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IN THE SUPREME COURT OF FLORIDA

MICHAEL ALLEN ADAMS,

Petitioner/Appellant,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 80,239

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0934070
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 904-252-3367

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The petitioner accepts the case and facts as they appear in the opinion of the Fifth District Court of Appeal except insofar as the facts allow the conclusion that the petitioner dealt with a middleman rather than a state agent. The petitioner sets forth in the body of the argument the material facts omitted by the district court, which facts lead to the contrary conclusion that the petitioner was entrapped.

SUMMARY OF THE ARGUMENT

Section 777.201, Florida Statutes (1987), memorializes the "objective" test, as is borne out by the substance, if not by the language, of the caselaw. Under this objective inquiry into police methods, the trial court correctly dismissed the charge of trafficking against the petitioner, based on entrapment. The petitioner was induced by a state agent to commit a crime where there was no evidence of ongoing criminal activity and no governance to insure that the means used to discover crime did not instead create it. Such methods pose substantial risk of inducing ordinary people to engage in criminal behavior, and are the sort of conduct that the entrapment defense is meant to deter, including the use of a de facto agent, otherwise styled a "middleman."

ARGUMENT

PETITIONER WAS ENTRAPPED AS A MATTER OF LAW ACCORDING TO THE "OBJECTIVE" STANDARD OF ENTRAPMENT WHICH EXISTS IN FLORIDA IN BOTH CASELAW AND STATUTE.

The District Court of Appeal found that the petitioner, Michael Adams, was induced to engage in crime not by a state agent but by a middleman, and held that the defense of entrapment was therefore not available to him. Review of this cause raises the overarching question of the nature of the defense of entrapment.

As this court notes in Herrera v. State, 594 So.2d 275, 277 (Fla. 1992), entrapment is a defense created by the courts. The seminal case is Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed.413 (1932). Here the Court recognized the impropriety of convicting defendants for criminal activity instigated by the government.[1]

In Sherman v. United States, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958), the Court relied upon Sorrells to "conclude from the evidence that entrapment was established as a matter of law." Writing for the majority, Mr. Chief Justice Warren decried any act that "plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this." (Emphasis added.)

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[1] The reason, according to the Court, was that the defendant caught in this situation was somehow "innocent." Sorrells, 287 U.S. at 451.

The underscored statement embodies in little the "objective" theory of entrapment. It considers not individual proclivities, but examines the propriety of police acts. The principle may be restated thus: To deter the reprehensible practice of entrapment, the defendant caught thereby will be let go. This is a matter of public policy crucial in a civilized society. See, e.g., State v. Hunter, 586 So.2d 319, 322-324 (Fla. 1991) (Barkett, J., concurring in part, dissenting in part).

Florida's constitution provides due process protection against such methods. Article I, section 9, of the Florida Constitution provides that the laws of the state shall be carried out with due process, or in other words, with fairness. See Herrera v. State, 594 So.2d 275, 278 (Fla. 1992) (Kogan, J., concurring in result only, with opinion). Concerned over the potential for abuse that naturally accompanies the use of subterfuge in combatting crime, Mr. Justice Kogan offered the reminder that due process, or fairness, requires that police conduct not fall below standards "to which common feelings respond, for the proper use of governmental power." Hunter, 586 at 324 (Kogan, J., concurring in part, dissenting in part) (citations omitted).

In Cruz v. State, 465 So.2d 516, 521-522 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), this court addressed this very real danger. Recognizing that the issue of "objective" entrapment is "a matter of law for the trial court to decide," and rests on whether "the police have cast their nets in permissible waters," the court elaborated the

following guide, a "threshold" test for entrapment:

> Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

Id. at 522.

The Cruz formula was enacted into law in 1987, through the promulgation of section 777.201, Florida Statutes (1987):

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

This section collapses both prongs of the Cruz standard into language that parallels section 2.13 of the Model Penal Code. By providing that certain methods of "encouragement" are repugnant to ideals of fairness and constitute a defense to the crime committed, this language retains the intention to measure government acts against an objective standard.[2]

This court recently reaffirmed the doctrine of "objective" entrapment, with its concern for fairness and right action, in Hunter, 586 So.2d at 322. Repeating the Cruz two-part test as the initial inquiry to be conducted when considering the defense of entrapment, the court concluded that "[b]y focusing on police

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[2] But cf. Gonzales v. State, 571 So.2d 1346, 1349-1350 (Fla. 3d DCA 1990) (Cruz test is two-fold, including both a "subjective," individual proclivities, test, and an "objective," due process, test.

conduct, this objective entrapment standard includes due process considerations."[3]

In the petitioner's case, the district court did not discuss whether the inducement to engage in crime, if performed by the state or its agent, would have constituted entrapment. Nor did the court discuss the nature of entrapment, whether "objective" or "subjective." It did not reach these issues because it found that Michael Adams had been persuaded to crime by a middleman, and not by the state.

However, the facts in the record-on-appeal do not support the district court's conclusion that Adams had no entrapment defense to assert. The major actor in the drug setup was Danny Sly, who "wanted to help" Easterling produce three drug traffickers (Record-on-Appeal, p. 50). The trial transcript shows that Sly was certainly aware of Easterling's substantial assistance agreement, and that Hollecker might know, although Easterling herself did not tell him (Record-on-Appeal, p. 38). The fact that a third person, Mark Hollecker, found Adams for Easterling and Sly does not eliminate state involvement. It was Sly who negotiated with Michael Adams, Sly who suggested the place of the transaction, Sly who informed Adams how much contraband was

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[3] Further, even if the objective view is "not founded on constitutional principles," Cruz, 465 at 520, n.2, the "prostitution of the law" meant to be avoided partakes of the same controlling ideal of civilized law as the constitututional principle of due process. See State v. Glosson, 462 So.2d 1082 (Fla. 1985), for an entrapment analysis whose crux is that government conduct which violates constitutional due process rights requires dismissal of criminal charges.

needed and for what amount of money (Record-on-Appeal, pp. 38-40).[4]

The Cruz standard rests on "ongoing criminal activity" and "reasonably tailored means." Addressing the ongoing activity requirement, the state points to Adams's prior drug exchanges and companionable use with Hollecker. The correct analysis, however, would recognize that "ongoing activity" cannot include what law enforcement agencies are not already aware of.[5] Pezzella v. State, 513 So.2d 1328 (Fla. 3d DCA 1987) (persuading a Quaalude addict to buy Quaaludes from police agent where police had no knowledge of previous illicit drug activity was entrapment); State v. Banks, 499 So.2d 894 (Fla. 5th DCA 1986) (use of sex to obtain contraband defendant did not already possess may be the manufacture of crime). Although section 777.201 does not specifically mention ongoing activity, it is plain that without such knowledge the police cannot demonstrate lack of improper inducement.

The second prong of the Cruz analysis is implicit in section 777.201. Analyzing Michael Adams's facts under this "reasonably tailored" requirement reveals that the law enforcement personnel in charge of Easterling's substantial assistance agreement did not instruct or oversee her efforts to produce traffickers

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[4] The petitioner asserts, without admitting, that at the very least Hollecker was a de facto agent of the state, and notes that the state should not be permitted to accomplish indirectly what it may not do directly.

[5] The principle is similar to that requiring probable cause before police may search for evidence of wrongdoing.

(Record-on-Appeal, pp. 34, 42-43, 49). Thus, the state's conduct was so lax that it cannot lay claim to reasonableness as required by either Cruz or section 777.201.

The state of the law interpreting entrapment, as well as its application, is in flux. The petitioner suggests that in spite of conclusions to the contrary, entrapment cases in Florida are decided on facts supporting the objective view. That is, it is plain from the facts of entrapment cases that the real determining factor is police misconduct. The so-called subjective test is invariably passed by a person who was the victim of unacceptable police behavior. In other words, the behavior of the state agent was such as to fail the objective test considering the "proper use" of government power, to which "common feelings respond." Sherman v. United States, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958).

Confusion would be reduced by this court's acknowledgment that section 777.201, Florida Statutes (1987), embodies the objective aspect of entrapment law. The subjective view is, at best, a subset of the objective, and is logically subsumed by it. The objective theory of entrapment serves the public policy of deterring reprehensible police conduct. Whether the defendant is guilty of a certain act is less crucial a consideration than the means by which that guilt was brought about. In the final analysis, certain means fall below what is acceptable in a civilized society, and those cannot be condoned.

As a postscript, it is perhaps relevant to mention the

standard jury instruction approved by this court in 1989. This instruction (not the substantive law it tracks), by setting forth the obverse of section 777.201, restructures Florida's entrapment law to eliminate its chief deterrence of wrong government acts--the objective examination of police activity.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, petitioner respectfully requests that this honorable court reverse the judgment and sentence of the Fifth District Court of Appeal and reinstate the order of the trial court, and remand this cause to the trial court with directions that the petitioner be discharged.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Anne Moorman Reeves

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0934070
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Michael Allen Adams, 400 W. Beacon, #502, Lakeland, Florida 33802, on this 11th day of December, 1992.

Anne Moorman Reeves

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

MICHAEL ALLEN ADAMS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	COURT CASE NO. 80,239

A P P E N D I X

PD

91-894
PA

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE OF FLORIDA,

Appellant,

v. CASE NO. 91-2280

MICHAEL ADAMS,

Appellee.

Opinion filed June 26, 1992

Appeal from the Circuit Court
for Osceola County,
Belvin Perry, Jr., Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellant.

James B. Gibson, Public Defender, and Paolo G. Annino, Assistant Public Defender, Daytona Beach, for Appellee.

DAUKSCH, J.

This is an appeal from an order granting appellee Michael Adams' motion to dismiss, pursuant to Rule 3.190(b), Florida Rules of Criminal Procedure. The trial court found that appellee's due process rights had been violated as the result of the Kissimmee Police Department entering into a substantial assistance agreement with one Kelley Jo Easterling. We reverse.

On November 24, 1991, appellee was charged with a violation of section 893.135, Florida Statutes (1989), knowingly selling, delivering or possessing more than twenty-eight grams but less than 200 grams of a mixture containing methamphetamine and ephedrine, a substance controlled by section 893.03(2)(c)3, Florida Statutes (1989).

On February 22, 1991, appellee filed a motion to dismiss pursuant to rule 3.190(b), Florida Rules of Criminal Procedure, arguing that he was entrapped as a matter of law into selling narcotics and that, therefore, his right to due process of law under the United States and Florida Constitutions had been violated.

At a hearing on the motion, Easterling, who had been previously arrested and charged with the offense of trafficking in cocaine, testified that she entered into a substantial assistance agreement with the Kissimmee Police Department. This agreement was described by the officer who arrested Easterling as being that in return for "her providing me with . . . three . . . similar trafficking narcotic cases," the officer would request the State Attorney's Office to change Easterling's charge from trafficking to possession.

Easterling testified that she first met appellee Michael Adams through her boyfriend Danny Sly and his friend Mark Hollecker. Easterling testified that Hollecker bought and sold drugs. During a trip to Lakeland with Sly and Hollecker to meet Adams at a barbecue, Easterling testified the three went back to Adams' house. Sly told Adams that Easterling had the money, and Adams told them he could get methamphetamine. Adams was offered "an extra couple hundred bucks" to bring the drugs to Kissimmee.

Appellee Adams testified that he had known Mark Hollecker and his family about twenty years and that he met Sly three or four years before when he had moved to Florida. Adams testified he had used drugs including marijuana and cocaine with Hollecker before. He was questioned:

> Q. Was this your only involvement with Mr. Hollecker concerning the use or sale of drugs?

A. I'm not sure. You talking about this time?

Q. Any time in the past?

A. No. They came to my apartment in Lakeland and I have gone and scored drugs and used them before. We went to a couple of concerts.

Adams testified that his involvement with this case began when he received a message on his answering machine from Hollecker. Hollecker informed Adams that Hollecker needed an ounce of cocaine to make $100 from "[a] good friend of his." Adams testified he told Hollecker "I would try to do it, but I had to have a gram and a-half for my trouble." Adams indicated that he told Hollecker he could not get cocaine, but could get methamphetamine, and wanted an ounce for himself because he was addicted to the substance.

Adams testified Hollecker suggested the sale take place in Kissimmee rather than Lakeland. Easterling was present in Adams's Lakeland apartment during the conversations, but when asked what persuaded him to deliver the narcotics to Easterling, Adams responded, "Nothing persuaded me to Kelley Easterling. I was supposed to deliver them to Mark Hollecker." Adams testified he was arrested when he told Easterling he had the contraband on his person, when he arrived at the Seven-Eleven store in Kissimmee where they had agreed to meet. He further testified that while she was in Lakeland, he didn't believe he "had twenty words" with Easterling.

The trial court entered an order granting appellee's motion to dismiss, concluding that the "action or non-action by law enforcement permitted Ms. Easterling and her cohorts to manufacture a crime in this case. This action by agents of law enforcement clearly [violates] the due process provisions of both the State and Federal Constitutions." We disagree.

In ruling that appellee's due process rights were violated by the actions of Easterling, Sly and Hollecker in getting appellee to obtain methamphetamine for them and deliver it to Kissimmee, the trial court relied primarily on State v. Glosson, 462 So.2d 1082 (Fla. 1985) and State v. Krajewski, 587 So.2d 1175 (Fla. 4th DCA), quashed, 589 So.2d 254 (Fla. 1991), on remand, 17 F.L.W. D900 (Fla. 4th DCA April 8, 1992). The Glosson court held that based upon the due process provision of Article I, Section 9 of the Florida Constitution, governmental misconduct which violates the constitutional due process rights of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges. Thus, the court ruled

> that a trial court may properly dismiss criminal charges for constitutional due process violations in cases where an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution.

Glosson, 462 So.2d at 1085. In Krajewski v. State, 587 So.2d 1775, 1184 (Fla. 4th DCA 1991), the court certified the following question:

> DOES THE PERFORMANCE OF AN AGREEMENT UNDER SECTION 893.135(4) AS AMENDED, WHEREBY AN INFORMER WILL RECEIVE A SUBSTANTIALLY REDUCED SENTENCE IN EXCHANGE FOR SETTING UP NEW DRUG DEALS AND TESTIFYING, CONSTITUTE A PER SE VIOLATION OF THE HOLDING IN STATE V. GLOSSON, 462 So.2d 1082 (FLA. 1985) AS TO AN INDIVIDUAL ENSNARED BY THAT PERFORMANCE?

The supreme court answered this question in the negative based on its holding in State v. Hunter, 586 So.2d 319 (Fla. 1991). State v. Krajewski, 589 So.2d 254 (Fla. 1991).[1]

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[1] Two other substantial assistance cases relied upon by appellee below were treated similarly. State v. Anders, 560 So.2d 288 (Fla. 4th DCA 1990), vacated, 587 So.2d 455 (Fla. 1991); State v. Embry, 563 So.2d 147 (Fla. 2d DCA 1990, quashed, 588 So.2d 995 (Fla. 1991), on remand, 593 So.2d 327 (Fla. 4th DCA 1992).

We find this case governed by that portion of the Hunter opinion which holds that "[w]hen a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense." State v. Hunter, 586 So.2d at 322, citing to State v. Garcia, 528 So.2d 76 (Fla. 2d DCA), rev. den., 536 So.2d 244 (Fla. 1988); Acosta v. State, 477 So.2d 9 (Fla. 3d DCA 1985); State v. Perez, 438 So.2d 436 (Fla. 3d DCA 1983). See also State v. Petro, 592 So.2d 254 (Fla. 2d DCA 1991); State v. Brugman, 588 So.2d 279 (Fla. 2d DCA 1991). In the instant case, it was Hollecker who made the initial contact with appellee. As with one of the Hunter defendants, appellee's involvement was "wholly voluntary even though his motive may have been benevolent." Hunter, 586 So.2d at 322. (The trial court found appellee "in the final analysis was just trying to do a favor for a friend."). Appellee's own testimony establishes that he had "minimal" contacts with Easterling, another important factor in Hunter. We thus agree with the state that appellee should not have been allowed to raise his entrapment or outrageous conduct and due process claims below. Appellee was not entitled to assert an entrapment defense as a matter of law, because he was induced into bringing the narcotics into Kissimmee by Mark Hollecker, not Kelley Easterling.

We reverse the order of the trial court dismissing the information and remand the cause for trial.

REVERSED and REMANDED.

GRIFFIN, J., concurs.

COWART, J., dissents, with opinion.

COWART, J., dissenting.

Easterling was arrested and charged by the Kissimmee Police Department with trafficking in cocaine. At that vulnerable moment, of course, she was in need of, and desired, any "substantial assistance" she could obtain from the Kissimmee Police Department. A Kissimmee police officer and Easterling agreed that if Easterling would provide the officer with three drug trafficking cases, the officer would request the state attorney's office to reduce the charges against Easterling. Thus motivated, Easterling went about producing three drug trafficking cases for the Kissimmee officer. Presumably Easterling got her credit for this one.

Easterling had two friends, Danny Sly and Mark Hollecker, both of whom were involved in the buying and selling of drugs. Hollecker had a long time trusting friend named Michael Adams. Easterling induced Sly and Hollecker to contact Adams, who lived in Lakeland, and to induce him to sell drugs to Easterling and to cause the transaction to take place in Kissimmee so Easterling could receive the credit. Hollecker with Easterling went to see Adams in Lakeland and arranged the transaction. When Adams arrived in Kissimmee and told Easterling he had the contraband drugs with him, he was arrested by the Kissimmee police officer.

The trial court granted Adams' motion to dismiss the charges against him because the action by the Kissimmee police officer permitting "Ms. Easterling and her cohorts to manufacture" the crime in this case "violated the due process provisions of both the state and federal constitutions". The State appeals. The majority opinion reverses.

Apparently under the particular facts and circumstances of this case and the law relating to due process and entrapment, if the Kissimmee police officer had himself directly induced Adams to obtain drugs to sell to the officer and the trial court had held that Adams' due process was thereby violated, the decision would be upheld.

Likewise and similarly, if Easterling alone acting at the behest and supplied motivation of the Kissimmee police officer, had induced Adams to obtain drugs to sell to Easterling and the trial court had held that Easterling was an agent of the Kissimmee police officer and that Adams' due process rights were violated, that decision would be upheld.

However, in this case, because Easterling, acting on behalf of the police officer induced a "middleman" (Hollecker) to handle the mechanics of contacting and inducing Adams to commit the crime of obtaining and possessing drugs to sell, the trial court's ruling that Adams' due process rights were violated is being reversed. There is no logical or moral basis for this distinction.

If the police officer cannot violate Adams' due process rights by inducing Adams to commit a crime which he would not have otherwise committed, then morally, logically and legally the police officer cannot do the same thing indirectly by using Easterling to do for him what he cannot legally do directly himself. Likewise, if Easterling, as a state agent, cannot violate Adams' due process rights by inducing him to commit a crime which he would not have otherwise committed, then morally, logically and legally, neither the police officer nor Easterling, can do the same thing indirectly by using Hollecker to do for them what they cannot legally do directly themselves. Easterling used Hollecker to do the exact same thing that the Kissimmee police officer used Easterling to do, -- that which had the officer or Easterling done directly would have been held to have violated Adams' due process rights. Just as surely as Easterling was acting at the instigation and behest of the Kissimmee police officer, Hollecker was acting at the instigation and behest of Easterling. Hollecker was just as much of a police agent as was Easterling, although he may have been more innocent in that Easterling knew she was acting on behalf of the Kissimmee police officer, while Hollecker might not have known why, and on whose behalf, he and Easterling were really acting. This ignorance on the part of Hollecker does not make him any less a person acting as a result of the Kissimmee police officer's agreement with Easterling. The result on Adams' due process rights is the same. To call Hollecker a "middleman" rather than to call him what he

really was -- a sub-agent acting on behalf of an agent (Easterling) -- acting on behalf of a state agent (the Kissimmee police officer), is rather shallow sophistry. However desired the result may be, in legal substance there is no magic when a principal uses an agent to do something for the principal. Good law always holds the principal responsible for the acts of agents. That Hollecker made the initial contact with Adams is the simple result of Easterling using Hollecker to do that and has, in substance, no more legal significance than had the Kissimmee police officer used Easterling to make the initial contact with Adams. Again, that Adams' contacts with Easterling (acting as principal to Hollecker as agent), were "minimal" is no more important than the fact that Adams had no contact with the Kissimmee police officer (acting as principal to Easterling as agent).

If this is good law, then, in order to avoid due process entrapment problems, law enforcement officers need only (1) not do the acts themselves, (2) tell their first level agents (like Easterling) not to directly induce persons to commit crimes they would otherwise not commit, and (3) instruct first level agents (like Easterling) to themselves solicit others (second level agents like Hollecker) to do the dirty work because the courts are only able to see and understand first level agents and hold that law enforcement officers as principals will not be held responsible for the acts of sub-agents like Hollecker (calling them "middlemen") as law enforcement agents are held responsible

for the acts of first level agents like Easterling. The legal principle in this case appears to be that a principal can do indirectly what the principal cannot do directly if enough agents are used to remove an agent's wrongful act two agency steps away from the principal. The law should look to substance and not form and if principals are to be held responsible for the acts of their agents, they should also be held responsible for the acts of agents obtained and used by their agents to accomplish the principal's purposes and objectives. In law no one should be able to do indirectly what they cannot do directly; otherwise the law places value on form, procedure, and subterfuge rather than on substance, and if the law does that, the law is shallow and useless and all is lost.