SUPREME COURT OF THE UNITED STATES

No. 90–1124

KEITH JACOBSON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[April 6, 1992]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, and with whom JUSTICE SCALIA joins except as to Part II, dissenting.

Keith Jacobson was offered only two opportunities to buy child pornography through the mail. Both times, he ordered. Both times, he asked for opportunities to buy more. He needed no Government agent to coax, threaten, or persuade him; no one played on his sympathies, friendship, or suggested that his committing the crime would further a greater good. In fact, no Government agent even contacted him face-to-face. The Government contends that from the enthusiasm with which Mr. Jacobson responded to the chance to commit a crime, a reasonable jury could permissibly infer beyond a reasonable doubt that he was predisposed to commit the crime. I agree. Cf. *United States* v. *Hunt*, 749 F.2d 1078, 1085 (CA4 1984) (ready response to solicitation shows predisposition), cert. denied, 472 U.S. 1018 (1985); *United States* v. *Kaminski*, 703 F.2d 1004, 1008 (CA7 1983) ("`the most important factor . . . is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement'") (quoting *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1336 (CA9 1977), cert. denied, 436 U.S. 926 (1978)); *United States* v. *Sherman*, 200 F.2d 880, 882 (CA2 1952) (indication of predisposition is a defendant's

willingness to commit the offense "`as evinced by ready complaisance'") (citation omitted).

The first time the Government sent Mr. Jacobson a catalog of illegal materials, he ordered a set of photographs advertised as picturing "young boys in sex action fun." He enclosed the following note with his order: "I received your brochure and decided to place an order. If I like your product, I will order more later." Record, Government Exhibit 24. For reasons undisclosed in the record, Mr. Jacobson's order was never delivered.

The second time the Government sent a catalog of illegal materials, Mr. Jacobson ordered a magazine called "Boys Who Love Boys," described as: "11 year old and 14 year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." *Id*., Government Exhibit 2. Along with his order, Mr. Jacobson sent the following note: "Will order other items later. I want to be discreet in order to protect you and me." *Id*., Government Exhibit 3.

Government agents admittedly did not offer Mr. Jacobson the chance to buy child pornography right away. Instead, they first sent questionnaires in order to make sure that he was generally interested in the subject matter. Indeed, a "cold call" in such a business would not only risk rebuff and suspicion, but might also shock and offend the uninitiated, or expose minors to suggestive materials. Cf. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978) (right to be free from offensive material in one's home); 39 U.S.C. §3010 (regulating the mailing of sexually explicit advertising materials). Mr. Jacobson's responses to the questionnaires gave the investigators reason to think he would be interested in photographs depicting preteen sex.

The Court, however, concludes that a reasonable jury could not have found Mr. Jacobson to be predisposed beyond a reasonable doubt on the basis

of his responses to the Government's catalogs, even though it admits that, by that time, he was predisposed to commit the crime. The Government, the Court holds, failed to provide evidence that Mr. Jacobson's obvious predisposition at the time of the crime "was independent and not the product of the attention that the Government had directed at petitioner." *Ante*, at 9. In so holding, I believe the Court fails to acknowledge the reasonableness of the jury's inference from the evidence, redefines "predisposition," and introduces a new requirement that Government sting operations have a reasonable suspicion of illegal activity before contacting a suspect.

This Court has held previously that a defendant's predisposition is to be assessed as of the time the Government agent first suggested the crime, not when the Government agent first became involved. *Sherman* v. *United States*, 356 U.S. 369, 372–376 (1958). See also, *United States* v. *Williams*, 705 F.2d 603, 618, n. 9 (CA2), cert. denied, 464 U.S. 1007 (1983). Until the Government actually makes a suggestion of criminal conduct, it could not be said to have "implant[ed] in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . . ." *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932). Even in *Sherman* v. *United States*, *supra*, in which the Court held that the defendant had been entrapped as a matter of law, the Government agent had repeatedly and unsuccessfully coaxed the defendant to buy drugs, ultimately succeeding only by playing on the defendant's sympathy. The Court found lack of predisposition based on the Government's numerous unsuccessful attempts to induce the crime, not on the basis of preliminary contacts with the defendant.

Today, the Court holds that Government conduct may be considered to create a predisposition to

commit a crime, even before any Government action to induce the commission of the crime. In my view, this holding changes entrapment doctrine. Generally, the inquiry is whether a suspect is predisposed before the Government induces the commission of the crime, not before the Government makes initial contact with him. There is no dispute here that the Government's questionnaires and letters were not sufficient to establish inducement; they did not even suggest that Mr. Jacobson should engage in any illegal activity. If all the Government had done was to send these materials, Mr. Jacobson's entrapment defense would fail. Yet the Court holds that the Government must prove not only that a suspect was predisposed to commit the crime before the opportunity to commit it arose, but also before the Government came on the scene. *Ante*, at 8.

The rule that preliminary Government contact can create a predisposition has the potential to be misread by lower courts as well as criminal investigators as requiring that the Government must have sufficient evidence of a defendant's predisposition *before it ever seeks to contact him.* Surely the Court cannot intend to impose such a requirement, for it would mean that the Government must have a reasonable suspicion of criminal activity before it begins an investigation, a condition that we have never before imposed. The Court denies that its new rule will affect run-of-the-mill sting operations, *ante*, at 8, and one hopes that it means what it says. Nonetheless, after this case, every defendant will claim that something the Government agent did before soliciting the crime "created" a predisposition that was not there before. For example, a bribe taker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered. A drug buyer will claim that the description of the drug's purity and effects was so tempting that it created the

urge to try it for the first time. In short, the Court's opinion could be read to prohibit the Government from advertising the seductions of criminal activity as part of its sting operation, for fear of creating a predisposition in its suspects. That limitation would be especially likely to hamper sting operations such as this one, which mimic the advertising done by genuine purveyors of pornography. No doubt the Court would protest that its opinion does not stand for so broad a proposition, but the apparent lack of a principled basis for distinguishing these scenarios exposes a flaw in the more limited rule the Court today adopts.

The Court's rule is all the more troubling because it does not distinguish between Government conduct that merely highlights the temptation of the crime itself, and Government conduct that threatens, coerces, or leads a suspect to commit a crime in order to fulfill some other obligation. For example, in *Sorrells*, the Government agent repeatedly asked for illegal liquor, coaxing the defendant to accede on the ground that "one former war buddy would get liquor for another." *Sorrells* v. *United States*, *supra*, at 440. In *Sherman*, the Government agent played on the defendant's sympathies, pretending to be going through drug withdrawal and begging the defendant to relieve his distress by helping him buy drugs. *Sherman*, *supra*, at 371.

The Government conduct in this case is not comparable. While the Court states that the Government "exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights," *ante*, at 10, one looks at the record in vain for evidence of such "substantial pressure." The most one finds is letters advocating legislative action to liberalize obscenity laws, letters which could easily be ignored or thrown away. Much later, the Government sent separate mailings of catalogs of

illegal materials. Nowhere did the Government suggest that the proceeds of the sale of the illegal materials would be used to support legislative reforms. While one of the HINT letters suggested that lobbying efforts would be funded by sales from a catalog, Record, Defendant's Exhibit 113, the catalogs actually sent, nearly a year later, were from different fictitious entities (Produit Outaouais and Far Eastern Trading Company), and gave no suggestion that money would be used for any political purposes. *Id.*, Government Exhibit 22, Government Exhibit 2. Nor did the Government claim to be organizing a civil disobedience movement, which would protest the pornography laws by breaking them. Contrary to the gloss given the evidence by the Court, the Government's suggestions of illegality may also have made buyers beware, and increased the mystique of the materials offered: "[f]or those of you who have enjoyed youthful material . . . we have devised a method of getting these to you without prying eyes of U.S. Customs seizing your mail." *Id.*, Government Exhibit 1. Mr. Jacobson's curiosity to see what "`all the trouble and the hysteria'" was about, *ante*, at 6, is certainly susceptible of more than one interpretation. And it is the jury that is charged with the obligation of interpreting it. In sum, the Court fails to construe the evidence in the light most favorable to the Government, and fails to draw all reasonable inferences in the Government's favor. It was surely reasonable for the jury to infer that Mr. Jacobson was predisposed beyond a reasonable doubt, even if other inferences from the evidence were also possible.

The second puzzling thing about the Court's opinion is its redefinition of predisposition. The Court acknowledges that "[p]etitioner's responses to the many communications prior to the ultimate criminal

act were . . . indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex . . . .” *Ante*, at 10. If true, this should have settled the matter; Mr. Jacobson was predisposed to engage in the illegal conduct. Yet, the Court concludes, “petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails.” *Ibid*.

The Court seems to add something new to the burden of proving predisposition. Not only must the Government show that a defendant was predisposed to engage in the illegal conduct, here, receiving photographs of minors engaged in sex, but also that the defendant was predisposed to break the law knowingly in order to do so. The statute violated here, however, does not require proof of specific intent to break the law; it requires only knowing receipt of visual depictions produced by using minors engaged in sexually explicit conduct. See 18 U.S.C. §2252(a)(2); *United States* v. *Moncini*, 882 F.2d 401, 404–406 (CA9 1989). Under the Court's analysis, however, the Government must prove *more* to show predisposition than it need prove in order to convict.

The Court ignores the judgment of Congress that specific intent is not an element of the crime of receiving sexually explicit photographs of minors. The elements of predisposition should track the elements of the crime. The predisposition requirement is meant to eliminate the entrapment defense for those defendants who would have committed the crime anyway, even absent Government inducement. Because a defendant might very well be convicted of the crime here absent Government inducement even though he did not know his conduct was illegal, a specific intent requirement does little to distinguish between those who would commit the crime without the inducement and those who would not. In sum, although the fact

that Mr. Jacobson's purchases of *Bare Boys I* and *Bare Boys II* were legal at the time may have some relevance to the question of predisposition, it is not, as the Court suggests, dispositive.

The crux of the Court's concern in this case is that the Government went too far and "abused" the "processes of detection and enforcement" by luring an innocent person to violate the law. *Ante*, at 12, quoting *Sorrells*, 287 U.S., at 448. Consequently, the Court holds that the Government failed to prove beyond a reasonable doubt that Mr. Jacobson was predisposed to commit the crime. It was, however, the jury's task, as the conscience of the community, to decide whether or not Mr. Jacobson was a willing participant in the criminal activity here or an innocent dupe. The jury is the traditional "defense against arbitrary law enforcement." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). Indeed, in *Sorrells*, in which the Court was also concerned about overzealous law enforcement, the Court did not decide itself that the Government conduct constituted entrapment, but left the issue to the jury. *Sorrells*, *supra*, at 452. There is no dispute that the jury in this case was fully and accurately instructed on the law of entrapment, and nonetheless found Mr. Jacobson guilty. Because I believe there was sufficient evidence to uphold the jury's verdict, I respect-fully dissent.