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MARCH 1973

ALERT

CRIMINAL DIVISION

FROM THE OFFICE OF
THE ATTORNEY GENERAL
OF THE STATE OF MAINE

MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

The main article on entrapment in this month's issue deals with a subject which is widely misunderstood by law enforcement officers as well as the general public. Because the discussion will present issues that will have a direct bearing on the day-to-day activities of law enforcement officers in the field, I am sure it will be of particular interest to our readers.

If any officer has a question about this or any other article in ALERT, he should contact the Attorney General's Office by phone or letter. Questions and comments of general import will be included in our new column FORUM. We also welcome and encourage comments for the FORUM column from judges and attorneys.

Jon A. Lund

JON A. LUND
Attorney General

ENTRAPMENT I

The doctrine of entrapment holds that an otherwise innocent, law-abiding citizen cannot be held responsible for his criminal acts when he has been unfairly persuaded to commit those acts by law enforcement undercover agents.

A careful analysis of the definition should reveal that as a courtroom tactic, the entrapment defense is extremely risky for the defendant. It is difficult for a defendant to argue to the jury that he was unfairly persuaded to commit criminal acts and at the same time deny that he did the acts. Some courts have held that it is impossible. That is why the entrapment defense is usually the defendant's last selection of weapons. If the defendant fails to convince the jury that the police entrapped him, he has, for all practical purposes, sealed his own doom. He has admitted that he committed the criminal acts.

Despite the high risk, the entrapment defense has been increasingly used in recent years. This is partly because the direct evidence in cases involving undercover agents is often so overwhelming that the defendant has no other choice than to argue entrapment. But, it is also true that entrapment has a special appeal in Western culture, and especially in the United States, where, since colonial times, our people have been suspicious of overly aggressive police conduct.

PHILOSOPHY OF ENTRAPMENT

This court-created protection for law-abiding citizens has its philosophical roots in the Judaeo-Christian doctrine of original sin. Man (so the argument goes) was created by God, so he is basically good. But, man was corrupted in the Garden of Eden by Satan, and is therefore, eternally subject to evil temptation. Most men, given a reasonable chance, will resist temptation and obey the law. But, it is always a close struggle and man must never be deprived of his reasonable chance. To entrap an otherwise innocent, law-abiding citizen by tricks, decoys and unfair persuasion is to deprive that citizen of his reasonable chance. Government's function (the argument concludes) is to encourage law-abiding citizens to remain law-abiding. Government's function is not to lure law-abiding citizens into crime. Or, put another way, the law enforcement officer exists to prevent crime, not create it.

But, however much the courts are concerned with the need to protect law-abiding citizens, they are equally concerned with the need to prevent crime. The courts recognize that certain criminal activity is virtually undetectable without the use of undercover agents employing traps, tricks and decoys. For example, the narcotics peddler, the

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loanshark, and the gambler operate in secret. Their victims are often eager, sometimes helpless, andrarely willing to cooperate with the police. To detect and prevent such criminal activity, it is essential that law enforcement agents be able to approach suspects and offer them the opportunity to commit a crime in front of witnesses who can testify at trial. To do this effectively, undercover agents must use traps and tricks.

And there is nothing wrong with trapping or tricking a criminal. the undercover agent in this instance is not creating crime. He is not unfairly coercing a struggling citizen into yielding to temptation. Instead, he is offering an already criminally disposed person the opportunity to commit a crime. Such a person may be unwary, but he is not innocent. As the United States Supreme Court said in *Sherman v. U.S.*, 78 S. Ct. 819, at 921 (1958).

> "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

The *Sherman* quote should dispel any misconception that traps in themselves are always wrong. They are not. The trap will always be examined closely by the court, but, only to help in determining the defendant's true state of mind at the time of temptation. State-of-mind is the issue. Both the innocent and the criminally-minded can be offered a trap. But, only the innocent can be entrapped.

DETERMINING DEFENDANT'S STATE-OF-MIND

To determine whether a defendant had an innocent mind at the time, the undercover agent offered him an opportunity to commit a crime, the court and jury will look at three main elements: (1) evidence of prior, similar criminal conduct, (2) the willingness of the defendant's response to the trap, (3) the type of trap offered by the police.

[a] Prior Similar, Criminal Conduct.

The majority of cases hold that evidence of prior, similar, criminal conduct is not necessary to prove that the defendant was criminally predisposed at the time the undercover agents set their trap. *U.S. v. Rodrigues*, 433 F.2d 760 (U.S. Court of Appeals for the First Circuit, 1970). However, if such evidence is available, it should always be used. It is admissible because the issue in entrapment is always state-of-mind. *State v. Allen*, 292 A.2d 167 (Maine Supreme Judicial Court, June 1972). And evidence of prior, similar conduct has a powerful effect on the jury. For example, in *State v. Hochman*, 86 N.W. 2d 446 (Supreme Court of Minnesota, 1957), an undercover agent approached a book store owner suspected of selling obscene books and expressed an interest in buying such books. The owner replied that he sold the "hotter stuff" only to his better customers. The owner then encouraged the agent to become a better customer, so that he could get to know him better. On a subsequent visit, the owner told the agent that he (the agent) had arrived too late and that the "stuff" had been sold to another customer. On the third visit, the owner did make the sale and the appellate court, in rejecting defendant's claim of entrapment, stressed that the defendant's own admissions of his prior business clearly demonstrated a "willingness and an intention to commit the offense as charged."

In *U.S. v. Abdallah*, 149 F.2d 219 (U.S. Court of Appeals, 2nd Circuit, 1945) narcotics agents, using an informer supplied with marked government money, secured illegal, postdated morphine prescriptions from a doctor suspected of issuing illegal prescriptions. To show prior criminal intent, the agents secured 115 filled narcotics prescriptions from drugstores surrounding the suspect's medical practice. These prescriptions had been issued over a six months period prior to arrest.

In *Cain v. U.S.*, 19 F. 2d 472 (U.S., Court of Appeals for the 8th Circuit, 1927), the agents went to trial with only one documented illegal purchase of narcotics. However, their informant was able to testify at trial that he had made several illegal purchases from defendant prior to the one documented purchase. In upholding the finding of no entrapment, the court stressed that defendant was "in the business" of unlawfully selling narcotics and therefore, was in no position to protest a police trap that merely offered him an opportunity to continue the usual course of his dealings.

The three cases above suggest that whenever possible, undercover agents should make an effort to document a series of transactions rather than one isolated event. If not possible, the agents should strengthen their position against the anticipated entrapment defense by securing evidence tending to show defendant was in the business before they set their trap. It will be especially helpful if the agents keep detailed, written accounts of whatever information or observations led them to focus their trap on defendant in the first place.

[b] Willingness of Defendant's Response

Although the undercover agent should always try to collect evidence of prior, similar conduct in order to show criminal intent, it is not the only means available to rebut the entrapment defense. Otherwise, criminally minded first offenders would find an easy sanctuary and the law will not permit this. *U.S. v. Rodrigues*, 433 F.2d 760 (First Circuit Court of Appeals, 1970).

When there is no evidence of prior, similar conduct, the usual method used to show criminal intent is the willingness with which the defendant responded to the police trap. For example, in *Price v. United States*, 56 F. 2d 135 (U.S. Court of Appeals for the Seventh Circuit, 1932), a government agent accompanied a drug addict into a restaurant owned by one of the defendants. The addict told the defendant (who knew of the addiction)

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that he was sick and the defendant immediately told the addict that he could get him anything he wanted. The first defendant then left the room for a few minutes and shortly after, the second defendant entered the restaurant with morphine and sold it to the addict. Given the immediacy of the defendant's response to the trap, there was no entrapment.

In *United States v. Nieves,* 451 F. 2d 836 (U.S. Court of Appeals for the Second Circuit, 1971), two undercover agents arranged to have an informant introduce them to two suspected cocaine sellers. After the introduction, the agents immediately made an offer to buy cocaine and the defendants immediately started negotiating the price. At the end of the negotiations, one of the defendants volunteered a phone number where he could be reached for future orders. There was no evidence introduced in court of prior similar conduct, but the entrapment defense failed. In concluding that defendants were criminally disposed and willing to sell cocaine at the time of the trap, the appellate court listed the volunteered phone number as one of the key facts supporting its conclusion.

In *U.S. v. Perkins,* 190 F. 2d 49 (U.S. Court of Appeals for the Seventh Circuit, 1951), an informer, acting under the control of a narcotics agent and using marked government money, asked a known, former addict, if he could "find any stuff." Immediately, the conversation between the two turned to haggling over price with a sale of heroin as an end result. The government had no evidence at all tending to show that defendant was currently selling narcotics or had ever done so in the past. In fact, the informer was trying to spring a trap on another suspect when he accidentally ran into the defendant, who was a former cellmate of the informant. But, the entrapment defense failed because in the court's view, defendant's eagerness to talk price showed that he was criminally predisposed to make the illegal sale. As stated above, entrapment is available only to the innocent, not to the criminally predisposed.

[c] Types of Traps

The third—and most important —test for determining whether defendant had an innocent state-of-mind when approached by the police is the type of trap used by the undercover agents. Entrapment will not be available to the defendant if the agents merely afford him an opportunity to commit a crime, as when an agent simply offers to purchase marijuana from a suspected marijuana dealer. *State v. Gellers,* 282 A.2d 173, (Maine Supreme Judicial Court, 1971). Nor, will the undercover agent hurt his case if he covers his naked trap with a little appropriate camouflage.

For example, in *Vaccaro v. Collier,* 38 F.2d 862 (U.S. District Court for Maryland, 1930), where an undercover agent attempted to purchase opium and morphine from a suspected narcotics dealer, the court said:

> "A suspected person may be tested by being offered opportunity to trangress the law in such manner as is not unusual, (as long as he is not) put under any form of *extraordinary* temptation or inducement. Thus, since a morphine dealer usually deals with addicts, an officer, in testing such a supposed dealer, may properly pretend to be an addict, with such a person's common discomforts and craving for the drug; thereby, giving color to the ruse, and he may offer a liberal price for the drugs and (be) persistent, for these things are common in such dealings. (38 F.2d at 870).

In constructing his trap, however, the undercover agent must be careful, as the court warned above, to avoid any inducement that is "extraordinary." The U.S. Supreme Court held that a jury could find such extraordinary inducement in *Sorrells v. United States,* 287 U.S. 435 (1932) under the following fact situation:

A prohibition agent visited defendant in North Carolina accompanied by three residents of the area who knew defendant well and who did not know that the agent was an agent. The agent soon learned that defendant was a former member of a certain World War I combat division and the agent told defendant that he, too, was a former member. The agent then asked defendant to get some liquor and defendant refused. The agent asked a second time and defendant refused again. The conversation then turned to war stories with one of the other men who also was a former member of the same division joining in. After an hour or so, the agent asked defendant a third time for liquor and the defendant left his home for a few minutes and returned with a jug which he sold to the agent for $5.00.

At trial, the government produced three witnesses who testified that defendant had a general reputation as a rumrunner. However, the government failed to produce any evidence tending to show that defendant had ever possessed or sold liquor on a specific prior occasion.

In contrast, the defense produced three neighbors and defendant's employer who testified that he had been employed for the past eight years in a textile mill without missing a day of work and that he had a good character. In addition, the witness present at the scene who happened to be a fellow veteran testified that it was expected that "one former war buddy would get liquor for another."

In holding that a jury could find entrapment here, the Supreme Court emphasized: (1) that defendant was an industrious, law-abiding citizen; (2) that the agent made repeated solicitations before succeeding; and (3) that most important, the agent took advantage of the sentiment aroused by swapping war stories with a "companion-in-arms." These facts taken together, the Court said, tend to show that defendant had an innocent state-of-mind when the agent sprang his trap.

The sharing of mutual experience again was an important ingredient

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in another case where the U.S. Supreme Court found an unfair trap. In *Sherman v. U.S.*, 356 U.S.369 (1958), a government informer, who was an addict, approached defendant, who was also an addict, in a doctor's office where defendant was attempting to take the cure. Over a series of meetings, the conversation between the government informer and defendant progressed to a discussion of their mutual problems in their attempts to overcome addiction. Finally, the informer asked defendant to supply him with a source because he (the informer) was not responding to treatment. Defendant refused a number of times, but finally agreed after the informer detailed his sufferings. Defendant supplied the drugs to the informer at no profit to himself and shared the drugs with the informer, thus resuming his habit.

It was not only the sharing of mutual experiences that led the court to condemn this trap. The court seemed particularly appalled that the informer would try to trap an addict who was voluntarily seeking treatment to cure his addiction. The court also stressed that defendant gave in only after repeated requests and complaints.

The government attempted to compensate for the questionable trap by pointing to defendant's previous narcotics convictions as proof of criminal intent. But, the most recent conviction was five years old, and the court also said that past convictions meant little considering that defendant was trying to take the cure. The court also noted that the police could gather no evidence of use or sale immediately prior to the documented transactions and the court seemed impressed that defendant did not make any profit from the documented sale. This totality of facts—and law enforcement agents should be aware that *no one fact is ever controlling in an entrapment case*—led the court to conclude that defendant had an innocent mind when approached.

* * * *

This article will be continued in next month's issue of ALERT.

IMPORTANT RECENT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J - Judge, P - Prosecutor, L - Law Enforcement Officer.

Search and Seizure; Automobiles L

Defendant was arrested on a traffic warrant. Because of recent burglaries in the area, the police insisted on taking certain property in defendant's car into protective custody. Defendant insisted that the property be left in his car, which was in a private parking lot. The police took the property anyway and found marijuana in a raincoat pocket.

The court held that the 4th Amendment gives owners a right to express their preference for the care of their personal property and compels police to respect that preference unless they can convince a magistrate to issue a warrant to seize the property. The court further held that the state could not transform the defendant's refusal to waive his constitutional right against unreasonable searches into a "suspicious" activity evidencing criminal conduct (i.e., here, possession of stolen goods). *People v. Miller*, 101 Cal. Rptr. 860 (Supreme Court of California, May, 1972).

Search and Seizure L

Defendant was convicted of possession of an unregistered sawed-off shotgun and appealed, claiming an illegal search and seizure. Officers responded to the scene of an altercation outside of a bar. When the officers arrived, they found a man fatally wounded on the ground, many bystanders, and another man holding a pistol. A bystander told one of the officers, "Check the blue Mercury...there are guns in it." The Mercury was 15 feet from where the dead man was lying. The officers went to the car, searched it, and found three guns, one a sawed-off shotgun.

The court held that the search was justified as an emergency. It would have been impractical to attempt to obtain a warrant under the circumstances. The presence of the victim and assailant, and probably friends of both, made immediate action imperative. If there were going to be more shooting, it would have been likely to happen long before a warrant could be procured. Furthermore, the number of police at the scene were not enough to make it feasible to stake out the car and send someone to obtain the warrant. *U.S. v. Preston*, 468 F.2d 1007 (6th Circuit Court of Appeals, October 1972).

Search and Seizure—Stop and Frisk L

Defendant was convicted of aggravated robbery and brought a habeas corpus petition for relief on the grounds that a frisk producing incriminating evidence was unlawful.

The defendant was one of four youths seen running by two police officers from a drug store in a high crime area. They were chased, momentarily lost, and again spotted. As the police wagon approached, they fled, and the defendant was the only one caught. He was frisked and a holster and cartridge were found. A woman immediately thereafter brought the police a gun that she said had been dropped by one of the four boys. The defendant was brought back to the drugstore and identified by the owner as one of the persons who had robbed him shortly before. The police had knowledge that robberies usually occurred at the opening and closing time of the store which was 10:00 p.m. The boys were seen running from the store at this time.

The court upheld the stop as valid since there was reason to believe criminal activity was afoot. *Terry v. Ohio*. Since the crime thought to be involved was robbery, a frisk for weapons was reasonable, as robbers

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are usually armed and dangerous. The furtive conduct by the boys upon seeing the police wagon further justified the officers' reasonable suspicion that the defendant was probably armed and needed to be frisked. *Richardson v. Rundle,* 461 F.2d 860 (3rd Circuit Court of Appeals, 1972).

Search and Seizure—Plain View L

Defendant was convicted of possession of narcotics. Two deputy sheriffs went to a house after receiving information from a roof repairman that he was suspicious that a laboratory was being operated in the house, where he had made repairs. The officers knocked on the front door, but no one was home. While standing on the front porch, they peered through a window which was partially covered by a drape. They saw oxygen tanks, beakers, other paraphernalia, and some white powdery substance on the floor. They checked with the next door neighbor and found that he had been keeping a record of his neighbors' movements. He told the officers that he had seen chemicals being brought into the house. The next day, the officers went back to the house after receiving a phone call from the neighbor and arrested the defendant and others, as they were leaving in a car. Narcotics were found on them at this time. Defendant claimed that the officers had made an illegal search of his house by looking in the window.

The court held that there was no illegal search. The court pointed out that the deputies had only gone to the house to talk with the occupants. They approached the house openly in broad daylight and merely looked through a window located immediately to the left of the front door. They moved no bushes or other objects out of the way to do so. The court said that there is no rule of private or public conduct which makes it illegal or an invasion of a person's right of privacy for anyone, openly and peaceably. At high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant, whether it be a pollster, a salesman, or an officer of the law. *U.S. v Hersh,* 464 F.2d 228 (9th Circuit Court of Appeals, July 1972).

Search and Seizure—Stop and Frisk L

Defendant was convicted of unlawful possession of narcotic drugs and appealed. Officers on patrol observed defendant step from an alcove of a building at 11:15 a.m., look at the officers, and then step back into the alcove as if to avoid contact with them. Defendant was carrying a brown paper bag. At the same time, the officers observed a co-defendant slide down in his seat in a car parked directly across from the alcove. The officers approached both men and asked them routine questions. The officers then decided to frisk both men, and after a minor struggle, found narcotics in the paper bag and among other personal belongings. Defendant claimed that the evidence should have been suppressed at his trial because it was the product of an illegal "stop and frisk".

The court held that defendant's avoidance of contact with the officers, coupled with his possession of a closed small paper bag, did *not* constitute a sufficient basis for a "stop and frisk".

> "There are clearly no facts present in this case which would justify a belief that appellant was armed and dangerous. Appellant did not run and came over to the police officers when called by them. Carrying a lunch bag is not a circumstance which would permit an inference that the bag contained a weapon. The circumstances here would at most justify investigative questioning." *Commonwealth v. Meadows,* 293 A. 2d 365, 367 (Superior Court of Pennsylvania, June 1972).

Search and Seizure—Stop and Frisk L

Two police officers were sitting in a patrol car when they were approached by a man. The man told them that he had seen another man down the street, sitting on a porch with a gun in his waistband. The man on the porch was described as wearing a black shirt and blue knit hat and having an artificial leg. The informant was unknown to the police officers and refused to give his name, saying he was afraid to be involved. The officers went to the described location and approached the defendant who fit the description given by the informant. One officer frisked the defendant, found a loaded pistol in his waistband, and arrested him. At the defendant's trial, the court held that the pistol was a product of an illegal search and seizure, and suppressed the pistol. The prosecution appealed.

The court of appeals held that the actions of the officers were justified. Even though the officers did not know the name of the informant, they were not required to drop the matter. The credibility of the informant was established by his status as an ordinary citizen offering aid to the police. (See ALERT January 1973, p.2) It was their duty to investigate it. When they saw a man fitting the description, they were entitled to question the man. Also, because the man was described as armed, they were entitled to make a limited frisk for weapons to protect themselves. *U.S. v. Walker,* 294 A.2d 376 (District of Columbia Court of Appeals, August, 1972).

Search and Seizure; Plain View; Chimel L

Defendants were convicted of interstate transportation of stolen motorcycles. This federal charge grew out of an investigation by a state police officer. The state officer noticed defendants stopped by a bridge and he stopped to offer help if needed. He then noticed that the visible serial number of both motorcycles appeared to have been altered. He then checked the secret manufacturer's serial number under the crank case and finding that they did not match, arrested the motorcyclists. He then searched

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defendants' saddle bags and found a propane torch and solder. Defendants apparently argued that the check of the crank case serial number constituted a search and was conducted without probable cause.

The court held that the plain-sight evidence of the altered serial number gave the officer probable cause to check under the crank case. The court further held that the officer was justified in searching the saddle bags because they were within reach of defendants and the officer, having arrested defendants, was authorized under *Chimel* to protect himself by searching for concealed weapons. *U.S. v. Zemke,* 457 F. 2d 110 (7th Circuit Court of Appeals, February, 1972).

Search and Seizure L

Defendant was convicted of possession of a sawed-off shotgun. Law enforcement officers had a search warrant for a sawed off shotgun, and took eight men along to execute the warrant because they anticipated danger. They knew that defendant had been convicted earlier for firing a weapon at a police officer and escaping from custody. One of the officers opened the unlocked screen door of the residence, called out his purpose, and move inside in one continuous motion, without waiting for a response from within. Defendant claimed that the evidence should have been suppressed because the officers did not announce their office and purpose before entering.

The court said:

"It is conceded that the agents in serving the warrant did not comply with the statute, which requires an announcement of identity and purpose prior to entry. This court has read into the statute an exception which applies when, under the circumstances, the announcement would create obvious peril to the lives of the law enforcement officers. Here the agents knew that defendant, previously convicted for armed assault against a policeman, was armed with a sawed off shotgun, an exceedingly dangerous weapon at short range. The entry was lawful under the circumstances." *U.S. v. McShane,* 462 F.2d 5, 6 (9th Circuit Court of Appeals, August 1972).

Admissions and Confessions L

Defendant was convicted of negligent homicide and failing to remain at the scene of an accident. Police officers arrived at the scene of a two-car accident and found two dead persons in one of the cars. Occupants of the other car told them that there had been a third person in the car with the two dead persons. Police determined that the car belonged to the defendant and one officer went to his home, which was two miles from the accident scene. The officer asked defendant where his car was and defendant said he didn't know. Then the officer noticed that defendant had an arm injury and said, "You got the injury in the accident, didn't you?" Defendant admitted that he had. Then the officer asked defendant to accompany him to the accident scene, and defendant did so. At the scene, in the course of questioning by other officers, the defendant told a story inconsistent with his having been in the car at the time of the accident. The officers concluded that neither of the dead men had been driving the car and that defendant was intoxicated. He was arrested and given the *Miranda* warnings. He had not been given them before. He claimed on appeal that his statements made to the police before the warnings were given should not have been admitted into evidence because he was not advised of his *Miranda* rights.

The court held that the defendant was not "in custody" or "deprived of his freedom of action in any significant way", either during the interview at his home or during the questioning at the accident scene. He was, therefore, not entitled to *Miranda* warnings and his statements could be admitted into evidence against him. *State v. Crossen,* 499 P.2d 1357 (Court of Appeals of Oregon, August 1972).

Admissions and Confessions JPL

Defendant was convicted of possessing and intending to unlawfully convert U.S. Post Office money orders. During the investigation of the crime, defendant was twice given *Miranda* warnings. He refused to sign a waiver, but stated that he desired to speak with an officer, which resulted in his confession. On appeal, defendant claimed he was interrogated without knowingly or intelligently waiving his right to remain silent.

The court found that the confession was voluntary. A person can make voluntary statements for purposes of *Miranda,* even though he does not sign a written waiver. The failure to sign a waiver form is only one of the factors to be considered on the issue of voluntariness. *U.S. v. Devall,* 462 F.2d 137, (5th Circuit Court of Appeals, 1972).

COMMENT: This case indicates that even though a person refuses to sign a Miranda *waiver form after being given warnings, if he expressly states a willingness to talk, he may be lawfully interrogated by a law enforcement officer.*

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.

ALERT

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

Any change in personnel or change in address of present personnel should be reported to this office immediately.

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