to raise the funds for legal representation.

The dissenter also noted that the police misconduct was visited upon the CI and not the defendant and, therefore, could not be said to have violated the defendant's due process rights. Consequently, there was no basis to supplant the fact-finder's conclusions with judicial speculation whether the defendant (who was not entrapped) would not have rolled into New York State with a carload of drugs for sale without the encouragement of the police and their uninformed informant.

BAH

But in *People v Bah* (180 Misc 2d 39 [Crim Ct, NY County 1999]), the court rejected the defendant's demand for a hearing under *People v Isaacson*, supra because his moving papers failed to set forth specific facts in support of his claim that the police engaged in egregious misconduct offensive to due process. The missing factors that the court pointed to were:

1. Any claim that the police manufactured a crime which would likely not have occurred otherwise.

2. That the police engaged in criminal or improper conduct repugnant to a sense of justice.

3. That the police overcame the defendant's resistance by appeals to human emotion or past friendship or the temptation of exorbitant gain.

4. That the police were motivated solely to obtain a conviction with no intent to deter further crime or protect the public (citing *People v Isaacson*, supra at 521).

All the defendant alleged was that an undercover officer encouraged him to engage in sexual activity. The defendant did not initiate the conversation, describe any desired conduct, or offer a fee, and he was not predisposed to commit this crime.

In the court's view, at most, the defendant laid the groundwork for an entrapment affirmative defense but fell far short of earning the right to a due process hearing.

The court also rejected the defendant's challenge to the legal sufficiency of the information charging him with patronizing a prostitute because it provided sufficient facts specifying the nature of the sexual conduct (i.e., sexual intercourse) in exchange for a fee.

AGENCY, ENTRAPMENT AND DUE PROCESS: O-For-3

In *People v Vickers* (168 AD3d 1268 [3d Dept 2019]), the Third Department affirmed the defendant's conviction for six counts of Criminal Sale of a Controlled Substance 3rd degree, rejecting his claim that he was entrapped, or was acting solely as an agent (i.e., doing a favor for the confidential informant who claimed to be his cousin) and violated his due process rights by setting him up to commit crimes because the police believed (without sufficient evidence to bring charges) that he had killed two police officers in an unrelated investigation.

The AD noted, first, that the defendant's T.O.D. motion only addressed the entrapment issue. Notwithstanding the lack of preservation, the court addressed the issue of agency and rejected the defendant's argument that he acted solely as an agent of the police in procuring heroin as a favor for his alleged cousin who offered to help find new suppliers and pestered him about providing drugs for his other "cousin" (an undercover police officer) who was a strung-out junkie in need of drugs.

Although the CI turned the defendant on to a heroin supplier (to expand his operation), the defendant stressed that he already had his own suppliers. Once the undercover entered the picture, he cut the CI out and dealt directly with the defendant. When they spoke, the defendant described the product and set the price. He also took enough money from the officer up front to obtain heroin for himself and his

driver (whom he insisted be paid for their trips from Saratoga to Albany County). The evidence also established that the defendant had sold drugs to others for the past several years.

The defendant testified that he provided the heroin to the undercover as a favor to the CI, but he admitted that he benefitted by pooling his money with the officer's cash to buy more coke at a cheaper rate and keeping the overage for his own use.

In view of the defendant's course of conduct, his salesman-like behavior and profit, the court was satisfied that he was not just doing a favor for his new-found cousin.

Considering the agency factors (e.g., the nature and extent of the relationship between the defendant and the buyer [none], who suggested the purchase [CI], the defendant's other drug dealings [he had several], and the defendant 's profit form this arrangement (beyond an incidental gratuity), the court was satisfied that jury's findings were not against the weight of the evidence.

The court was similarly unpersuaded by the defendant's entrapment claim, finding that he was predisposed to commit the crime (as evidence by his past and continuing drug-dealing activity) and that the police merely afforded him with a new opportunity to ply his trade (citing, inter alia, *People v Calvano*, 30 NY2d 191 [1972]).

The court also rejected the defendant's due process claim, concluding that the police did not, as the defendant claimed, concoct a scenario to dupe him into selling heroin to an undercover, but rather just involved themselves in his already-extant criminal activity. The court also noted that the defendant showed no hesitation to involve himself in this crime (and there was no promise of exorbitant gain), nor did the police appear to be motivated solely by a desire to obtain a conviction of this defendant.

MINDING MANNERS

Similarly, in *People v Manners* (196 AD3d 1125 [4th Dept 2021]), the Fourth Department held that the trial court did not err in denying the defendant's request for an agency instruction where the evidence showed that the defendant sold $100.00 worth of crack cocaine to a cooperating buyer and insisted on keeping a portion of the drugs for himself. The court found that unlike a tip offered by the buyer as a token of appreciation, the defendant decided on his own to take a piece of the action.

ONE WHO BUYS FOR HIMSELF AS WELL AS FOR ANOTHER IS STILL ENTITLED TO AN AGENCY CHARGE

In *People v Andujas* (79 NY2d 113 [1992]), the Court of Appeals held that the trial court erred in giving the jury a standard jury instruction on agency, thus eliminating the possibility of an acquittal where the defendant, in the first of two transactions, purchased cocaine for the buyer and a portion for himself (because the undercover claimed to have insufficient funds for a half gram which was the seller's minimum amount for sale).

Acting on a tip of drug dealing at a hospital, the undercover approached the defendant who said that he did not deal drugs but could get them from a third party. After the initial split transaction, the defendant later purchased a second half-gram for the undercover officer and gave all of it to him.

The trial court instructed the jury that "if the proof establishes that the defendant was acting solely as an agent of the undercover officer, AND IN NO OTHER CAPACITY, then he acted as an agent of the

buyer." But, if the proof established that the defendant acted IN HIS OWN BEHALF AND AS AN AGENT OF THE SELLER, then he is NOT an agent of the buyer.

Defense counsel took an exception to the charge, arguing that it unfairly suggested that the agency defense was unavailable to someone who, like him, purchased some of the drugs for himself as well as for someone else.

The Court of Appeals agreed, reasoning that the same logic that precludes a conviction for one who buys drugs solely to accommodate another (i.e., conduct inconsistent with acting as a seller), also applies to one who buys only for himself. Consequently, it was error not to instruct the jury that one who acts, in part, for himself as well as for the buyer could still be considered an agent of the buyer.

But, in *People v Job* (87 NY2d 856 [1996]), the Court of Appeals held that the trial court properly declined to expand its agency instruction as suggested by *People v Andujas*, supra, where the defendant testified that the undercover officer asked her to obtain crack cocaine for him and offered to get her high. She said that she bought four vials of crack, keeping two for herself and expecting that she would later have to provide sex for the crack that she ingested.

The Court said that the jury was properly instructed that it could consider any benefit received from the buyer as supporting an agency defense and, as such, the charge, in its entirety, provided the jury with appropriate guidance on the law (citing *People v Fields*, 87 NY2d 821 [1995]).

And, in *People v Soto-Becerril* (198 AD3d 423 [1st Dept 2021]), the First Department held that the trial court properly denied the defendant's request for an agency instruction because there was no reasonable view of the evidence to support it. Focusing on the importance of the relationship between buyer and defendant, the court noted that here, there was none. The evidence further showed thar the defendant initiated the sale, negotiated the price ($40.00 for two bags of heroin) and was found in possession of $20.00 of the pre-recorded buy money when arrested. The court was satisfied, therefore, that the defendant was not merely accommodating the buyer.

HIGH SIERRA: AGENCY DOES NOT APPLY TO POSSESSION

In *People v Sierra* (45 NY2d 56 [1978]), the Court of Appeals held that the existence of an agency relationship provides NO DEFENSE to a charge of criminal POSSESSION of a controlled substance. Rather, it only applies (when warranted) to charges of criminal SALE and POSSESSION WITH INTENT to sell.

In this case, an undercover officer handed $175.00 to the defendant/ bar employee to get him some cocaine. The defendant said, "what do I get for the favor," and the undercover forked over an additional $20.00. The defendant left the premises and returned shortly thereafter with just over and eighth of an ounce of cocaine.

The trial court instructed the jury on agency with respect to the sale and possession with intent counts but decline to do so for the possession charges. The Court of Appeals agreed, noting that the agency theory does not properly lie with possession since one who possesses for him/herself or on behalf of another is still guilty of unlawful possession if he/she does so knowingly. Nor did the Court accept the notion that brief possession (i.e., long enough to obtain the drugs and deliver them to the buyer) somehow makes it less unlawful.

In the Court's view, the instant the defendant came into possession of the drugs, she had control over them such that she could have discarded or destroyed them but instead, delivered them to the buyer. And, absent some innocent explanation, the jury was within its right to infer that it was unlawful (citing *People v Reisman*, 29 NY2d 278 [1971]).

BLUE HERRING

In *People v Herring* (83 NY2d 780 [1994]), the Court of Appeals held that the evidence was insufficient as a matter of law to warrant an agency charge where an undercover officer approached the defendant, asked if he had drugs for sale whereupon the defendant led the officer to a storefront, took money from him and went inside the building after which he obtained four vials of crack cocaine from his codefendant.

In the Court's view, there was no reasonable view of the evidence to support the conclusion that the defendant was acting other than as a middleman who was steering customers to the codefendant. The Court noted that the defendant had no prior relationship with the undercover buyer, and he immediately responded when he asked if he had any "nickels" by leading the officer into the building, taking his money, and helping consummate the transaction.

The Court stated that entitlement to an agency charge depends entirely on the relationship between the buyer and the defendant, and absent a showing that the defendant was acting solely on behalf of the buyer, the jury need not be so instructed (citing *People v Lam Lek Chong*, supra). The Court also pointed out that a defendant may qualify as a seller (rather than an agent of the buyer) even though he doesn't solicit the sale or receive any consideration for the transfer of the drugs from the seller to the buyer.

Unlike the dissenter (Hon Carmen B. Ciparick) who felt that there was a sufficient basis to give the charge (based on the existence of some evidence, however slight, that the defendant was acting as an extension of the buyer), the majority concluded that absent proof of some relationship between the parties, the instruction was not required.

The dissenter, however, pointed out that the defendant was not actively soliciting customers, he did not request or receive anything of value for his role in the transaction, no pre-recorded buy money was found on him, and any question whether the defendant was steering customers or just acting to accommodate the buyer should have been left to the jury.

Similarly, in *People v Ortiz* (76 NY2d 446 [1990]), the Court held that an agency instruction was not called for where the undercover officer approached the codefendant in front of a building and asked for cocaine, whereupon he was told to wait while he went inside the building. In the meantime, the officer observed a few people approach the defendant and converse with the defendant in front of the building.

The officer, and a woman who told her the price of cocaine, walked over to the defendant, from whom the officer asked to buy some cocaine. The defendant replied, "go straight in" the building. The officer and the woman went in the front hall and got behind a half dozen other customers who were waiting in line to buy coke from the codefendant.

When it was her turn, the officer bought two vials of cocaine for $10.00 each from the codefendant who then passed the money on to a third party who assisted in the transaction. When the officer went back

outside, she saw the defendant directing other people into the building. The defendant was arrested with a small amount of cocaine and marijuana on his person, but no money.

At trial, the defendant was acquitted of the possession charges but convicted as an accomplice of Criminal Sale of a Controlled Substance 3rd degree. The Appellate Division affirmed as did the Court of Appeals which found no reasonable view of the evidence to support an agency instruction (citing *People v Argibay*, supra and *People v Watts*, 57 NY2d 299 [1982]).

Rejecting the defendant's argument that he did not overtly peddle drugs, promote this sale or profit from the transaction, the Court noted that the defendant's contact with the buyer suggested no prior relationship and the defendant's conduct was indicative of one who was steering multiple customers to his codefendant/seller.

FROM MANHATTAN TO HONG KONG AND BACK AGAIN

In *People v Lam Lek Chong*, supra, the Court of Appeals rejected the defendant's argument that he was simply acting as an agent of the undercover buyers. When they identified themselves as drug dealers seeking to buy large amounts of heroin, the defendant directed them to sellers in New York City ("Shark Fish" and "Sonny") from whom they bought several thousand dollars' worth of heroin. The defendant accompanied them to Hong Kong (to meet other dealers, David Chan and "Fernando") where the deal fell through. They returned returned to New York City and the defendant led them to a Fernando's apartment where a substantial amount of heroin was waiting for picking up.

The defendant testified that he was simply doing the buyers a favor in the hope of encouraging their interest and investment in his legitimate business ventures including a travel agency and a night club. The court noted, however, that he hounded the buyers for the balance due on the initial deal ($14,000.00), insisted on payment of his travel expenses to China (which he said was a wild good chase) and became upset when the officers tried to pay someone else instead of him for the third transaction.

The Court held that the trial court erred in instructing the jury that it could not find the defendant acted as an agent if he received any benefit, however slight but said that reversal was not required because the defendant was not entitled to the instruction in the first place. In the Court's view, the defendant did not simply connect the buyers with sellers solely as an accommodation, but rather helped orchestrate large-scale, commercial drug deals from which he profited and expected a future benefit.

FINAL THOUGHT

As is evident, it is no small feat for the defense to obtain an instruction much less an acquittal by asserting entrapment (which involves an acknowledgment of the criminal act but blaming its commission on overbearing police persuasion of one not otherwise predisposed), agency (i.e., simply doing a favor for a friend with no expectation of a benefit) and/or a due process violation on account of egregious police misconduct that offends principles of fundamental fairness.

However, when the facts so warrant, and there is no favorable plea offer or sentencing commitment, it may be worth swinging for the fences and putting the focus on the police, without whose instigation and persistence there may have been no crime at all.