

No. _____

In the
Supreme Court of the United States

JONATHAN FRANCIS KIMBRELL
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Two FBI agents, posing as two parents and their unrealistically precocious 11-year-old child, convinced Kimbrell that the child was desperately wanting to have sex with an adult, that such sexual activity would be highly beneficial for her, and that Kimbrell was uniquely qualified for the job. Kimbrell, a sex-addict who spent years seeking sexual partners on the internet, had never before engaged in any illegal conduct involving children. Was Kimbrell entitled to an entrapment instruction, notwithstanding his apparent eagerness to continue the months long on-line negotiation with the agents that let up to a proposed encounter with the non-existent victim?

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Opinion Below

The unpublished opinion of the Court of Appeals is attached as an Appendix to this Petition.

Jurisdiction

The Court of Appeals for the Fifth Circuit rendered judgment on August 12, 2022. This petition is filed within 90 days of that date. *See* SUP. CT. R. 13.1. Section 1254(1), 28 U.S.C., confers jurisdiction on this Court to review the judgment through certiorari.

Authority Involved

18 U.S.C. §2422:

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger; nor shall any person be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

According to the Government, Jonathan Kimbrell “is a sex addict,”¹ and the evidence supports that assessment. Throughout his 20-year marriage, Kimbrell fed his addiction through numerous extramarital online encounters, using chat rooms, Craig’s List, dating sites, swinger sites, Facebook Messenger, and on-line ads. Most often these encounters were entirely virtual and involved fetishes, role playing, and the exchange of photos. Occasionally, however—perhaps ten percent of the time—these online encounters resulted in actual physical sexual encounters, originally only with other women, but eventually his sexual encounters would involve couples or just other men, though Kimbrell did not regard himself as being bisexual.²

Nothing, however, indicated that any of Kimbrell’s two decades of salacious pursuits had ever involved children prior to stumbling upon the FBI-orchestrated, proactive, reverse-sting operation that led to the instant charge of using a computer to attempt to persuade, induce, entice, or coerce a minor to engage in illegal sexual activity.³ To the contrary, during the sting operation, the undercover FBI agents asked Kimbrell if he had ever “been active with a younger one before,” and Kimbrell said “no.”⁴ He also said “no” when the agent asked if he had any images of “young ones” he’s “played with” to send to the agents to prove that Kimbrell was “legit.”⁵

¹ ROA.2009, n.5 (Government’s sentencing memo). *See* ROA.1181-83, 1208 (Government’s closing trial arguments).

² ROA.920-35, 1100, 1119-23.

³ ROA.380. *See* 18 U.S.C. § 2422(b).

⁴ ROA.1019-20. *See* ROA.1485 (emails of 5/12 at 8:04 pm & 8:09 pm).

⁵ ROA.394. *See* ROA.1446 (emails of 5/3 at 2:05 pm and 2:12 pm).

At trial, the 44-year-old Kimbrell denied having pedophilic tendencies,⁶ and the FBI found no historical evidence of sex offenses of any kind and found no child pornography “or other such evidence” on his phone and laptop, which were seized upon his arrest.⁷ Moreover, no predilection for pedophilic tendencies was ever suspected by Kimbrell’s three daughters (two biological and one adopted) or the friends of those daughters.⁸ Likewise, Kimbrell’s wife, who had known Kimbrell since he was a teenager, testified that she often discovered (to her dismay) her husband’s dalliances, as revealed by internet text and photo exchanges she found between him and other women or couples.⁹ And while she had, on occasion, observed emails involving role play in which images of “grown women” dressed in pigtails would call Kimbrell “Daddy,” she never saw any images of minors and none of the texts involved expressions of sexual interest in children.¹⁰

Then, in May 2019, Kimbrell answered an ad that resulted in the instant conviction and the prospect of spending the next quarter century behind bars. Hence, on May 2, Kimbrell was pursuing his compulsion in the usual manner when he stumbled upon an advertisement on the website Doublelist, an “adult hookup website,” which functions “as an intermediary for people to post ads or respond to ads based on what sexual interest they might have.”¹¹ The ad purported to have been placed by a person age 33, looking to “date” a person between 25 and 35, but with “coffee first.”

⁶ ROA.644, 1016, 1026, 1096.

⁷ ROA.604-05, 2009, n.5.

⁸ ROA.1134-37, 1143-56, 2009, n.5.

⁹ ROA.1119-23.

¹⁰ ROA.1122, 1124, 1126-27.

¹¹ ROA.382, 607. *See* <https://doublelist.com> (a sign-up website that advertises, “Connect with straight, gay, bi and curious!).

The ad also stated:

Looking for someone likeminded, kinky, into more youthful play. (lake charles/beaumont) I am looking for anyone that is open to expanding their horizons beyond the typical judgmental norms. Youthful play. Discretion is key.¹²

Intrigued, Kimbrell, using a pseudonym, replied, “kinky married and very discreet..... Im interested.....,” and he attached a photo of his penis to his reply.¹³

The ad was not a genuine solicitation to sexual activity. Rather, it was drafted by FBI Agent Emerson Baty on Doublelist, with the purpose of luring persons into violating the law. To that end, Agent Baty, pretending to be a man named “Eric Stevens” or “E”, responded to Kimbrell: “Sounds interesting. Are you into young fun?”¹⁴ Kimbrell said “yes,” and Baty explained: “I have a stepdaughter that is well behaved. I’m not always alone with her but when I am, we have fun. You have an age preference?” Kimbrell said “no” and asked for a picture. Baty then added that “her mom is cool with it, she’s the one that got me in the game.”¹⁵ Baty then sent a photo purporting to be of his stepdaughter but was actually a photo of a young looking, adult FBI task force officer, made to look even younger through the use of a Snapchat filter that superimposed dog ears and spots on her face.¹⁶ He also sent Kimbrell a picture of FBI Agent Marisa Cowdry, claiming that the image was of his wife and the child’s mother “Melissa Collins” or “Mel.”¹⁷

¹² ROA.381, 607. *See* ROA.1439.

¹³ ROA.389. *See* ROA.1440.

¹⁴ ROA.392. *See* ROA.1442 (email of 5/3 at 9:13 am).

¹⁵ ROA.390, 392. *See* ROA.1441-44 (emails of 5/2 at 6:25 pm and emails 5/3 at 5:48 a.m., 9:13 am, 9:17 am, & 1:39 pm).

¹⁶ ROA.393. *See* ROA.1443-44 (email of 5/3 at 1:48 pm). *See also* ROA.1718-20 (subsequent photos).

¹⁷ ROA.394. *See* ROA.1445-46 (email of 5/3 at 2:02 pm).

Through a series of more than 50 emails exchanged over the course of the next eight days, Agents Baty and Cowdry, using separate email accounts, conveyed to Kimbrell that Melissa had an 11-year-old daughter named “Layla,” who regularly had sex with her stepfather Eric, that Layla’s mother Melissa was the instigator of this activity, and that Melissa would watch whenever Eric had sex with her daughter. Melissa explained that Layla “needs more experience” doing “different things with different people” other than just her and her stepfather.¹⁸

The balance of the emails between Kimbrell, Eric, and Melissa were in the nature of a job interview, whereby Melissa and Eric were seeking to make sure that Kimbrell was the right man to join in their sexual escapades, which they often described as being both welcomed by, and beneficial for, the child. Ultimately, they advised Kimbrell that they had concluded that he was a “good person who is honest and caring,” that he would be a “great teacher” to Layla, and that Layla would “really love” having sex with him.¹⁹

Melissa told Kimbrell that she was excited to have Kimbrell meet Layla and that Layla was excited to meet him.²⁰ They then introduced Kimbrell directly to Layla (via email), who was portrayed by Agent Baty. In her first email to Kimbrell, Layla explained that her parents had told them about Kimbrell and that he would be “a good family friend,” which she thought was “cool.” She subsequently proceeded to tell Kimbrell that her stepfather said that Kimbrell could be trusted to keep the “family secrets” and that made her feel happy. She also told Kimbrell that she really

¹⁸ ROA.1445-55.

¹⁹ ROA.1455, 1457. *See* ROA.1601-38, *passim* (Exhibit 2a - emails between Eric and Kimbrell); ROA.1639-71, *passim* (Exhibit 2b - emails between Melissa and Kimbrell).

²⁰ ROA.1460-61.

enjoyed having sexual intercourse with her stepfather and was looking forward to doing the same with Kimbrell, provided that his penis was not “super big.” She also invited him to tell her all the things that he would do to her, and even begged him to resend the photo of his penis because her stepfather erased the one he originally sent.²¹

Over the course of the next four weeks, Layla and Kimbrell exchanged over 100 emails, and in many of those emails, Layla, with Agent Baty at the keyboard, expressed in a manner wholly inconsistent with that of an eleven-year-old girl an overwhelming desire to engage in various sexual activities with Kimbrell, described in lurid detail, whom she could not wait to include in a depraved ménage-à-quatre.²²

After seven weeks and over 400 emails, Melissa and Eric arranged to meet Kimbrell at a restaurant, where the adults would go over the “ground rules” before walking over to the nearby hotel, where Layla would be waiting for them.²³ Hence, on June 6, 2019, Kimbrell showed up as planned and met with the agents, and when the three of them were walking across the parking lot to the hotel, a takedown team arrested Kimbrell.²⁴

Following a four-day trial, the jury found Kimbrell guilty as charged,²⁵ and the district court thereafter sentenced Kimbrell to 292 months in prison.²⁶

²¹ ROA.1474-75.

²² See ROA.1672-1722, *passim* (Exhibit 2c - emails between Layla and Kimbrell).

²³ ROA.517.

²⁴ ROA.542-46.

²⁵ ROA.245-52, 254

²⁶ ROA.283-84, 292.

Reasons for Granting the Petition

To provide guidance on the limits of federal law enforcement overreach, this Court should hold that a defendant's lack prior criminal activity is sufficient to warrant a jury instruction on entrapment, particularly where the defendant is psychologically vulnerable and the government's inducement conduct is outrageous and unrealistic.

As this Court held 64 years ago:

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the government, and 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." The stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.²⁷

Accordingly, "[i]n their zeal to enforce the law . . . 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."²⁸

In this case, the Fifth Circuit holds that Kimbrell was not entitled to a jury instruction on entrapment solely because he never showed any reluctance, only enthusiasm, throughout the course of the agents' weeks-long scheme to get him to show up for the rendezvous with the fictional 11-year old. In other words, the Fifth Circuit holds that under those circumstances, no reasonable jury, as a matter of law, could have found that Kimbrell lacked predisposition to commit the crime.²⁹ Hence,

²⁷ *Sherman v. United States*, 356 U.S. 369, 372 (1958) (quoting *Sorrells v. United States*, 287 U.S. 435, 442 (1932) & finding entrapment as a matter of law).

²⁸ *Jacobson v. United States*, 503 U.S. 540, 548 (1992).

²⁹ *Mathews v. United States*, 485 U.S. 58, 62 (1988) ("We hold that even if a defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from

the question before this Court is whether the arguably pointless, wasteful, and outrageous behavior of the Government in manufacturing a wholly unlikely crime may be excused and insulated from the jury's review while the target of this behavior (the defendant) must be put in jail for decades, notwithstanding that he, afflicted with a sexual addiction disorder of which the Government has taken advantage, has never in his long adult life engaged in the illicit behavior that the agents have induced.

This Court has never defined the contours of predisposition. It should do so now given the ease with which the Government can create wholly unrealistic fantasy worlds on the internet likely only to ensnare vulnerable but otherwise law abiding citizens who do not otherwise pose an actual danger to society.

A discussion of Kimbrell's criminal predisposition *vel non* must be considered in the context of the Government's inducement conduct. Here, the Government did more than merely provide an opportunity for Kimbrell to commit a crime. Rather, the agents engaged in improper inducement through a bizarre manufactured scenario that was the product of their "creative activity."³⁰ Through the use of such creative "plus factors,"³¹ the Government crossed the line beyond legitimate investigative activity in three different ways.

First, notwithstanding the reference to "youthful play," the government agent conceded that the term could be construed merely as "age play" rather than a solicitation for sexual activity with

which a reasonable jury could find entrapment.").

³⁰ *Sorrells*, 287 U.S. at 451 ("the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials).

³¹ See *United States v. Barta*, 776 F.3d 931, 933 (7th Cir. 2015) (identifying impermissible inducement tactics as "plus factors"); *United States v. Pérez-Rodríguez*, 13 F.4th 1, 17 (1st Cir. 2021) (same).

an actual minor,³² and, as the Government further conceded, the ad was placed on an “adult hookup website” not generally associated with illegal sexual activity.³³ Indeed, the ad purported to have been placed by a person age 33, looking to “date” a person between 25 and 35, but with “coffee first.”³⁴ Only after Kimbrell responded did the agent indicate, unsolicited, that he had a “well behaved,” 11-year-old stepdaughter with whom he has been having “fun” with for some time, and even then, Kimbrell initially responded that he wanted to “play” with Eric and Melissa without the involvement of the minor.³⁵ As the First Circuit has held under nearly identical facts, “this type of ‘bundling of licit and illicit sex into a package deal’ can constitute a ‘plus factor’ for purposes of establishing improper inducement.”³⁶

Second, after Kimbrell repeatedly tried for two days to insist that any intimate activity, at least initially, be between only the three adults involved,³⁷ the agents insisted otherwise, explaining, “[t]hat just typically isn’t how we do it.”³⁸ As this Court has explained, “‘persuasion or mild

³² ROA.607.

³³ ROA.382.

³⁴ ROA.607-08, 1439

³⁵ ROA.1442-47, 1452.

³⁶ *Pérez-Rodríguez*, 13 F.4th at 20 (quoting *United States v. Hinkel*, 837 F.3d 111, 118 (1st Cir. 2016)). See *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir. 2014) (describing “the government’s taking advantage of an alternative, non-criminal type of motive” as a “typical[]”example of an inducement plus factor).

³⁷ See ROA.1447 (email 5/3 at 2:34 pm); ROA.1448 (email 5/3 at 4:23 pm); ROA.1451 (email 5/4 at 5:31 pm); ROA.1452 (email 5/4 at 6:37 pm).

³⁸ ROA.1455 (email 5/6 at 10:31 am).

coercion’ and ‘pleas based on need, sympathy, or friendship’ can constitute sufficient inducement to permit jury consideration of entrapment.”³⁹

Third, and most significant, through the numerous representations purporting to come directly from all three of the invented personas—mother, stepfather, and young child—the two agents repeatedly conveyed to Kimbrell that the “illegal conduct was not harmful, but actually beneficial to the minor.”⁴⁰ As the First Circuit has noted, the “government’s perverse statements that the minors would enjoy and benefit from sexual exploitation were important because such suggestions have the potential to influence the mind of a person who is not predisposed to abuse children and convince him that sex with a minor is acceptable.”⁴¹ Such behavior is akin to that condemned by this Court in *Jacobson*, in which the Government, attempting to get the defendant to order images of child pornography, solicited the defendant with literature from bogus organizations advocating against the validity of the child-pornography laws, contending that they amounted to an unconstitutional infringement on the defendant’s rights.⁴²

³⁹ *United States v. Theagene*, 565 F.3d 911, 922 (5th Cir. 2009) (quoting *United States v. Nations*, 764 F.2d 1073, 1080 (5th Cir. 1985) (in turn quoting *United States v. Jackson*, 700 F.2d 181, 191 (5th Cir. 1983)).

⁴⁰ *Pérez-Rodríguez*, 13 F.4th at 21 (holding that this behavior constituted a “plus factor” sufficient to permit the jury to find improper government inducement).

⁴¹ *Id.* at 27. See *Hinkel*, 837 F.3d at 118 (stating that the agent “downplayed the harm that could be expected to flow from the commission of the crime by describing how ‘amazing’ the encounter would be”); *United States v. Gamache*, 156 F.3d 1, 11 (1st Cir. 1998) (“[T]he government agent provided justifications for the illicit activity [by] . . . expressing that she, as the mother of the children, strongly approved of the illegal activity, and explaining that she had engaged in this conduct as a child and found it beneficial to her.”).

⁴² 503 U.S. at 552-53 (“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.”).

The FBI agents engaged in analogous behavior in this case. Thus, in the following representative sample of email excerpts, Agent Cowdry, playing the role of the minor's mother Melissa told Kimbrell:

She [Layla] needs more experience and someone to teach her besides just me and E. She needs to experience different things from different people. But you also need to be careful enough as to not hurt her because we need to be careful. I enjoy myself while you do this and can record or memorialize however you want me too. I'm there for support and enjoyment but also to make sure she's safe. I like to play with toys while you are playing but I don't like to participate. I want her to have her own experiences.⁴³

* * *

That sounds good to me. I'm happy to hear you are empathetic and that you want to give others pleasure for your own pleasure. You seem like a good person who is honest and caring and I appreciate you sharing that with me.⁴⁴

* * *

That [detailed description of proposed sexual conduct] sounds really nice. I think she would really love that. She needs someone to show her how and someone she can be comfortable with and it seems like you would be a great teacher based on what you told me this morning. I don't think she has had a real orgasm yet. At least she hasn't acting like she has yet haha. She needs someone who knows what they are doing and it seems like you definitely do ;)⁴⁵

* * *

I think you guys would get along great. I told her a little about you and she is excited to meet you too.⁴⁶

* * *

⁴³ ROA.405. See ROA.1455 (email of 5/6 at 10:31 am)

⁴⁴ ROA.409. See ROA.1455 (email of 5/6 at 7:05 pm)

⁴⁵ See ROA.1457 (email of 5/7 at 3:53 pm) (not read to the jury, but admitted as evidence).

⁴⁶ ROA.417. See ROA.1460 (email of 5/9 at 10:41 am).

But I don't think you're like those people in the past that have not turned out to be good people. I think that you are very serious and going to be a good influence for Layla. . . . I know that Layla is very excited to meet you. So I don't want to make her wait any longer than we have to.⁴⁷

Similar representations that Kimbrell would be providing a beneficial service to Layla were made by Agent Baty, as depicted in the following representative sample of email excerpts drafted and sent by the agent, playing the role of Eric the minor's stepfather, to Kimbrell:

Mel and I have been talking about introducing you to Layla. We have been very cautious to this point which is why Layla trusts us and who we allow around her. . . . We've talked to her about you and she is excited but we still must be safe.⁴⁸

* * *

Layla told me she got to message you today. She said you seem really nice and easy to talk to. . . . She has been really excited all evening.⁴⁹

* * *

I just spoke with Mel and told her how things went with Layla and how she seems to be taking to you very well. She was excited and thinks that your idea of letting her watch while all of us play would be a great and welcome change. Layla was talking about you again today so I know she will enjoy herself, especially if she continues to trust and develop that connection with you.⁵⁰

* * *

Layla has really taken to you and that is key. If Mel trust you 100% you are going to be in heaven trust me. Mel and I are going to look at our schedules and see when is the soonest we can make this thing happen. If we don't hurry Layla will drive us crazy man, I'm not sure what you have told her but I haven't seen her this excited in quite awhile!⁵¹

⁴⁷ ROA.1036. *See* ROA.1495-96 (email of 5/14 at 8:18 pm).

⁴⁸ ROA.980. *See* ROA.1462 (email of 5/9 at 8:44 pm).

⁴⁹ ROA.989. *See* ROA.1465-66 (email of 5/10 at 9:22 pm).

⁵⁰ ROA.426. *See* ROA.1467 (email of 5/11 at 11:50 am).

⁵¹ ROA.1024. *See* ROA.1487 (email of 5/13 at 2:23 pm).

* * *

We are ready to go. Layla would drive us crazy if we had to push it back.⁵²

Layla herself, played by Agent Baty, assured Kimbrell that she was giddy with the prospect of her parents allowing her to finally meet Kimbrell in person and engage in all manner of blissful sexual activity with him:

Hi it's Layla. My mom and E have told about u. They said they thing you are going to be a good family friend and that we should get to know each other good. I think that's cool.⁵³

Yea I remember [E's face the first time they had sex] lol. He was really shocked but I enjoyed it. It was fun! I bet I could do the same to you. If you want lol. As long as you aren't suuuuper big then it mite hurt a lil.⁵⁴

I just remember his face and what I did to him lol. He is the only one. I'm was cool and felt good and I like making E happy. He is gentle and nice and mommy loves him. How do u want 2 play. I enjoy E but kinda wanno know what u want me to do to ya. I want it to be good, even better than E.⁵⁵

I liked being on top of E and then sucking on him. He likes that and the noises he make let tell me I'm doing a good job. When E is behind me it feels really good but I can't see him and I like to be able to see. Oh and it feel good if he licks on me 2 but he doesn't do it all the time. I wish he did though. I'm not tall cuz mom is short lol.⁵⁶

⁵² ROA.541. *See* ROA.1599-1600 (email of 5/11 at 11:50 am).

⁵³ ROA.420. *See* ROA.1466-67 (email of 5/10 at 9:22 pm).

⁵⁴ ROA.460. *See* ROA.1474 (email of 5/12 at 11:51 am).

⁵⁵ ROA.461. *See* ROA.1475 (email of 5/12 at 12:23 pm).

⁵⁶ ROA.466. *See* ROA.1483 (email of 5/12 at 6:33 pm).

You sound like a pro lol! I didn't know I cud be in control if you were behind me. This sounds fun! When do you think mom and E will let us meet?⁵⁷

I thought about the things you told me and just wanted to hear more lol! I play with myslef sometimes, but not thinking about E all the time. Didu have a good day? I was dreaming and thinking about if we meet and what would hapen lol. I think we will meet soon. I hope.⁵⁸

“Oh turtle, I can't w8!! I will probably be up alllll night thinking about what we r gonna do 2morrow!”⁵⁹

Through this “creative” (if not thoroughly creepy) inducement activity, as reflected in the foregoing sample of the more than 420 emails exchanged between the parties between May 3 and June 6, 2019, the two government agents, acting as Melissa, Eric, and Layla, repeatedly assured Kimbrell that he was the nicest, most caring, most trustworthy person they had ever met, that his engaging in sexual acts with Layla would be beneficial to Layla, that his efforts in expanding the young girl's sexual horizons would be heroic, and that his failure to follow through on his commitment to their venture would be a devastating disappointment to all three of them, especially “Layla.”

In short, the Government took advantage of Kimbrell's heretofore not illegal sexual compulsions by creating a bizarre and unique fantasy world in which the otherwise undisputably

⁵⁷ ROA.467. See ROA.1483 (email of 5/12 at 7:12 pm).

⁵⁸ ROA.469-70. See ROA.1489 (email of May 13, at 6:38 pm).

⁵⁹ ROA.536. See ROA.1594 (email of June 5, at 9:00 pm).

important child-welfare policy considerations behind the offense statute simply do not apply. Such “creative activity” surely exceeds in audacity those similar “Government acts intended to create predisposition” that were condemned by this Court in *Jacobson*.

In light of the Government’s conduct described above, Kimbrell, citing older Fifth Circuit cases and authorities from this Court and other circuits, argued that he made a prima facie showing of a lack of predisposition sufficient to merit a jury instruction on entrapment, that is, an instruction regarding the Government’s obligation to “prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.”⁶⁰

Specifically, he argued that predisposition is contradicted because the Government made the initial suggestion that the criminal activity involved the sexual abuse of a minor, a factor that weighs in favor of finding a prima facie case.⁶¹ Also relevant is the fact that Kimbrell initially insisted on engaging with Eric and Melissa without “Layla.”⁶² But most significant, the undisputed evidence indicates that the 44-year-old Kimbrell had never before engaged in illegal sexual activity involving a child or ever possessed any child pornography.⁶³

⁶⁰ See *Jacobson*, 503 U.S. at 548-49.

⁶¹ See *Pérez-Rodríguez*, 13 F.4th at 22 (finding relevant to establishing a prima facie case of a lack of predisposition that “the government first suggested sexual abuse of a minor”).

⁶² See *id.* at 23 (holding that initial insistence on meeting adult without minor’s presence “can be read as a sign of some reluctance to commit the crime”).

⁶³ *United States v. Bradfield*, 113 F.3d 515, 523 (5th Cir. 1997) (“The record is devoid of evidence that Bradfield had ever shown an interest or willingness to participate in a drug deal before he met [government informant].”); *Theagene*, 565 F.3d at 920 (holding that a “lack of predisposition can appear from, for example, lack of prior interest or experience related to the crime”); *Pérez-Rodríguez*, 13 F.4th at 21 (“Tellingly, the record contains no such evidence” of prior criminal convictions for similar offenses or a history of sexual interest in minors.”); *Gamache*, 156 F.3d at 12 (“[T]here was no evidence presented that Gamache had engaged in similar activities independent of this sting operation. The jury could have relied on this evidence to find a lack of predisposition”); *Hinkel*, 837 F.3d at 118 (stating that the defendant

Thus, Kimbrell advised Eric that he had never had sex with a minor and that he possessed no images of child pornography. Kimbrell had no criminal history involving sexual misconduct of any type, and the Government found no illegal content on any of his electronic devices.⁶⁴ His family members and others testified that Kimbrell had a positive reputation and never exhibited any pedophilic tendencies.⁶⁵ Finally, Kimbrell himself testified that he was not a pedophile and, more important, that he had never engaged in any illegal sexual activity with a minor child.⁶⁶

That Kimbrell, for at least 20 years, had an insatiable need for sex, with women, with couples, with men, that he was into role play, domination, and other stomach-turning “crazy stuff,” including “pretending to be an adult having sex with a kid,”⁶⁷ an apparent reference to Mrs. Kimbrell’s testimony about seeing images of adult women in pigtails referring to Kimbrell as “daddy.” But as distasteful as Kimbrell’s previous activities may have been, they are not illegal, and even if the evidence permits an inference that Kimbrell has fantasized about having sex with minors,

produced sufficient evidence to “clearly” meet his prima facie burden of a lack of predisposition because, inter alia, “the government had not uncovered any evidence suggesting that he had other underage victims”).

⁶⁴ See *Nations*, 764 F.2d at 1080 (“As for predisposition, the jury could have credited the testimony that Nations was a businessman with no criminal history or experience and could have rejected the informant Street’s testimony to the contrary.”).

⁶⁵ *Bradfield*, 113 F.3d at 523 n.26 (finding prima facie evidence of a lack of predisposition based, in part, on testimony of drug-trafficking defendant’s employer that defendant “was a hard-working husband and father”); *United States v. Benavidez*, 558 F.2d 308, 311 (5th Cir. 1977) (finding that the defendant met his burden in part because of “additional testimony that the defendant had a good reputation in the community and was not known to be a drug dealer”); *United States v. Groessel*, 440 F.2d 602, 606-07 (5th Cir. 1971) (holding that upon showing of government inducement, evidence of defendant’s “unblemished reputation” entitled him an entrapment instruction even though the defendant “initiated” criminal discussions).

⁶⁶ *Benavidez*, 558 F.3d at 311 (holding that defendant “met his burden of fairly raising the issue of entrapment” because, in part, he “testified that he never sold drugs before”).

⁶⁷ ROA.1181-83.

“a person’s inclinations and fantasies are his own and beyond the reach of the government.”⁶⁸ What is important is that despite his proclivities, Kimbrell never in his long adult life committed any crimes related to those proclivities.⁶⁹

According to the Fifth Circuit these factors added up to zero. Thus the court held that the jury was not entitled even to consider whether Kimbrell was predisposed to having sex with an actual child notwithstanding that despite his sexual addiction, he had never committed such an act in his 44 years of life. Yet, one cannot avoid the strong feeling that if the FBI had simply left Kimbrell alone, he would continue to go through life posing no danger to any real children.

Conclusion

This Court has not, but should, provide guidance on this aspect of the entrapment document. Accordingly, this Court should grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,

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⁶⁸ *Jacobson*, 503 U.S. at 551-52.

⁶⁹ *See id.* at 551 (“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.”).