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Trapped to Confess: *State v. Gray* and Arizona's Outlier Entrapment Statute

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TRAPPED TO CONFESS: *STATE v. GRAY* AND ARIZONA'S OUTLIER ENTRAPMENT STATUTE

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Abstract: On June 20, 2016, in *State v. Gray*, the Arizona Supreme Court held that for a defendant to invoke the defense of entrapment, he or she must affirmatively admit each element of the crime. The case emerged after Maverick Gray was arrested and charged for selling cocaine to an undercover police officer, and raised the entrapment defense at trial without disputing the government's evidence of his guilt. The court explained that simply choosing not to challenge the evidence does not rise to the level of an affirmative admission. The dissent persuasively argued that Arizona's entrapment statute is draconian by contradicting a defendant's right against self-incrimination, protected by the Fifth Amendment to the U.S. Constitution. This Comment agrees with the dissent's position that Arizona's entrapment defense should be read narrowly to uphold fairness and to protect defendants' constitutional liberties.

INTRODUCTION

In June 2013, an undercover Tucson, Arizona, police officer approached Maverick Gray at a bus stop to buy crack cocaine, which Gray agreed to sell for ten dollars.[1] Gray was subsequently arrested and charged with sale of narcotics.[2] At trial, Gray requested a jury instruction on the entrapment defense recognized in Arizona's criminal code, section 13-206 of the Arizona Revised Statute.[3] The Pima County Superior Court denied Gray the ability to assert the

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[1] State v. Gray (*Gray II*), 372 P.3d 999, 1000–01 (Ariz. 2016); State v. Gray (*Gray I*), 357 P.3d 831, 832 (Ariz. Ct. App. 2015), *vacated*, 372 P.3d 999.

[2] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 832–33.

[3] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 833; *see* ARIZ. REV. STAT. ANN. § 13-206(A)–(B) (2017); *see also* State v. Gessler, 690 P.2d 98, 101 (Ariz. 1984) ("Entrapment is a question for the jury unless there is no evidence to support the defense or unless uncontradicted testimony makes it clear that an otherwise innocent person has been induced to commit criminal acts."). When a defendant raises a legitimate defense supported by evidence, the judge must instruct the jury on the law defining the defense. MODEL JURY INSTRUCTIONS ch. 8, § 8.01 (COMM. ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT 2016). The Arizona entrapment statute requires a person raising the affirmative defense of entrapment to admit by the person's testimony or other evidence the elements of the crime, and to prove by clear and convincing evidence that (1) the idea of committing the offense originated with law enforcement officers or their agents; (2) the law enforcement officers and their agents urged and induced the person to commit the offense; and (3) the person was not predisposed to commit the offense before being urged or induced. ARIZ. REV. STAT. ANN. § 13-206(B).

defense and declined to instruct the jury on it, reasoning that Gray did not meet the requirements of the entrapment statute.[4] The court concluded that Gray did not meet the statute's requirement to "admit by [his] testimony or other evidence the substantial elements of the offense charged" when he simply chose not to challenge the State's evidence.[5]

The Arizona Court of Appeals affirmed the trial court's decision, and the Arizona Supreme Court granted review.[6] In the majority opinion, written by Chief Justice Scott Bales, the Arizona Supreme Court acknowledged that the entrapment statute is not clear on whether a defendant can admit the elements of an offense by remaining silent.[7] However, the court ultimately affirmed the trial court's decision.[8] The court based its decision primarily on the ground that Arizona's current entrapment defense is a product of pre-1997 Arizona common law, which embodied the view that defendants must affirmatively admit the substantial elements of the crime in order to assert the entrapment defense.[9] As Justice Clint Bolick indicated in his dissent, however, this is the minority approach when compared with other states' modern entrapment statutes.[10]

Justice Bolick's dissent specifically argued that requiring affirmative admission from defendants in order to invoke the entrapment defense may conflict with the U.S. Constitution's Fifth Amendment Self-Incrimination Clause.[11] It may present an unconstitutional condition on defendants that forces them to give up a constitutional right in order to raise the defense.[12] Justice Bolick

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[4] *Gray II*, 372 P.3d at 1001.

[5] *Gray II*, 372 P.3d at 1000–01 (alteration in original) (quoting ARIZ. REV. STAT. ANN. § 13-206(A)); *Gray I*, 357 P.3d at 833.

[6] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 834.

[7] *Gray II*, 372 P.3d at 1000–01 ("The [Arizona entrapment] statute does not expressly address whether a defendant can 'admit' the elements merely by not challenging the state's evidence.").

[8] *Id.* at 1004.

[9] *Id.* at 1001–02 (citing State v. McKinney, 501 P.2d 378, 381 (Ariz. 1972) (holding that a defendant must admit the substantial elements of the crime in order to invoke the entrapment defense); and then citing State v. Nilsen, 657 P.2d 419, 420 (Ariz. 1983) (clarifying that a defendant need not take the stand in order to assert the entrapment defense, but also cannot merely passively admit the elements of the crime)).

[10] *Gray II*, 372 P.3d at 1004–06 (Bolick, J., dissenting) (noting that many courts, including the U.S. Supreme Court, agree that failure to admit all the elements of a crime does not necessarily result in inconsistency with the entrapment defense, and that inconsistency is arguably not even at issue because it is possible for a defense to be logically raised even if a defendant does not admit to every element of the crime).

[11] *Id.* (quoting U.S. CONST. amend. V) ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). The Fifth Amendment's Self-Incrimination Clause ensures that any confession made by a defendant in a criminal case is made freely and voluntarily, without compulsion or improper influence. *See* Bram v. United States, 168 U.S. 532, 542–43, 546 (1897).

[12] *Gray II*, 372 P.3d at 1006–09 ("Here, Arizona offers an entrapment defense to criminal defendants, but only at the cost of surrendering the right against self-incrimination. The State is not constitutionally entitled to exact such a high cost for invoking a legitimate (indeed in many instances essential) defense.").

found this especially problematic in light of the fact that the Arizona Supreme Court's only justification for the condition is that innocence and entrapment are inconsistent defenses, which might confuse the jury.[13] He argued that even under the majority's method of construing the entrapment statute, the incriminating statements that Gray made to the undercover police officer nevertheless constituted "other evidence" from which the court could conclude that Gray admitted to the offense.[14]

Part I of this comment summarizes the factual and procedural history of *Gray*. Part II analyzes the majority's reasoning behind upholding a strict reading of Arizona's entrapment statute and requiring affirmative admission from defendants. Part III advocates for the dissent's view that Arizona's entrapment statute threatens defendants' constitutional right against self-incrimination and fails to consider the possibility that denial of certain elements of a crime could still be consistent with the defense of entrapment.

I. A COMMON LAW-DRIVEN DECISION

In June 2013, an undercover police officer approached Maverick Gray at a bus stop in Pima County, Arizona, and asked if Gray could help him obtain "hard," also known as crack cocaine.[15] Gray made a deal with the officer to get him cocaine for a ten-dollar fee, and the two of them drove to an apartment complex.[16] The undercover officer paid Gray twenty dollars and Gray left the car, returning after ten minutes with the requested drugs.[17] Shortly after the officer paid the fee, Gray was arrested and charged with sale of narcotics.[18] Throughout the transaction and arrest, the undercover officer had also been secretly recording his conversation with Gray.[19] The conversation included statements from Gray after the arrest, such as, "I'm a good person" and "I don't usually do this."[20]

Gray's criminal case was brought to the Pima County Superior Court.[21] The government introduced into evidence the statements recorded by the un-

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[13] *Id.* at 1007 ("Given the centrality of the right against self-incrimination in both the Bill of Rights and our state's Declaration of Rights, it would be difficult for the State to articulate a sufficient justification for the condition. Instead, the State's justifications are feeble . . . .") (citation omitted).

[14] ARIZ. REV. STAT. ANN. § 13-206(A) (2017) ("To claim entrapment, the person must admit by the person's testimony or *other evidence* the substantial elements of the offense charged.") (emphasis added); *Gray II*, 372 P.3d at 1009–10.

[15] State v. Gray (*Gray II*), 372 P.3d 999, 1000–01 (Ariz. 2016); State v. Gray (*Gray I*), 357 P.3d 831, 832 (Ariz. Ct. App. 2015), *vacated*, 372 P.3d 999.

[16] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 832.

[17] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 832.

[18] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 832.

[19] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 832–33, 834.

[20] *Gray II*, 372 P.3d at 1001.

[21] *Id.* at 1000.

dercover officer over Gray's objection.[22] Gray did not contest the State's evidence, but raised the defense of entrapment, codified in section 13-206.[23]

Arizona's entrapment defense is an affirmative defense based on the theory that a defendant only committed the offense because law enforcement prompted and urged him or her to do so, and that he or she did not have a predisposition to commit the crime.[24] The entrapment defense requires a defendant to first "admit by [his] testimony or other evidence the substantial elements of the offense charged."[25] Gray argued to the trial court that he had admitted to the elements of the crime, either by not challenging the government's evidence or through his recorded incriminating statements.[26] The trial court rejected Gray's arguments, concluding that he failed to meet the admission requirement of the entrapment statute, and denied Gray's request for a jury instruction on the entrapment defense.[27] The trial court found Gray guilty of the sale of narcotics, and sentenced him to nine years and three months in prison.[28]

Gray then appealed his conviction to the Arizona Court of Appeals.[29] On August 13, 2015, in an opinion written by Justice Michael O. Miller, the court of appeals held that the trial court did not abuse its discretion in refusing to give a jury instruction on the entrapment defense, and thus affirmed the trial court's decision.[30] The court of appeals reasoned that Gray could not assert the entrapment defense because Gray did not make any statements at trial, either through testimony or a stipulation read into evidence, that could be considered an admission of the substantial elements of the crime.[31] The court of appeals also found that Gray's recorded statements did not satisfy section 13-206 be-

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[22] *Id.* at 1001; *Gray I*, 357 P.3d at 832–33.

[23] ARIZ. REV. STAT. ANN. § 13-206 (2017); *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 833.

[24] ARIZ. REV. STAT. ANN. § 13-206(A)–(B). Subsection B of Arizona's entrapment statute reads:

> A person who asserts an entrapment defense has the burden of proving the following by clear and convincing evidence:
> 1. The idea of committing the offense started with law enforcement officers or their agents rather than with the person.
> 2. The law enforcement officers or their agents urged and induced the person to commit the offense.
> 3. The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.

Id. § 13-206(B).

[25] *ID.* § 13-206(A).

[26] *Gray I*, 357 P.3d at 833.

[27] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 833.

[28] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 832, 833.

[29] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 832, 833.

[30] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 831, 834.

[31] *Gray II*, 372 P.3d at 1001; *Gray I*, 357 P.3d at 833.

cause the admission had to be affirmatively admitted, not implicitly admitted by existing evidence.[32]

Gray appealed and the Arizona Supreme Court granted de novo review of the case, finding that application of the entrapment statute was an important state-wide issue.[33] The court, in an opinion written by Chief Justice Scott Bales, affirmed the decision of the trial court and vacated the judgment of the court of appeals.[34] The court began its analysis of whether Gray could appropriately invoke the entrapment defense by examining the Arizona entrapment statute itself.[35] The court acknowledged that the statute does not clarify whether a defendant can admit the elements of a crime simply by remaining silent.[36] Gray argued that silence should be deemed an admission, but the court ultimately rejected this view, interpreting the statute based on the case law influencing the statute's enactment.[37] The court alluded to two previous Arizona Supreme Court cases illustrating this common law approach to the entrapment defense: *State v. McKinney*, decided in 1972, and *State v. Nilsen*, decided in 1983.[38] In both cases, the court held that a defendant asserting an entrapment defense must admit the substantial elements of the crime.[39] *Nilsen* further clarified that this assertion cannot be made through silence, but must be in the form of in-court testimony or an alternative such as a stipulation read into evidence.[40] Thus, based on the pre-1997 case law supporting the affirmative admission requirement for asserting the entrapment defense, the court in *Gray* held that Gray was not eligible to invoke the defense.[41]

Furthermore, the court rejected Gray's argument that requiring a defendant to affirmatively admit the elements of a crime before claiming entrapment contradicts the Fifth Amendment's right against self-incrimination.[42] The court held that requiring affirmative admissions does not implicate the "unconstitutional conditions" doctrine.[43] The unconstitutional conditions doctrine provides "that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that ben-

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[32] ARIZ. REV. STAT. ANN. § 13-206 (2017); *Gray I*, 357 P.3d at 834.

[33] *Gray II*, 372 P.3d at 1001.

[34] *Id.* at 1000, 1004.

[35] ARIZ. REV. STAT. ANN. § 13-206; *Gray II*, 372 P.3d at 1001–02.

[36] *Gray II*, 372 P.3d at 1001.

[37] *Id.* at 1001–02.

[38] *Id.*; *see* State v. Nilsen, 657 P.2d 419, 420 (Ariz. 1983); State v. McKinney, 501 P.2d 378, 381 (Ariz. 1972); *supra* note 8 and accompanying text.

[39] *Nilsen*, 657 P.2d at 420; *McKinney*, 501 P.2d at 381.

[40] *Nilsen*, 657 P.2d at 420.

[41] *Gray II*, 372 P.3d at 1001–02, 1004.

[42] *Id.* at 1003; *see* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[43] *Gray II*, 372 P.3d at 1003.

efit altogether."[44] The majority reasoned that the affirmative admission requirement is not an unconstitutional condition because entrapment is an affirmative defense, and because the requirement is similar to a plea bargain, where there is no constitutional bar.[45]

Finally, the court rejected Gray's argument that the entrapment statute, by providing that a defendant must admit by personal testimony or other evidence the substantial elements of the offense, allowed his recorded incriminating statements to be considered an admission of the crime.[46] The court reasoned that the recordings did not prove that he affirmatively admitted the substantial elements of the offense, because an unintentional confession is not the same as a true admission of guilt.[47]

II. The History and Reasoning Behind the Denial of Maverick Gray's Entrapment Defense

The Arizona Supreme Court vacated the ruling of the Arizona Court of Appeals, which had upheld the trial court's finding that the Arizona entrapment statute required defendants to actively admit the substantial elements of the crime in order to assert the defense.[48] The Arizona Supreme Court's majority opinion, written by Chief Justice Scott Bales, interpreted the entrapment statute narrowly based on how the court previously ruled on the same issue in earlier cases that predated the enactment of the statute.[49] The dissent, written by Justice Clint Bolick, argued that the majority's definition of an affirmative admission raises concerns regarding defendants' right against self-incrimination, and that Gray's recorded statement clearly comports with the entrapment statute's mention of "other evidence" that could be considered an admission of a crime.[50]

A. A Minority Approach

The Arizona legislature enacted section 13-206, the entrapment statute, in 1997.[51] Prior to the statute's enactment, Arizona's entrapment defense was embodied in common law.[52] The majority in *Gray* referenced two cases demonstrating the common law approach to the entrapment defense: *State v. McKin-*

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[44] *Id.* at 1006 (Bolick, J., dissenting) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989)).

[45] *Id.* at 1003 (majority opinion).

[46] *Id.* at 1003–04.

[47] *Id.*

[48] State v. Gray (*Gray II*), 372 P.3d 999, 1004 (Ariz. 2016).

[49] *See id.* at 1000–01.

[50] *See id.* at 1004, 1009–10 (Bolick, J., dissenting).

[51] *Id.* at 1002 (majority opinion); s*ee* Ariz. Rev. Stat. Ann. § 13-206 (2017); *supra* note 24 and accompanying text.

[52] *Gray II*, 372 P.3d at 1001.

ney and *State v. Nilsen*.[53] In *McKinney*, decided in 1972, the Arizona Supreme Court held that for a defendant to invoke the entrapment defense, he or she must admit the substantial elements of the crime, and must not deny knowledge of the crime.[54] The court elaborated on this point in 1983 in *Nilsen*, where it stated that the defendant's admission must be made affirmatively, and not implicitly by silence.[55]

In 1988, the U.S. Supreme Court rejected Arizona's common law approach in *Mathews v. United States*.[56] Writing for the majority, Chief Justice William Rehnquist decided that, as a matter of federal law, a defendant may invoke the entrapment defense without admitting all of the elements of the crime.[57] In *Mathews*, the prosecution argued that a defendant cannot both deny an element of a crime and raise an entrapment defense because this inconsistency would "encourage perjury, lead to jury confusion, and subvert the truth-finding function of the trial."[58] The court disagreed, however, noting that in most cases, any inconsistent testimony by the defendant would destroy his credibility, and thus his chances of prevailing at trial.[59]

Despite *Mathews*, Arizona reaffirmed its common law approach in *State v. Soule*, reintroducing the concerns about perjury and jury confusion that the U.S. Supreme Court had dismissed in *Mathews*.[60] Following the Arizona Supreme Court's decision in *Soule*, the Arizona legislature enacted the entrapment statute in 1997.[61] Therefore, based on Arizona's entrapment statute and its consistency with the cases that preceded it, the Arizona Supreme Court in *Gray* held that Gray did not meet the statute's requirements for invoking the entrapment defense.[62]

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[53] *Id.* at 1001–02 (citing State v. McKinney, 501 P.2d 378, 381 (Ariz. 1972); and then citing State v. Nilsen, 657 P.2d 419, 420 (Ariz. 1983)).

[54] *McKinney*, 501 P.2d at 378, 381 ("A defendant who wishes to avail himself of a defense of entrapment must admit the substantial elements of the crime and one who denies knowledge of the crime may not raise the defense of entrapment.") (citations omitted).

[55] *Nilsen*, 657 P.2d at 419, 420 ("[W]e cannot see how one can passively admit to the elements of the offense. This admission must be made in some affirmative manner and cannot be assumed from a defendant's silence.").

[56] *Gray II*, 372 P.3d at 1002 (citing Mathews v. United States, 485 U.S. 58, 62 (1988)).

[57] *Mathews*, 485 U.S. at 58, 62; *Gray II*, 372 P.3d at 1002 (citing *Mathews*, 485 U.S. at 58, 62).

[58] *Mathews*, 485 U.S. at 65.

[59] *Id.* at 65–66.

[60] *Mathews*, 485 U.S. at 65–66; *Gray II*, 372 P.3d at 1002 (citing State v. Soule, 811 P.2d 1071, 1073–74 (Ariz. 1991)). Justice Bolick's dissent in *Gray* highlighted Arizona's outlier status in this matter by noting that the *Mathews* opinion influenced many states to abandon the inconsistent defense approach that required affirmative admission of the crime. *See Gray II*, 372 P.3d at 1004 (Bolick, J., dissenting).

[61] *Gray II*, 372 P.3d at 1002 (majority opinion).

[62] *Id.*

B. Considering Maverick Gray's Constitutional Rights

In his appeal, Gray also contended that requiring a defendant to affirmatively admit the substantial elements of the crime conflicts with the U.S. Constitution's Fifth Amendment guarantee that "[N]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[63] The court rejected Gray's argument on the ground that the entrapment defense is an affirmative defense that attempts to excuse one's criminal acts, and therefore necessitates an affirmative admission.[64] The court also denied Gray's argument that requiring an affirmative admission from the defendant effectively compels the defendant to confess.[65] In so concluding, the court quoted *Williams v. Florida*, a 1970 U.S. Supreme Court case that held that presenting a defendant with the dilemma of choosing between silence and asserting a defense does not jeopardize his or her right against self-incrimination.[66]

The dissent argued that limiting the entrapment defense to those who choose to admit the elements of the crime implicates the unconstitutional conditions doctrine.[67] The majority, however, found that the Arizona entrapment statute's requirement of an affirmative admission is not an unconstitutional condition, relying on two U.S. Supreme Court cases.[68] The first case, *Corbitt v. New Jersey*, decided in 1978, involved a plea bargain.[69] The court in *Corbitt* held that no unconstitutional condition is placed on first-degree murder defendants who have the option of pleading no contest in order to be eligible for a sentence of less than life imprisonment.[70] The second case, *Ohio Adult Parole Authority v. Woodard*, was decided in 1998 and involved a voluntary clemency interview.[71] In *Woodard*, the Court held that a defendant's Fifth Amendment privilege is not violated when the State adopts an unfavorable view toward defendants who decline to answer voluntary clemency interview questions.[72] Based on these two cases, the court in *Gray* concluded that Arizo-

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[63] U.S. CONST. amend. V; *Gray II*, 372 P.3d at 1003.

[64] *Gray II*, 372 P.3d at 1003; *see* ARIZ. REV. STAT. ANN. § 13-103(B) (2017) ("For the purposes of this section, 'affirmative defense' means a defense that is offered and that attempts to excuse the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable."); § 13-206(A) (stating that entrapment is an affirmative defense).

[65] *See Gray II*, 372 P.3d at 1003.

[66] *Id.* at 1003 n.2 (quoting Williams v. Florida, 399 U.S. 78, 84) ("That the defendant faces . . . a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.").

[67] *Id.* at 1006 (Bolick, J., dissenting).

[68] *Id.* at 1003 (majority opinion) (citing Corbitt v. New Jersey, 439 U.S. 212, 218 (1978); and then citing Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 285–88 (1998)).

[69] *Corbitt*, 439 U.S. at 212, 221.

[70] *See id.* at 218.

[71] *Woodard*, 523 U.S. at 276.

[72] *Id.* at 285–86.

na can similarly limit the entrapment defense to defendants who admit the substantial elements of the crime.[73]

In his dissent, Justice Bolick disagreed with the court's conclusion that its interpretation of the entrapment statute did not place an unconstitutional condition on Gray.[74] First, he noted that neither of the two cases the majority cited involved defendants being required to affirmatively admit elements of the crime.[75] He suggested that *Corbitt* and *Woodard* involved situations with significantly less pressure on the defendants, which only further emphasized the unjustly mandatory nature of Arizona's affirmative admission requirement.[76]

Justice Bolick also cited a 1968 U.S. Supreme Court case, *United States v. Jackson*, in which Justice Potter Stewart, in his opinion for the court, invalidated part of a federal statute that subjected defendants in certain kidnapping cases to the death penalty unless they pled guilty or waived their right to a jury trial.[77] The Court in *Jackson* held that the statute "needlessly chill[ed]" defendants from asserting their constitutional right to refuse to plead guilty and demand a jury trial, and thus was unconstitutional.[78]

Relying on *Jackson*, Justice Bolick argued that Arizona's entrapment statute similarly discourages defendants from asserting their right against self-incrimination.[79] He objected to the State's contention that allowing Gray to assert the entrapment defense would foster perjury and jury confusion, because it is possible for innocence and entrapment to coexist, especially when it comes to crimes requiring specific intent.[80] Justice Bolick also referred back to *Mathews*, where the U.S. Supreme Court held that inconsistent defenses would "impair a defendant's credibility, thus providing a check against raising them."[81] Therefore, in Justice Bolick's view, potential inconsistency and jury confusion are "feeble" justifications for stripping defendants of such a core constitutional liberty.[82]

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[73] *Woodard*, 523 U.S. at 286–87; *Corbitt*, 439 U.S. at 225–26; *Gray II*, 372 P.3d at 1003.

[74] *Gray II*, 372 P.3d at 1006 (Bolick, J., dissenting).

[75] *Id.* at 1009 n.3.

[76] *See id.*

[77] United States v. Jackson, 390 U.S. 570, 570, 582–85 (1968); *Gray II*, 372 P.3d at 1007 (citing *Jackson*, 390 U.S. at 584–85).

[78] *Jackson*, 390 U.S. at 582–83.

[79] *Gray II*, 372 P.3d at 1007.

[80] *Id.* at 1006 (explaining that for specific intent crimes, where one can admit engaging in certain actions while denying the intent to commit the crime, there is no inconsistency between admitting to the crime and asserting the entrapment defense).

[81] *Gray II*, 372 P.3d at 1008 (citing Mathews v. United States, 485 U.S. 58, 64–65 (1988)).

[82] *Id.* at 1007.

C. "Other Evidence"

The Arizona Supreme Court also held that Gray's incriminating statements, captured by a recording by the undercover police officer, were insufficient to satisfy section 13-206.[83] The court explained that because Gray did not affirmatively admit each substantial element of the offense in these statements, he did not adequately admit to the commission of the crime of sale of narcotics.[84] The court described Gray's statements in the recording as an ignorant inculpation of himself, and distinguished it from an admission.[85] Finally, the court noted that the recorded conversation on its own was insufficient to prove that the transaction took place.[86]

Justice Bolick took the opposite view in his dissent, arguing that the recordings were essentially an admission of the crime.[87] He first emphasized that the entrapment statute, by stating that "other evidence" could be an admission of the crime, clearly included Gray's recorded statements.[88] Justice Bolick stressed that the majority neglected to sufficiently explain why a pre-*Miranda* admission like Gray's did not constitute "other evidence."[89] Justice Bolick also explained that Gray did in fact admit the substantial elements of the crime, because by saying "I'm a good person" and "I don't usually do this" immediately after the drug transaction, Gray admitted to the substantial elements of the crime of selling narcotics, namely knowingly selling or transferring a narcotic drug.[90]

III. PROTECTING THE CONSTITUTIONAL RIGHTS OF DEFENDANTS RAISING THE ENTRAPMENT DEFENSE

Justice Bolick's dissent in *Gray* accurately depicts the threat to constitutional liberty that the Arizona entrapment statute poses to criminal defend-

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[83] ARIZ. REV. STAT. ANN. § 13-206 (2017); *Gray II*, 372 P.3d at 1003–04 (majority opinion)

[84] ARIZ. REV. STAT. ANN. § 13-3408(A)(7) ("A person shall not knowingly . . . [t]ransport for sale, import into this state, offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a narcotic drug."); *Gray II*, 372 P.3d at 1004.

[85] *Gray II*, 372 P.3d at 1004 ("There is a difference between a defendant admitting the commission of a crime and unwittingly inculpating himself.").

[86] *Id.*

[87] *Id.* at 1009 (Bolick, J., dissenting).

[88] *Id.*

[89] *Id.* In 1966, the U.S. Supreme Court held in *Miranda v. Arizona* that before an individual is taken into police custody and questioned, he must be notified:

> [T]hat he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. 436, 478–79 (1966).

[90] *Gray II*, 372 P.3d at 1009–10; *see* ARIZ. REV. STAT. ANN. § 13-3408(A)(7) (2017).

ants.[91] In Arizona, if defendants want to argue that law enforcement induced them to commit a crime, they must first admit all the substantial elements of the crime, even if a denial of an element would not result in an inconsistency.[92] As Justice Bolick noted, there are certain crimes for which defendants could deny one of the elements of the crime and still logically raise an entrapment defense.[93] One example of this is a specific intent crime, where a defendant could deny having the intent to commit the crime, while admitting to the acts of committing the crime.[94] Justice Scalia's concurring opinion in *Mathews* added strong support to this argument, explaining that if a jury finds inducement and lack of predisposition, which are the two main factors of an entrapment defense, then commission of the crime is automatically proven, eliminating the need for an affirmative admission of the crime.[95]

By precluding defendants from raising the entrapment defense unless they give up their constitutional right to self-incrimination, Arizona's approach to entrapment may have a disproportionate effect on certain groups of individuals.[96] Research suggests that an overwhelming number of victims of government entrapment schemes are minorities, namely black and Hispanic individuals.[97] Based on those statistics, Arizona's entrapment statute may have a disproportionate impact on those individuals, and may lead to higher percentages of drug convictions and prison sentencing in those communities.[98] Such results

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[91] *See* State v. Gray (*Gray II*), 372 P.3d 999, 1006 (Ariz. 2016) (Bolick, J., dissenting).

[92] *See id.* at 1004.

[93] *Id.* at 1006.

[94] *Id.*

[95] *See* Mathews v. United States, 485 U.S. 58, 67 (1988) (Scalia, J., concurring).

[96] *See Gray II*, 372 P.3d at 1004; Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA TODAY (July 20, 2014, 10:19 PM), http://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial profiling/12800195/ [https://perma.cc/F6CK-JXCD] (illustrating data and statistics on the disparate impact that government sting operations have on minorities, particularly black and Hispanic individuals); Annie Sweeney and Jason Meisner, *Chicago Prosecutors Quietly Drop Charges Tied to Drug Stash House Stings*, CHI. TRIB. (Jan. 29, 2015, 8:12 PM), http://www.chicagotribune.com/news/local/breaking/ct-stash-houses-charges-dropped-met-20150129-story.html [https://perma.cc/J9BZ-FXQ8] (reporting that government agencies have been criticized for leading sting operations targeting mostly minority suspects).

[97] *See Gray II*, 372 P.3d at 1004; Heath, *supra* note 96; Sweeney & Meisner, *supra* note 96.

[98] *See Gray II*, 372 P.3d at 1004; Jim Yardley, *The Heat Is on a Texas Town After the Arrest of 40 Blacks*, N.Y. TIMES (Oct. 7, 2000), http://www.nytimes.com/2000/10/07/us/the-heat-is-on-a-texas-town-after-the-arrests-of-40-blacks.html [https://perma.cc/5ETR-CQEM]. During a government sting operation in Tulia, Texas, forty of forty-three defendants arrested were black, although blacks constituted only ten percent of Tulia's population. Yardley, *supra*. The American Civil Liberties Union filed a lawsuit against the agencies responsible for the sting, alleging racial bias as motivation for the operation, which led to twenty-two defendants being imprisoned and the rest placed on probation. Adam Liptak, *$5 Million Settlement Ends Case of Tainted Texas Sting*, N.Y. TIMES (Mar. 11, 2004), http://www.nytimes.com/2004/03/11/us/5-million-settlement-ends-case-of-tainted-texas-sting.html [https://perma.cc/55B5-EPJE]; Yardley, *supra*. The Tulia case was later settled, with government officials acknowledging poor supervision of the undercover agent who executed the operation. Liptak, *supra.* The agent was later convicted of perjury. Steve Barnes, *Rogue Narcotics Agent in Texas Is Found*

are contrary to the purposes of the Fifth Amendment's Self-Incrimination Clause, which was designed to protect the rights of all criminal defendants to be presumed innocent and remain silent, and to ensure that the government proves the elements of their crimes beyond a reasonable doubt.[99]

Justice Bolick also correctly identified the problems surrounding Arizona's entrapment statute and the Arizona Supreme Court's interpretation of the statute.[100] First, he stressed that the court based its decision solely on the fact that the statute is consistent with Arizona common law.[101] He properly indicated that the reasoning from those common law cases had already been addressed and refuted by the U.S. Supreme Court in *Mathews*.[102] Additionally, the majority of states have updated their entrapment statutes to eliminate or modify the affirmative admission requirement.[103] Yet, the court in *Gray* did not provide any additional meritorious reason for upholding its minority approach.[104] The U.S. Supreme Court in *Mathews* directly addressed the potential problems of perjury and jury confusion in its decision to strike the affirmative admissions requirement for defendants asserting the entrapment defense.[105] Furthermore, Justice Bolick emphasized that the protection of defendants' fundamental rights in the criminal context substantially outweigh the dangers of perjury and jury confusion, which are mitigated nevertheless through the defendant's in-court testimony.[106]

CONCLUSION

The Arizona Supreme Court inappropriately held in *Gray* that to assert the defense of entrapment, criminal defendants must affirmatively admit the substantial elements of their crimes. According to the court, merely declining to challenge the State's evidence or offering pre-*Miranda* incriminating statements as evidence of the admission does not satisfy that requirement. By adhering to this strict common law approach to entrapment, Arizona veers from the modern trajectory of the U.S. Supreme Court and the majority of other states, where the need for affirmative admissions in entrapment statutes has already been addressed and rejected.

Guilty of Perjury, N.Y. TIMES (Jan. 15, 2005), http://www.nytimes.com/2005/01/15/us/rogue-narcotics-agent-in-texas-is-found-guilty-of-perjury.html [https://perma.cc/4CB9-33GY].

[99] *See* United States v. Demma, 523 F.2d 981, 986 (9th Cir. 1975).

[100] *See Gray II*, 372 P.3d at 1009.

[101] *See id.* at 1004.

[102] *See id.*

[103] *See id.*

[104] *See id.* at 1001, 1004 (majority opinion).

[105] *See* Mathews v. United States, 485 U.S. 58, 65 (1988).

[106] *See Gray II*, 372 P.3d at 1005–06 (Bolick, J., dissenting).

More importantly, the Arizona Supreme Court's decision also endangers defendants' Fifth Amendment privilege against self-incrimination. It requires them to admit all the substantial elements of their crimes in order to raise the entrapment defense, even if denying an element would not be inconsistent with the defense. Given the core liberty at stake and the lack of a strong argument for affirmative admissions, the court should consider an alternative approach to the entrapment defense that gives defendants greater leeway to assert the defense by silence or other evidence, and to allow the jury to decide whether defendants merit the defense. By doing so, the court also upholds fairness for minorities, black and Hispanic individuals in particular, who potentially experience a disparate impact from government entrapment operations and will likely be disproportionately affected by the majority's decision in *Gray*.