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 WHITE delivered the opinion of the Court.

On September 24, 1987, petitioner Keith Jacobson was indicted for violating a provision of the Child Protection Act of 1984, Pub. L. 98–292, 98 Stat. 204 (Act), which criminalizes the knowing receipt through the mails of a ``visual depiction [that] involves the use of a minor engag-ing in sexually explicit conduct . . . .'' 18 U. S. C. §2252(a)(2)(A). Petitioner defended on the ground that the Government entrapped him into committing the crime through a series of communications from undercover agents that spanned the 26 months preceding his arrest. Petitioner was found guilty after a jury trial. The Court of Appeals affirmed his conviction, holding that the Government had carried its burden of proving beyond reasonable doubt that petitioner was predisposed to break the law and hence was not entrapped.

Because the Government overstepped the line between setting a trap for the "unwary innocent" and the "unwary criminal," *Sherman* v. *United States*, 356 U. S. 369, 372 (1958), and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested, we reverse the Court of Appeals' judgment affirming his conviction.

In February 1984, petitioner, a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska, ordered two magazines and a brochure from a California adult bookstore. The magazines, entitled Bare Boys I and Bare Boys II, contained photographs of nude preteen and teenage boys. The contents of the magazines startled petitioner, who testified that he had expected to receive photographs of ``young men 18 years or older.'' Tr. 425. On cross-examination, he explained his response to the magazines:

> "[PROSECUTOR]: [Y]ou were shocked and surprised that there were pictures of very young boys without clothes on, is that correct?
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> "[JACOBSON]: Yes, I was.
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> "[PROSECUTOR]: Were you offended?
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> . . . . .
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> "[JACOBSON]: I was not offended because I thought these were a nudist type publication. Many of the pictures were out in a rural or outdoor setting. There was—I didn't draw any sexual connotation or connection with that." *Id.,* at 463.

The young men depicted in the magazines were not engaged in sexual activity, and petitioner's receipt of the magazines was legal under both federal and Nebraska law. Within three months, the law with respect to child pornography changed; Congress passed the Act illegalizing the receipt through the mails of sexually explicit depictions of children. In the very month that the new provision became law, postal inspectors found petitioner's name on the mailing list of the California bookstore that had mailed him Bare Boys I and II. There followed over the next 2½ years, repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the new law by order-

ing sexually explicit photographs of children through the mail.

The Government began its efforts in January 1985 when a postal inspector sent petitioner a letter supposedly from the American Hedonist Society, which in fact was a fictitious organization. The letter included a membership application and stated the Society's doctrine: that members had the ``right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without restrictions being placed on us by outdated puritan morality.'' Record, Government Exhibit 7. Petitioner enrolled in the organization and returned a sexual attitude questionnaire that asked him to rank on a scale of one to four his enjoyment of various sexual materials, with one being ``really enjoy,'' two being ``enjoy,'' three being ``somewhat enjoy,'' and four being ``do not enjoy.'' Petitioner ranked the entry ``[p]re-teen sex'' as a two, but indicated that he was opposed to pedophilia. *Ibid.*

For a time, the Government left petitioner alone. But then a new ``prohibited mail specialist'' in the Postal Service found petitioner's name in a file, Tr. 328–331, and in May 1986, petitioner received a solicitation from a second fictitious consumer research company, "Midlands Data Research," seeking a response from those who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite *[sic]* age." Record, Government Exhibit 8. The letter never explained whether ``neophite'' referred to minors or young adults. Petitioner responded: ``Please feel free to send me more information, I am interested in teenage sexuality. Please keep my name confidential.'' *Ibid.*

Petitioner then heard from yet another Government creation, ``Heartland Institute for a New Tomorrow'' (HINT), which proclaimed that it was ``an

organization founded to protect and promote sexual freedom and freedom of choice. We believe that arbitrarily imposed legislative sanctions restricting *your* sexual freedom should be rescinded through the legislative process.'' *Id.*, Defendant's Exhibit 102. The letter also enclosed a second survey. Petitioner indicated that his interest in "[p]reteen sex-homosexual" material was above average, but not high. In response to another question, petitioner wrote: "Not only sexual expression but freedom of the press is under attack. We must be ever vigilant to counter attack right wing fundamentalists who are determined to curtail our freedoms." *Id.*, Government Exhibit 9.

"HINT" replied, portraying itself as a lobbying organization seeking to repeal ``all statutes which regulate sexual activities, except those laws which deal with violent behavior, such as rape. HINT is also lobbying to eliminate any legal definition of `the age of consent'.'' *Id.*, at Defendant's Exhibit 113. These lobbying efforts were to be funded by sales from a catalog to be published in the future ``offering the sale of various items which we believe you will find to be both interesting and stimulating.'' *Ibid.* HINT also provided computer matching of group members with similar survey responses; and, although petitioner was supplied with a list of potential "pen pals," he did not initiate any correspondence.

Nevertheless, the Government's ``prohibited mail specialist'' began writing to petitioner, using the pseudonym "Carl Long." The letters employed a tactic known as "mirroring," which the inspector described as "reflect[ing] whatever the interests are of the person we are writing to." Tr. 342. Petitioner responded at first, indicating that his interest was primarily in "male-male items." Record, Government Exhibit 9A. Inspector "Long" wrote back:

> "My interests too are primarily male-male items. Are you satisfied with the type of VCR

> tapes available? Personally, I like the amateur stuff better if its [sic] well produced as it can get more kinky and also seems more real. I think the actors enjoy it more." *Id.*, Government Exhibit 13.

Petitioner responded:

> "As far as my likes are concerned, I like good looking young guys (in their late teens and early 20's) doing their thing together." *Id.*, Government Exhibit 14.

Petitioner's letters to "Long" made no reference to child pornography. After writing two letters, petitioner discontinued the correspondence.

By March 1987, 34 months had passed since the Government obtained petitioner's name from the mailing list of the California bookstore, and 26 months had passed since the Postal Service had commenced its mailings to petitioner. Although petitioner had responded to surveys and letters, the Government had no evidence that petitioner had ever intentionally possessed or been exposed to child pornography. The Postal Service had not checked petitioner's mail to determine whether he was receiving questionable mailings from persons—other than the Government—involved in the child pornography industry. Tr. 348.

At this point, a second Government agency, the Customs Service, included petitioner in its own child pornography sting, ``Operation Borderline,'' after receiving his name on lists submitted by the Postal Service. *Id.,* at 71–72. Using the name of a fictitious Canadian company called ``Produit Outaouais,'' the Customs Service mailed petitioner a brochure advertising photographs of young boys engaging in sex. Record, Government Exhibit 22. Petitioner placed an order that was never filled. *Id.*, Government Exhibit 24.

The Postal Service also continued its efforts in the Jacobson case, writing to petitioner as the "Far Eastern Trading Company Ltd." The letter began:

> "As many of you know, much hysterical nonsense has appeared in the American media concerning `pornography' and what must be done to stop it from coming across your borders. This brief letter does not allow us to give much comments; however, why is your government spending millions of dollars to exercise international censorship while tons of drugs, which makes yours the world's most crime ridden country are passed through easily." *Id.*, Government Exhibit 1.

The letter went on to say:

> ``[W]e have devised a method of getting these to you without prying eyes of U.S. Customs seizing your mail. . . . After consultations with American solicitors, we have been advised that once we have posted our material through your system, it cannot be opened for any inspection without authorization of a judge.'' *Ibid.*

The letter invited petitioner to send for more information. It also asked petitioner to sign an affirmation that he was ``not a law enforcement officer or agent of the U.S. Government acting in an undercover capacity for the purpose of entrapping Far Eastern Trading Company, its agents or customers.'' Petitioner responded. *Ibid.* A catalogue was sent, *id.*, Government Exhibit 2, and petitioner ordered Boys Who Love Boys, *id.*, Government Exhibit 3, a pornographic magazine depicting young boys engaged in various sexual activities. Petitioner was arrested after a controlled delivery of a photocopy of the magazine.

When petitioner was asked at trial why he placed such an order, he explained that the Government had succeeded in piquing his curiosity:

> "Well, the statement was made of all the trouble and the hysteria over pornography and I wanted to see what the material was. It didn't describe the—I didn't know for sure what kind of sexual action they were referring to in the Canadian letter. . . ." Tr. 427–428.

In petitioner's home, the Government found the Bare Boys magazines and materials that the Government had sent to him in the course of its protracted investigation, but no other materials that would indicate that petitioner collected or was actively interested in child pornography.

Petitioner was indicted for violating 18 U. S. C. §2552(a)(2)(A). The trial court instructed the jury on the petitioner's entrapment defense,[1] petitioner was convicted, and a divided Court of Appeals for the Eighth Circuit, sitting *en banc*, affirmed, concluding that "Jacobson was not entrapped as a matter of law." 916 F. 2d 467, 470 (1990). We granted certiorari. 499 U. S. ____ (1991).

There can be no dispute about the evils of child

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[1]The jury was instructed:

``As mentioned, one of the issues in this case is whether the defendant was entrapped. If the defendant was entrapped he must be found not guilty. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.

``If the defendant before contact with law-enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law-enforcement officers o[r] their agents to commit that crime, then he was entrapped. On the other hand, if the defendant before contact with law-enforcement officers or their agents did have an intent or disposition to commit the crime charged, then he was not entrapped even though law-enforcement officers or their agents provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.'' App. 11–12.

pornography or the difficulties that laws and law enforcement have encountered in eliminating it. See generally *Osborne* v. *Ohio*, 495 U. S. 103, 110 (1990); *New York* v. *Ferber*, 458 U. S. 747, 759–760 (1982). Likewise, there can be no dispute that the Government may use undercover agents to enforce the law. ``It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.'' *Sorrells* v. *United States*, 287 U. S. 435, 441 (1932); *Sherman* v. *United States*, 356 U. S., at 372; *United States* v. *Russell*, 411 U. S. 423, 435–436 (1973).

In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. *Sorrells, supra,* at 442; *Sherman, supra,* at 372. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. *United States* v. *Whoie,* 288 U. S. App. D. C. 261, 263–264, 925 F. 2d 1481, 1483–1484 (1991).[2]

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[2]Inducement is not at issue in this case. The Government does not dispute that it induced petitioner to commit the crime. The sole issue is whether the Government carried its burden of proving that petitioner was predisposed to violate the law *before* the Government intervened. The dissent is mistaken in claiming that this is an innovation in entrapment law and in suggesting that the

Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate ``sting'' operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready

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Government's conduct prior to the moment of solicitation is irrelevant. See *post,* at 3-4. The Court rejected these arguments five decades ago in *Sorrells*, when the Court wrote that the Government may not punish an individual ``for an alleged offense which is the product of the creative activity of its own officials'' and that in such a case the Government ``is in no position to object to evidence of the activities of its representatives in relation to the accused ....'' 287 U. S., at 451. Indeed, the proposition that the accused must be predisposed prior to contact with law enforcement officers is so firmly established that the Government conceded the point at oral argument, submitting that the evidence it developed during the course of its investigation was probative because it indicated petitioner's state of mind *prior* to the commencement of the Government's investigation. See Tr. of Oral Arg. 41, 49.

This long-established standard in no way encroaches upon Government investigatory activities. Indeed, the Government's internal guidelines for undercover operations provide that an inducement to commit a crime should not be offered unless:

``(a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; *or*

``(b) The opportunity for illegal activity has been structured so that there is reason for believing that

commission of the criminal act amply demonstrates the defendant's predisposition. See *United States* v. *Sherman,* 200 F. 2d 880, 882 (CA2 1952). Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner—who must be presumed to know the law— had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. *Mathews* v. *United States*, 485 U. S. 58, 66 (1988).

But that is not what happened here. By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner since January 1985. *Sorrells*, *supra*, at 442; *Sherman*, 356 U. S., at 372.

The prosecution's evidence of predisposition falls into two categories: evidence developed prior to the Postal Service's mail campaign, and that developed during the course of the investigation. The sole piece of preinvestigation evidence is petitioner's 1984 order and receipt of the Bare Boys magazines. But this is scant if any proof of petitioner's predisposition to commit an illegal act, the criminal character of which a defendant is presumed to know. It may indicate a predisposition to view sexually-oriented photographs that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act

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persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.'' Attorney General's Guidelines on FBI Undercover Operations (Dec. 31, 1980), reprinted in S. Rep. No. 97–682, p. 551 (1982).

within a broad range, not all of which is criminal, is of little probative value in establishing predisposition.

Furthermore, petitioner was acting within the law at the time he received these magazines. Receipt through the mails of sexually explicit depictions of children for noncommercial use did not become illegal under federal law until May 1984, and Nebraska had no law that forbade petitioner's possession of such material until 1988. Neb. Rev. Stat. §28–813.01 (1989). Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence. Hence, the fact that petitioner legally ordered and received the Bare Boys magazines does little to further the Government's burden of proving that petitioner was predisposed to commit a criminal act. This is particularly true given petitioner's unchallenged testimony was that he did not know until they arrived that the magazines would depict minors.

The prosecution's evidence gathered during the investigation also fails to carry the Government's burden. Petitioner's responses to the many communications prior to the ultimate criminal act were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails.[3]

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[3]We do not hold, as the dissent suggests, see *post,* at 6, that the Government was required to prove that petitioner knowingly violated the law. We simply

Furthermore, a person's inclinations and ``fantasies . . . are his own and beyond the reach of government . . . . *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 67 (1973); *Stanley* v. *Georgia*, 394 U. S. 557, 565–566 (1969).

On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights. For instance, HINT described itself as ``an organization founded to protect and promote sexual freedom and freedom of choice'' and stated that ``the most appropriate means to accomplish [its] objectives is to promote honest dialogue among concerned individuals and to continue its lobbying efforts with State Legislators.'' Record, Defendant's Exhibit 113. These lobbying efforts were to be financed through catalogue sales. *Ibid.* Mailings from the equally fictitious American Hedonist Society, *id.*, Government Exhibit 7, and the correspondence from the non-existent Carl Long, *id.*, Defendant's Exhibit 5, endorsed these themes.

Similarly, the two solicitations in the spring of 1987 raised the spectre of censorship while suggesting that petitioner ought to be allowed to do what he had been solicited to do. The mailing from the Customs Service referred to ``the worldwide ban and intense

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conclude that proof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit the crime charged independent of the Government's coaxing.

enforcement on this type of material,'' observed that ``what was legal and commonplace is now an `underground' and secretive service,'' and emphasized that ``[t]his environment forces us to take extreme measures'' to insure delivery. *Id.*, Government Exhibit 22. The Postal Service solicitation described the concern about child pornography as ``hysterical nonsense,'' decried ``international censorship,'' and assured petitioner, based on consultation with ``American solicitors'' that an order that had been posted could not be opened for inspection without authorization of a judge. *Id.*, Government Exhibit 1. It further asked petitioner to affirm that he was not a government agent attempting to entrap the mail order company or its customers. *Ibid.* In these particulars, both government solicitations suggested that receiving this material was something that petitioner ought to be allowed to do.

Petitioner's ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails. See *Sherman,* 356 U. S., at 374. The evidence that petitioner was ready and willing to commit the offense came only after the Government had devoted 2½ years to convincing him that he had or should have the right to engage in the very behavior proscribed by law. Rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner. As was explained in *Sherman*, where entrapment was found as a matter of law, ``the Government [may not] pla[y] on the weaknesses of an innocent party and beguil[e] him into committing crimes which he otherwise would not

have attempted.'' *Id.*, at 376.

Law enforcement officials go too far when they "implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrels*, 287 U. S., at 442 (emphasis added). Like the *Sorrels* court, we are "unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.*, at 448. When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.

Because we conclude that this is such a case and that the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails, we reverse the Court of Appeals' judgment affirming the conviction of Keith Jacobson.

It is so ordered.