ICAC STANDARDS CASE LAW

We are not attorneys and the information below does not constitute legal advice. Each case is different and an attorney should be consulted to determine the relevancy of any case law. The purpose of this document is to examine potential federal case law that may have influenced the development of specific elements of the ICAC Standards.

Contents

1) Legislative Mandate

The Protect the Children Act 2008 lays out the foundation for the ICAC and the ICAC Operational and Investigative Standards provides the minimum rules that govern sting operations. The Act is incorporated in Title 42 Chapter 154, Section 17614 is specific to the Duties and functions of task forces. The MOU's assure compliance by law enforcement agencies to ensure that law enforcement officials are targeting those predisposed to commit such crimes against children.

17614. Duties and functions of task forces

Each State or local ICAC task force that is part of the national program of task forces shall-

(1) consist of State and local investigators, prosecutors, forensic specialists, and education specialists who are dedicated to addressing the goals of such task force;

(2) work consistently toward achieving the purposes described in section 17613 of this title;

(3) engage in proactive investigations, forensic examinations, and effective prosecutions of Internet crimes against children;

(4) provide forensic, preventive, and investigative assistance to parents, educators, prosecutors, law enforcement, and others concerned with Internet crimes against children;

(5) develop multijurisdictional, multiagency responses and partnerships to Internet crimes against children offenses through ongoing informational, administrative, and technological support to other State and local law enforcement agencies, as a means for such agencies to acquire the necessary knowledge, personnel, and specialized equipment to investigate and prosecute such offenses;

(6) participate in nationally coordinated investigations in any case in which the Attorney General determines such participation to be necessary, as permitted by the available resources of such task force;

(7) establish or adopt investigative and prosecution standards, consistent with established norms, to which such task force shall comply;

(8) investigate, and seek prosecution on, tips related to Internet crimes against children, including tips from Operation Fairplay, the National Internet Crimes Against Children Data System established in section 17615 of this title, the National Center for Missing and Exploited Children's CyberTipline, ICAC task forces, and other Federal, State, and local agencies, with priority being given to investigative leads that indicate the possibility of identifying or rescuing child victims, including investigative leads that indicate a likelihood of seriousness of offense or dangerousness to the community;

(9) develop procedures for handling seized evidence;

(10) maintain-

(A) such reports and records as are required under this subchapter; and

(B) such other reports and records as determined by the Attorney General; and

(11) seek to comply with national standards regarding the investigation and prosecution of Internet crimes against children, as set forth by the Attorney General, to the extent such standards are consistent with the law of the State where the task force is located.

(Pub. L. 110–401, title I, §104, Oct. 13, 2008, 122 Stat. 4235 .)

2) ICAC Operational and Investigative Standards

The Memorandum of Understanding between a Task Force and local law enforcement units require the compliance with ICAC Standards. The Standards are labelled 'Law Enforcement Sensitive' but are frequently attached to the MOU. If the MOU, with the ICAC Standards referenced as Appendix B, is signed by a County Commission or City Commission, these are considered Public Records within Florida and have been posted on the Internet by some municipalities.

3) Section 3. Training

a) Staff Required Training

3.1 All Professional and administrative personnel assigned responsibilities associated with ICAC operations shall be required to read and comply with the Standards. Additionally, all training program curriculum supported by ICAC resources shall be consistent with the Standards, and approved by OJJDP or, in instances of local raining, by the Commander.

i) Probable Purpose

In the event anyone on the program commits entrapment, it is not possible to use a response of not knowing the standards or procedures.

ii) Possible Case Law

US v. Brooks, 215 F. 3d 842 - Court of Appeals, 8th Circuit 2000

While this case relates to the behavior of an informant, the concept could apply to anyone on a sting. "However, ignorance of its agents' actions does not relieve the government of responsibility for the conduct of its agents,"

4) Section 4. Case Management

a) Case Predication and Prioritization Factors

4.1.2 The following factors should be considered:

- A child is believed to be at immediate risk of victimization
- A child is vulnerable to victimization by a known offender
- A known suspect is aggressively soliciting a child(ren)
- Manufacturers, distributors, or possessors of images that appear to be home photography with domiciled children
- Aggressive high volume unlawful images, contraband images, images depicting the sexual exploitation of minors, manufacturers or distributors who either are commercial distributors, repeat offenders, or specialize in sadistic images
- Manufacturers, distributors, and solicitors involved in high-volume trafficking or belong to an organized group sharing unlawful images, contraband images, images depicting the sexual exploitation of minors ring that operates as a criminal conspiracy.
- Distributors, solicitors and possessors of unlawful images, contraband images, images depicting the sexual exploitation of minors
- Any other form of technology facilitated child sexual victimization

i) Probable Purpose

Efforts for arrests need to be focused on actual ongoing criminal activity. There is a fine line between entrapment and outrageous government conduct. Outrageous government conduct is a very difficult charge to prove and has not been recognized in Florida as a specific defense, but has been discussed in Florida and Federal cases.

ii) Possible Case Law

United States v. Bogart, 783 F. 2d 1428 - Court of Appeals, 9th Circuit 1986

Our view, shared by Justice Brandeis, that a crime manufactured by the government "from whole cloth" would constitute outrageous conduct also has a firm jurisprudential basis. Criminal sanction is not justified when the state manufactures crimes that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent the government's involvement, no crime would have been committed. Similarly, a defendant need not be incarcerated to protect society if he or she is unlikely to commit a crime without governmental interference. Nor does the state need to rehabilitate persons who, absent governmental misconduct, would not engage in crime. Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, but becomes an end in itself — "to secure the conviction of a private criminal." *Id.* Under such circumstances, the criminal justice system infringes upon personal liberty and violates due process.

Permissible conduct has been described as that which, even with the use of stealth and subterfuge, is designed to expose illicit traffic, illegal conspiracies, violations or would-be violations of the law and to prevent crime. *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). However, this is not a case where the government is ferreting out ongoing criminal activity . It is a case where the government, through its agent, went about putting persons into the business of crime for the first time.

United States v. Twigg, 588 F. 2d 373 - Court of Appeals, 3rd Circuit 1978

The rule that is left by *Hampton* is that although proof of predisposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was "outrageous." *See* ***United States*** *v. Prairie*, 572 **F.2d** 1316, 1319 (9th Cir. 1978); ***United States*** *v. Johnson*, 565 **F.2d** 179, 181 (1st Cir. 1977). Where the facts can easily be resolved, the validity of the defense is to be decided by the trial court. ***United States*** *v. Graves*, 556 **F.2d** 1319, 1322 (5th Cir. 1977).[8]

The type of conduct that would be considered outrageous by Justice Powell or the Supreme Court is unclear. However, we find the reasoning in two cases decided prior to *Hampton* helpful in resolving this problem.

In ***United States*** *v. West*, 511 **F**.**2d** 1083 (3d Cir. 1975), this court reversed a conviction primarily on fundamental fairness grounds. On facts similar to *Hampton*, Judge Hastie wrote:

But when the government's own agent has set the accused up in illicit activity by supplying him with narcotics and then introducing him to another government agent as a prospective buyer, the role of government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing.

US v. Black, 733 F. 3d 294 - Court of Appeals, 9th Circuit 2013

We agree with the district court, and affirm the denial of the defendants' motions to dismiss for outrageous government conduct. Although the *initiation* of the reverse sting operation here raises questions about possible overreaching, as we shall explain, the defendants have not met the "extremely high standard," *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir.1993), of demonstrating that the facts underlying their arrest and prosecution are so "extreme" as to "violate[] fundamental fairness" or are "so grossly shocking ... as to violate the universal sense of justice," *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir.2011). We also affirm the district court's rejection of sentencing entrapment.

NOTE The dissenting opinion of Noonan in this case as well as the dissenting opinion in the motion for rehearing (**US v. Black, 750 F. 3d 1053 - Court of Appeals, 9th Circuit 2014)** are of the opinion that this case as an example of violations of fundamental fairness.

US v. Bonanno, 852 F. 2d 434 - Court of Appeals, 9th Circuit 1988

Bonanno was superseded by US v Black but is included as it would have been precedent at the time the 2011 Standards were prepared.

Defines the requirements for denying outrageous conduct claims:

(1) the defendant was already involved in a continuing series of similar crimes, or the charged criminal enterprise was already in process at the time the government agent became involved; (2) the agent's participation was not necessary to enable the defendants to continue the criminal activity; (3) the agent used artifice and stratagem to ferret out criminal activity; (4) the agent infiltrated a criminal organization; and (5) the agent approached persons already contemplating or engaged in criminal activity.

b) Section 4.3 Undercover Investigations – 4.3.1

4.3.1 – Carefully managed undercover operations conducted by well-trained officers are among the most effective techniques available to law enforcement for addressing ICAC offenses

i) Probable Purpose

Multiple issues here, if errors occur because LE were not trained properly then potential for liability by government. Also see 4.3.4 a

ii) Possible Case Law

Canton v. Harris, 489 US 378 - Supreme Court 1989

Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.

In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may 391*391 have resulted from factors other than a faulty training program. See *Springfield* v. *Kibbe*, 480 U. S., at 268 (O'CONNOR, J., dissenting); *Oklahoma City* v. *Tuttle*, *supra*, at 821 (opinion of REHNQUIST, J.). It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

c) Section 4.3 Undercover Investigations- 4.3.2

4.3.2 – Supervisors are responsible for ensuring that ICAC investigators receive a copy of the Standards

d) Section 4.3 Undercover Investigations – 4.3.3

4.3.3 - ICAC investigations shall be consistent with the principles of law and due process.

e) Section 4.3 Undercover Investigations – 4.3.4 a

4.3.4 a – Only sworn, personnel shall conduct ICAC investigations in an undercover capacity. Private citizens shall not be asked to seek out investigative targets, nor shall they be authorized to act as police agents in an online undercover capacity.

i) Probable Purpose

Multiple issues here, vigilantism can lead to problems with prosecution but also if individual is working with LE then they are presumed to be agents of LE and must be fully trained in procedures. .

ii) Possible Case Law

US v. Morris, 549 F. 3d 548 - Court of Appeals, 7th Circuit 2008

There is, we grant, a legitimate concern with vigilantism—with private citizens conducting stings without the knowledge or authorization of the authorities. The vigilantes' aim might be to blackmail any offender whom they detect rather than to turn him over to the law enforcement authorities for prosecution. Cf. *United States v. Nardello,* 393 U.S. 286, 287, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969); *United States v. Frost,* 139 F.3d 856, 857 and n. 1 (11th Cir.1998). Or they might botch their investigation, alerting the offender in time for him to elude justice. But stings, including private ones, must be distinguished from entrapment. Stings are schemes for getting a person who is predisposed to criminal activity to commit a crime at a time or place in which he can be immediately apprehended; they are an essential tool of law enforcement against crimes that have no complaining victim. Entrapment refers to the use of inducements that cause a normally law-abiding person to commit a crime, and is a defense when the entrapment is conducted by law enforcement officers or their agents. As we explained in *United States v. Hollingsworth,* 27 F.3d 1196, 1200 (7th Cir.1994) (en banc), "The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation. A public official is in a position to take bribes; a drug addict to deal drugs; a gun dealer to engage in illegal gun sales. For these and other traditional targets of stings all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability can be presumed. It is different when the defendant is not in a position without the government's help to become involved in illegal activity. The government `may not provoke or create a crime, and then punish the criminal, its creature.

f) Section 4.3 Undercover Investigations – 4.3.4 b

4.3.4 b – ICAC personnel shall not electronically upload, transmit, or forward any contraband. This does not prohibit the transfer of evidence between law enforcement officials as provided by section 4.4.4 of these standards.

i) Probable Purpose

It would not be appropriate for LE to supply the CP or other inappropriate images and then charge for these images. In drug cases, it is typically considered entrapment when

LE supplies all of the ingredients for manufacturing drugs and then charge an individual for manufacturing the drugs.

g) Section 4.3 Undercover Investigations – 4.3.4 c

4.3.4 c – Other than images or videos of individuals, age 18 or over, which have provided their informed written consent, and at the time consent was given were employed by a criminal justice agency, no actual human images or videos shall be utilized in an investigation. Employee is defined as a sworn, or compensated individual, or any individual working under the direction and control of a law enforcement agency.

h) Section 4.3 Undercover Investigations – 4.3.4 d

4.3.4 d – Absent prosecutorial input to the contrary, during online dialogue, undercover officers should allow the investigative target to set the tone, pace, and subject matter of the online conversation. Image transfer shall be initiated by the target.

i) Probable Purpose

There is a very fine line between 'ready and willing' and inducement. If the LE just states that age and the target responds with suggestions of sex, then this is considered ready and willing evidence of predisposition, but per Poehlman, if the LE suggests activities then it is difficult to determine predisposition or inducement.

ii) Possible Case Law

Jacobson v. United States, 503 US 540 - Supreme Court 1992

In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.

Law enforcement officials go too far when they "implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute

Also review *Sherman*, 356 U. S., at 374, *Sorrells* v. *United States*, 287 U. S. 435, 441 (1932).

US v. Poehlman, 217 F. 3d 692 - Court of Appeals, 9th Circuit 2000

Poehlman's enthusiastic, protracted and extreme descriptions of the sexual acts he would perform with Sharon's daughters are, according to the government, its strongest evidence of Poehlman's predisposition. Indeed, once he got the idea of what Sharon had in mind, Poehlman expressed few concerns about the morality, legality or appropriateness of serving as the girls' sexual mentor. But Poehlman was not convicted of writing smutty e-mails; he was convicted of crossing state lines, some six months later, to have sex with minors. The problem with using Poehlman's e-mails as evidence of predisposition is that they were all in response to specific, pointed suggestions by Sharon. The e-mails thus tell us what Poehlman's disposition was once the government had implanted in his mind the idea of sex with Sharon's children, but not whether Poehlman would have engaged in such conduct had he not been pushed in that direction by the government. In short, Poehlman's erotic e-mails cannot provide proof of predisposition because nothing he says in them helps differentiate his state of mind prior to the government's intervention from that afterwards.

i) Section 4.3 Undercover Investigations – 4.3.4 e

4.3.4 e – Undercover online activity shall be recorded and documented. Any departure from this policy due to unusual circumstances shall be documented in the relevant case file and reviewed by an ICAC supervisor.