No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MICHAEL HOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JENNIFER NILES COFFIN
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

QUESTION PRESENTED

James Michael Hood, a person with no prior criminal history, was arrested after an online "sting" operation in which over a three-day period a male police officer posed as a 17-year-old female pageant contestant interested in a secret, sexual relationship with him. The two exchanged over one thousand text messages, through which the police officer capitalized on Hood's need for companionship and threatened to withdraw from their conversation when he was reluctant to take their relationship to next levels. After the police officer placed the real minor female on the phone to allay Hood's fears, he went to meet her in a public place. Upon arriving the meeting place, he was arrested and charged with attempted enticement of a minor to engage in criminal sexual activity, in violation of 18 U.S.C. § 2422(b). At trial, the jury was instructed on entrapment, but found Hood guilty. The case presents the following question for review:

Whether, when the government has induced a person to break the law and the defense of entrapment is at issue, the government need only show that its inducement succeeded after a short period of time to prove beyond a reasonable doubt that the person was predisposed to break the law, regardless of the psychologically graduated nature of the inducement.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

(1) *United States v. James Michael Hood*, No. 3:17-cr-00083-1, District Court for the Eastern District of Tennessee. Judgment of conviction entered April 9, 2019.

(2) *United States v. James Michael Hood*, No. 19-5361, U.S. Court of Appeals for the Sixth Circuit. Opinion and judgment affirming conviction entered April 23, 2020.

(3) *United States v. James Michael Hood*, No. 3:17-cr-00083-1, District Court for the Eastern District of Tennessee. Motion for compassionate release denied June 16, 2020.

(4) *United States v. James Michael Hood*, No. 3:17-cr-00083-1, District Court for the Eastern District of Tennessee. Motion for compassionate release filed July 16, 2020 (awaiting ruling).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

No. 20-_____

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Petitioner James Michael Hood respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit appears at pages 1a to 7a of the appendix to this petition, and is available at 811 F. App'x 291 (6th Cir. 2020). The district court's judgment appears at pages 8a to 15a of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' judgment affirming the conviction and sentence was entered on April 23, 2020. This petition is timely filed under Supreme Court Rule 13.1 and this Court's order of March 19, 2020 regarding filing deadlines in light of the ongoing public health concerns relating to COVID-19.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 2422(b) provides:

> 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.

STATEMENT OF THE CASE

Overview. This Court last addressed the doctrine of entrapment as a matter of law nearly three decades ago, in *Jacobson v. United States,* 503 U.S. 540 (1992), well before the modern digital age. This case raises the important question whether, when the government has employed a fictitious online relationship to induce a person to commit a crime and entrapment is at issue, the mere fact that the person committed the crime after just three days is sufficient to prove beyond a reasonable doubt that he was predisposed to commit the crime, regardless of the emotionally graduated nature of the government's inducement. As demonstrated by this case, a focus on the short duration of the government's inducement fails to account for the

modern era of incessant and instantaneous online communication, where emotionally impactful relationships may form and escalate in a matter of moments or hours—paving the way for government agents to entrap otherwise law-abiding people. This Court should now clarify that entrapment as a matter of law may be established even when the government's inducement occurred over a short period of time.

A. The evidence presented at trial

The evidence at trial was undisputed. James Michael Hood, a 53-year old divorced man who lived alone, first saw the public profile page of J.H., a real 17-year-old pageant contestant, under the "people you may know" tab on his Facebook page. Pet. App. 1a; Trial Tr., Vol. 1, at 149 (Doc. 46). At the time, J.H. was soliciting votes from the public for the contest. Pet. App. 1a. Hood sent a friend request, and J.H. accepted, thinking Hood might be a judge for the pageant. *Id.* The two then corresponded on Facebook messenger first about the pageant, then about J.H.'s school and extracurricular interests. *Id.* Hood assured her that he was not flirting, but asked if they could be friends and complimented her beauty several times. *Id* at 2a. When Hood asked to move the conversation to text message, J.H. stopped replying. *Id.* Concerned that he had upset her, Hood apologized repeatedly until J.H. blocked him. *Id.* Hood did not try to initiate contact again.

Meanwhile, J.H. and her mother reported the Facebook activity to the police. *Id.* About two weeks after the Facebook chat session ended, and during which time Hood did not try to contact J.H., Investigator Thomas Evans of the Knoxville police department asked J.H.'s mother to temporarily unblock Hood and invite him to

correspond by text message, providing a telephone number the agent would use to pose as J.H. *Id.* She did so, and Hood quickly sent a text to that number, the first of an exchange of over one thousand text messages during the span of several days. *Id.*[1] In the beginning, "Hood expressed a strong interest in becoming friends with 'J.H.'" *Id.* He also expressed an interest in romance; he asked when she turned 18, said that he cared about her, showered her with compliments, and wrote romantic poetry for her. *Id.* Hood told the fictional J.H. that he was touched by her battle with rheumatoid arthritis and impressed by her commitment to helping others who suffered from the disease, offering to help her in any way he could.[2] Trial Tr., Vol. 1, at 99. Evans, posing as J.H., encouraged Hood's interest by pretending to be flattered. Pet. App. 2a. When "Hood began using terms of endearment such as sweetie[,]" "'J.H.' reciprocated." *Id.* The fictional J.H. told Hood he was "neat," "nice," and "sweet," hinted that she found her high-school-aged boyfriend "boring," claimed that his poetry gave her "chills," and said that the idea of being with Hood "in another world" for a night sounded "so nice." Trial Tr., Vol. 1, at 108, 109, 118, 121, 148. She confessed that she didn't always feel good about herself, but that Hood made her feel special, and that it was "kinda exciting having a secret" "[t]hat only two people know about."

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[1] The verbatim text conversation between the agent and Hood was entered as an exhibit at trial and is retained in the record in the court of appeals. *See* Hood Br. App., Sixth Cir. R. 19, at 59-124 (Gov't Trial Exh. 9). All the trial exhibits were made part of the record in the court of appeals. *See* App., Sixth Cir. R. 19, 20.

[2] Hood himself suffers from arthritis, which he disclosed in an apology letter to J.H. and her family written after his arrest. Hood Br. App., Sixth Cir. R. 19, at 135 (Gov't Trial Exh. 16).

Trial Tr., Vol. 1., at 101, 121, 132.

Early on in their conversation, each time the agent steered the conversation toward sex, Hood attempted to slow things down. "Hood exhibited signs of fear that his relationship with 'J.H.' was inappropriate or violated the law." Pet. App. 2a. When the fictional J.H. asked him "what do you think of when you think of me," Hood was apprehensive, deflecting, "I have to be careful. You are 17." *Id.* Hood later expressed concern that he was being set up, and the fictional J.H. feigned indignation in response, immediately threatening to end the conversation. *Id.* Hood apologized profusely. *Id.* Once they made amends, the agent worked on Hood to extract more explicit descriptions of his desires for J.H., insisting, "Tell me what you want and how you can love me[.]" Trial Tr., Vol. 1, at 128. Hood said that he hoped "to spend time with" her. Trial Tr., Vol. 1, at 130. When the agent demanded details and pretended to be worried about meeting in public, Hood suggested they meet at his apartment. Trial Tr., R. 46, Vol 1, at 130-31. The fictional J.H. asked what they would do there and Hood said they would "just talk lol . . . get to know each other." Pet. App. 2a. At this point, the agent "first suggested the possibility of a sexual relationship" when he stipulated that if they were going to meet, then J.H. expected them to have sexual relations: "I think that if we care about each other intimacy is part of it." *Id.* at 2a, 5a.

Hood "was hesitant at first to admit to wanting an 'intimate' relationship." *Id.* at 2a. He again stated that he wanted to slow down and get to know her first. *Id.* In response, the fictional J.H. "pretended to be affronted by Hood's refusal to express his

sexual desires" and "continued to pester Hood to be upfront about his feelings." *Id.* at 2a, 3a. When Hood explained that he only wanted to please J.H, the agent pushed back: "Honestly. I was thinking that you would kinda take the lead. I thought men did that?" Trial Tr., Vol. 1, at 138. Eventually, the fictional J.H. explicitly conditioned her visit to Hood's apartment on his confessing a desire to have sex: "If you want to tell me what you want to do with me I will find a way [to come over]." Trial Tr., Vol. 1, at 142. Hood did not respond immediately, and about five minutes later the fictional J.H. declared, "Nevermind. Bye[.]" *Id.* Hood implored, "Why are u doing this to me? You are 17. I'm trying to be careful[.]" Pet. App. 3a. He later confided in her, "This is new to me." Trial Tr., Vol. 1, at 143. The agent seized the opportunity, urging him, "Then you can be honest. Me too. I haven't been with a man." *Id.* At that point, three days and almost five hundred messages into the conversation, Hood relented, asking about J.H.'s experiences with sex and what she looked like naked. Pet. App. 3a. The sexual nature of the conversation escalated over the next few days, with Hood graphically fantasizing about specific sexual acts they could do together and eventually narrating his own masturbation. *Id.* Upon the agent's further encouragement and suggestion of penetrative sex, Hood promised not to get J.H. pregnant. Trial Tr., Vol 1., 153-54.

Even so, Hood exhibited reluctance to meet in person, while the agent scaled up the emotional pressure. *Id.* Hood slowed down his responses, so that in the final days of their conversation, the agent had to initiate several chat sessions to keep the ruse going. *E.g.*, Trial Tr., Vol. 1, at 181, 182, 186, 190. The agent eventually arranged

a live phone call between Hood and the real minor J.H. "in the hope of allaying Hood's fears" so that they could make plans to meet in person. Pet. App. 3a. During that conversation, Hood expressed astonishment at J.H.'s interest in him and asked what she liked about him. Sixth Cir. R. 20, Gov't Exh. 5 at 2:30 (audio recording); *id.* at 4:22. J.H. told him, "I love that your words are like poetry. It's really sweet[,]" and "I love a lot of stuff [about you]." *Id.* at 1:01; 2:40. After the call, Evans, again posing as J.H., arranged to meet Hood at a coffee shop in Knoxville. Pet. App. 3a. When Hood arrived, he was arrested and taken into custody. *Id.* After the arrest, police searched his cell phone and found a "bookmark" entitled "Jr. Young Miss Nudist Pageant Pics" that he had saved on his Google Chrome browser in 2016, a year before these events. The search also uncovered screen shots of two news articles, also saved in 2016, that Hood had "accessed" in 2017 about law enforcement officers in local departments: One had been indicted for possessing child pornography and the other was arrested for child solicitation. *Id.*

Mere hours later, Hood was charged in the Eastern District of Tennessee with a single count of attempting to persuade, induce, and entice a minor to engage in criminal sexual activity, i.e., aggravated statutory rape in violation of Tenn. Code Ann. § 39-13-506(c), which prohibits the unlawful sexual penetration of a minor aged between 13 and 18, in violation of 18 U.S.C. § 2422(b).[3] The offense carries a

[3] The inducement of attempted unlawful sexual penetration was necessary to charge attempted statutory rape under Tennessee law, and therefore was necessary to charge the attempted "sexual activity for which any person can be charged with a criminal offense" under § 2422(b).

mandatory minimum of ten years in prison. Hood had never before been arrested. Presentence Report ¶¶ 33-36.

B. Hood's entrapment defense

Before trial, Hood notified the court that he intended to invoke the defense of entrapment, and the government presented its case accordingly. Pet. App. 3a. The district court denied Hood's motion for judgment of acquittal, but found there was sufficient evidence of entrapment—i.e., that the government induced Hood to attempt to have sex with J.H. and that Hood lacked the predisposition to do so—to instruct the jury on entrapment. *Id.* As a result, it became the government's burden to prove beyond a reasonable doubt that Hood was already predisposed to commit the offense before being approached by government agents. *Jacobson v. United States*, 503 U.S. 540, 549 (1992); *United States v. McLernon*, 746 F.2d 1098, 1112 (6th Cir. 1984). The trial court instructed the jury using the Sixth Circuit's pattern jury instruction, which directs the jury to consider, when assessing whether the government has met its burden, the following factors:

> [1] the character or reputation of the defendant, including any prior criminal record; [2] whether the suggestion of the criminal activity was initially made by the Government; [3] whether the defendant was engaged in criminal activity for profit; [4] whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and [5] the nature of the inducement or persuasion supplied by the government.[4]

[4] The district court also instructed the jury on a sixth factor, "whether the defendant took part in any similar criminal activity with anyone else before or afterwards." *United States v. Stokes*, 1993 WL 312009, at *3 (6th Cir. 1993).

McLernon, 746 F.2d at 1112. The court explained that the fourth factor, whether the defendant evidenced reluctance overcome by repeated inducements, is the most important to the predisposition analysis. *Id.* at 1113. The jury returned a guilty verdict, and Hood was sentenced to 121 months imprisonment to be followed by a term of supervised release for life. Pet. App. 3a. Special conditions of his lifetime supervised release include sex offender mental health treatment, no contact with children under age 18, no visiting of any place primarily associated with children under age 18, and registration as a sex offender as required by state and federal law. Pet. App. 10a.

On appeal, Hood contended that he was entrapped as a matter of law. He argued that the government "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[.]" *Jacobson*, 503 U.S. at 554.[5] After reviewing the five factors, the court of appeals affirmed. Pet. App. 4a. The court held that the first factor weighed in Hood's favor because he had no criminal history, and his search history and the photos saved on his phone could "hardly demonstrate[] a predisposition to violate the law by having sexual relations with minors." *Id.* The court held that the second factor also weighed in Hood's favor because, when the agent suggested that Hood talk about intimacy, this "was the first time either Hood or the agent had raised the topic of sex." *Id.* The question whether Hood engaged in

[5] The Sixth Circuit has phrased this standard as requiring that undisputed evidence "must demonstrate a patently clear absence of predisposition." *United States v. Pennell*, 737 F.2d 521, 534 (6th Cir. 1984).

the conduct for profit (he did not) the court said was "neutral." *Id*. The court concluded, however, that "the evidence otherwise strongly indicates predisposition." *Id.* The court assumed based on the relatively short duration of the inducement that Hood's demonstrated reluctance was inconsequential. *Id*. at 5a.

Ultimately, the court rejected Hood's claim of entrapment as a matter of law because "it took a mere three days for Hood to request sex with 'J.H.' and less than a week before he agreed to meet 'her' for sex." *Id.* at 5a. Because the government only had to "capitaliz[e] on [Hood's] need for companionship" for three days, it said, "any inducement in this case [] was minimal." *Id.* at 5a, 6a. The court contrasted Hood's case with other cases in which entrapment as a matter of law was successfully established, where the inducement occurred over longer periods of time. *Id.* at 5a. The court found support for the jury's "commonsense conclusion that Hood's intention all along was to have sex with J.H." in the fact that "Hood's relationship with J.H. escalated quickly." *Id.* at 6a. The court characterized Hood's "outward display of fear that he would be detected by law enforcement" as further evidence of his predisposition. *Id.*

Having rejected his claim of entrapment, the court affirmed Hood's conviction and 121-month sentence. *Id.*

REASONS FOR GRANTING THE PETITION

I. This case presents the important and timely question whether, in the age of digital relationships, the government may prove a person's predisposition simply by showing its inducement occurred over a short period of time.

This Court has long held that entrapment as a matter of law is established when the government fails to adduce evidence "to support the jury verdict that the petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law[.]" *Jacobson v. United States,* 503 U.S. 540 (1992). In the two cases in which it has found entrapment as a matter of law, the Court emphasized the emotional connection the government agent fostered with its target. In both, a mutual sentiment, cultivated or drawn to the forefront by the agent, when the target had either no history of committing crimes or a negligible one, prevented the conclusion that the target would have independently committed the offense at hand. *See id.*; *Sherman v. United States,* 356 U.S. 369 (1958).

The court below has transformed this Court's decisions into a multi-factor test that, in its application, undermines the purpose of the entrapment defense. Though almost every circuit employs a similar multifactor test, most have used it to conduct an appropriately holistic analysis of the defendant's predisposition to commit the crime before being approached by government agents. But under the Sixth Circuit's approach, the government need only show that its inducement efforts succeeded quickly, and that fact alone will outweigh all the other factors to prove beyond a reasonable doubt a targeted individual's independent predisposition. This is true even when, as here, the agent poses as a fictitious minor interested in a consensual

sexual relationship with the target; the target has no criminal history or history of similar conduct; and when his initial reluctance to commit the crime was overcome by the government's sustained, emotionally manipulative encouragement. In effect, the Sixth Circuit has created a *de facto* "length-of-time" rule for assessing entrapment as a matter of law—a rule that runs headlong into the reality of modern social interaction and unfairly broadens government's ability to entrap the unwary person to commit a crime he otherwise would not have committed.

In today's world of online social media platforms and direct text messaging, communication flies and personal relationships develop at lightening speed. As it now stands in the Sixth Circuit, the government can use the anonymity, ease, and immediacy of online communication to originate a criminal scheme, provide the fictitious contraband for that scheme, and induce a person to commit a crime through a short but calculated campaign of emotion-tinged social pressure, when the person has never before committed such a crime (or any crime) and even expresses reluctance to do so. Only this Court can provide the necessary guidance on the modern application of a doctrine last examined well before the digital age. The Court should clarify that entrapment as a matter of law may be established even when the government's inducement occurred over a short period of time.

A. The defense of entrapment exists to protect against the government's manufacturing of crime by playing on the weaknesses of an otherwise innocent person.

This Court first recognized the defense of entrapment in *Sorrells v. United States*, 287 U.S. 435 (1932), when it embraced Justice Brandeis' earlier view that

"[t]he government may set decoys to entrap criminals, [b]ut it may not provoke or create a crime and then punish the criminal, its creature." *Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J, dissenting). In *Sorrells*, a government agent accompanied the defendant's friends to the defendant's home, where he bonded with the defendant over their common experiences as soldiers who fought in the same division in World War I. *Id.* at 439. During a single, one-and-a-half-hour-long conversation, the agent asked the defendant to procure liquor at least three times. *Id.* at 439-40. The defendant ultimately agreed, and was charged with violating the National Prohibition Act. *Id.* at 438-39. This Court held that he should have been permitted to raise the defense of entrapment. *Id.* at 452. The evidence, it said, established that "the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War." *Id.* at 441. The Court explained that although "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises[,] . . . . [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." *Id.* at 441-42. In permitting the defense, the Court reasoned, "it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose." *Id.* at 452.

Twenty-five years later, in *Sherman v. United States,* 356 U.S. 369 (1958), the Court introduced the concept of entrapment as a matter of law, concluding from the undisputed evidence introduced at trial that the government could not show that Sherman was predisposed to commit the offense in question, so could not overcome the defense of entrapment. *Id.* at 373-74. In reaching this conclusion, the Court confirmed that "[t]he intervening years have in no way detracted from the principles underlying [*Sorrells*]. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of a crime." *Id.* at 372. What is more, a defendant convicted by a jury properly instructed on entrapment may still be entitled to acquittal if it is established that he was entrapped as a matter of law. "To determine whether entrapment has been established," the Court explained, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Id.*

Sherman was charged with selling illegal narcotics. *Id.* at 370. The government informant, Kalchinian, met Sherman at a doctor's office where both men were seeking treatment for narcotics addictions. *Id.* at 371. The two forged a friendship based on their mutual struggles with addiction. *Id.* Kalchinian eventually asked Sherman to supply him with drugs, claiming that the drug treatment was not working, but "[n]ot until after a number of repetitions of the request, predicated on Kalchinian's presumed suffering, did petitioner finally acquiesce." *Id.* Indeed, "[o]ne request was not enough . . . additional ones were necessary to overcome, first, the petitioner's refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation."

Id. at 372. The Court rejected the government's argument that Sherman "evinced a ready complaisance to accede to Kalchinian's request" and expressed reluctance only to avoid violating the law because "the Government's characterization of petitioner's hesitancy to Kalchinian's request as the natural wariness of the criminal cannot fill the evidentiary void" regarding his predisposition. *Id.* at 375. Though Sherman did in fact have a criminal history for selling narcotics, the court found this unpersuasive in its predisposition analysis. *Id.* at 375-76. As Justice Frankfurter explained, "[a]ppeals to sympathy [and] friendship . . . can no more be tolerated when directed at a past offender than against an ordinary law-abiding citizen." *Id.* at 383 (Frankfurter, J., concurring). Thus, the Court held that Sherman was entrapped as a matter of law because this case "illustrates an evil which the defense of entrapment is designed to overcome": when "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Id.* at 376.

The last time this Court applied the doctrine of entrapment as a matter of law to reverse a conviction was nearly thirty years ago, in *Jacobson v. United States*, 503 U.S. 540 (1992). Jacobson was convicted of illegal receipt of child pornography through the mail after the government targeted him over a period of 26 months through a campaign of repeated mailings by which it offered to sell him sexually explicit materials depicting young boys. *Id.* at 540. The government simultaneously engineered a mutual interest in protecting free speech, "exert[ing] substantial pressure on petitioner to obtain and read such material as part of a fight against

censorship and the infringement of individual rights." *Id.* at 552. In addition to posing as two fictitious organizations purporting to fight censorship, the government invented a pen-pal who "employed a tactic known as 'mirroring,' . . . described as 'reflecting whatever the interests are of the [other] person[.]'" *Id.* at 545.

The Court in *Jacobson* again outlined its approach to determining whether a defendant has been entrapped as a matter of law, explaining that "[w]here the Government has induced an individual to break the law and the defense of entrapment is at issue, . . . the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Id.* at 548. If "the prosecution fail[s], as a matter of law, to adduce evidence to support the jury verdict that the petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt," then the conviction must be reversed. *Id.* at 554. The Court held that "although [Jacobson] had become predisposed to break the law [], 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 the petitioner" because "[b]y the time the 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." *Id.* at 550. The Court emphasized the policy rationale underlying its earlier decisions: "In 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." *Id.* at 549.

B. The Sixth Circuit's myopic focus on the length of time it took for the government to induce the defendant to commit the crime misconstrues this Court's precedent and eviscerates the defense of entrapment in the modern online era.

In the nearly three decades since *Jacobson* was decided, lower courts have rarely held that a defendant was entrapped as a matter of law. Most of those decisions were issued shortly after *Jacobson*,[6] with only one court holding that a defendant was entrapped as a matter of law within the last decade, in *United States v. Barta*, 776 F.3d 931, 933 (7th Cir. 2015). The dearth of cases might not be so remarkable, given that entrapment was meant to be an uncommon defense (and if successful will not generate an appeal). But the same thirty-year period has also seen the rise of the internet, with a corresponding growth in the available tools for law enforcement agents to encounter, tempt, and encourage unwitting people to commit crimes.

Today, government agents regularly use internet forums to anonymously encounter individuals who might attempt to engage in illegal sexual activity, often resulting in prosecution for violation of 18 U.S.C. § 2422 (the provision under which Hood was charged and convicted). *See, e.g., United States v. Strubberg,* 929 F.3d 969 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 874 (2020); *United States v. Hinkel*, 837 F.3d 111 (1st Cir. 2016); *United States v. Rutgerson*, 822 F.3d 1223, 1228 (11th Cir. 2016);

[6] *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc); *United States v. Sandoval*, 20 F.3d 134 (5th Cir. 1994); *United States v. Skarie*, 971 F.2d 317 (9th Cir. 1992); *United States v. Beal*, 961 F.2d 1512, 1516 (10th Cir. 1992).

United States v. Herbst, 666 F.3d 504, 508 (8th Cir. 2012); *United States v. Brand*, 467 F.3d 179 (2d Cir. 2006); *United States v. Helton*, 480 F. App'x 846, 851 (6th Cir. 2012). Yet still, Congress did not intend "in enacting the 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 to lure them into its commission and to punish them." *Sorrells*, 287 U.S. at 448. Focusing exclusively on the duration of the government's efforts at inducement to decide whether these individuals were predisposed to commit the crime, as under the Sixth Circuit's approach, ignores the modern reality that meaningful relationships may be formed and dissolved in compressed time today through social media or other online forums. *See* Part B.4, *infra.* The Sixth Circuit's temporal focus also cannot be squared with this Court's rationale for the entrapment defense.

1. This Court's decisions do not require that the government's inducement occur over a long period of time for a court to find as a matter of law that the defendant lacked an independent predisposition to commit the crime. As the Seventh Circuit put it, "there is no *per se* rule regarding the number of contacts or length of relationship it takes to constitute inducement" for a finding of entrapment as a matter of law. *Barta*, 776 F.3d at 933, 937-38. While it is true that the inducement in *Jacobson* occurred over a months-long period of time, that fact was not dispositive. The Court considered the circumstances as a whole to determine that the government had failed to establish predisposition beyond a reasonable doubt, emphasizing that the government invented a shared, laudable goal of protecting free speech.

This holistic view focusing on the shared-sentiment nature of the inducement, rather than its temporal duration, comports with the principles announced in the Court's earlier cases. Indeed, in *Sorrells,* the very first case in which this Court recognized the defense of entrapment, the inducement occurred within just a single conversation and was successful not because of the defendant's predisposition but because the government "[took] advantage of the sentiment aroused by reminiscences of their experiences as companions in arms[.]" *Sorrells,* 267 U.S. at 439-40, 441. And in *Sherman*, though the inducement occurred over several months, the Court concerned itself primarily with the sentimental character of the campaign, which "play[ed] on the weaknesses of an innocent party and beguile[d] him into committing crimes[,]" rather than its length. *Sherman*, 356 U.S. at 373, 376.

Writing for the First Circuit in *United States v. Gendron*, 18 F.3d 955 (1st Cir. 1994), then-Judge Breyer drew special attention to this core principle of emotional manipulation, explaining that in *Jacobson*, "the solicitations reflected a psychologically 'graduated' set of responses to Jacobson's own noncriminal responses, beginning with innocent lures and progressing to frank offers." *Id.* at 963. In *Gendron,* the First Circuit held that the defendant was not entrapped as a matter of law even though the government "sent him child pornography solicitations over a fairly long period of time," because "[t]he government neither 'graduated' its response (from innocent lure to frank offer) nor, with one exception, did it appeal to any motive other than the desire to see child pornography." *Id.* at 963. The absence of a "psychologically graduated" campaign to elicit a non-criminal interest distinguished the case from the

otherwise similar facts in *Jacobson*. Thus, "[e]ach case, and each entrapment defense, must be judged on its own facts" and determining whether government engaged in improper inducement "is a contextual inquiry that cannot be reduced to applying a checklist of rigid rules." *Barta*, 776 F.3d at 938.

2. The Sixth Circuit's approach in Hood's case is a stark example of how that court has improperly transformed the case-specific duration of the government's inducement in decades-old cases into a length-of-time rule that overtakes all other evidence of the person's lack of predisposition. In holding that Hood was not entrapped as a matter of law, the court reasoned that, despite Hood's manifest reluctance and the emotional tactics deployed by the agent, which the court did not dispute, "[a]ny inducement in this case [] was minimal" and "[t]he pressure exerted by Agent Evans was hardly excessive" because "[o]nce the government got involved, it took a mere three days for Hood to request sex with 'J.H.' and less than a week before he agreed to meet 'her' for sex." Pet. App. at 5a. The court then posited "[i]n contrast, courts have found improper 'inducement' where government agents or informants spent months or in some cases years attempting to facilitate the defendant's commission of a crime." *Id.* This reasoning tracked with the court's earlier reasoning in *United States v. Helton,* 480 Fed. App'x. 846 (6th Cir. 2012), where a government agent posed as a minor and induced the defendant to engage in sexual conversation. The Sixth Circuit rejected the defendant's argument that he was entrapped as a matter of law there in part because the "[d]efendant did not have a lasting relationship with the Government agent—it took only two days for [the]

[d]efendant to suggest [] that their relationship might turn sexual." *Id.* at 850-51; *see also United States v. Hackworth*, 483 Fed. App'x 972 (2012).

In both *Hood* and *Helton,* the court relied on *United States v. McLernon,* 746 F.2d 1098 (6th Cir. 1984), a Sixth Circuit case that predates *Jacobson.* In that case, the government inducement spanned eight years and involved an intense "blood brother" relationship between the defendant and an informant, developed largely over a series of long-distance phone calls, with the informant ultimately threatening his own death if the defendant did not supply him with drugs. *Id* at 1103-04. Given the depth and gravity of the relationship, the court noted that "the nature of the government inducement in this case is unique." *Id* at 1113. Even so, it grounded its holding of entrapment as a matter of law not in the temporal duration of the inducement, but in the broader principles set forth by this Court, reasoning that "the repetitious and escalating government inducement [] overcame [the defendant's] nondisposition" to commit the crime. *Id* at 1114. Like *Jacobson* and *Sherman, McLernon* does not stand for the proposition that inducement *must* occur over a long period of time to establish entrapment as a matter of law; rather, all three cases rest on the same core principle, that the government may not "[i]nduce[] an unwary and innocent man into committing crimes he was not predisposed to commit." *Id.* Yet, in recent years, the Sixth Circuit has twisted the holding in *McClernon* to permit the government to induce an unwary man into committing a crime, so long as it does not take a long time to do so.

3. Other courts have not followed this divergent path, but have instead found entrapment as a matter of law where a persistent and psychologically graduated inducement occurred over a 24-hour period or in the space of a single conversation because "the time involved is less important than the degree of pressure applied." *United States v. Sandoval*, 20 F.3d 134, 138 & n.13 (5th Cir. 1994) (holding that the defendant was entrapped as a matter of law because the government made "repeated efforts" to induce the bribe in the face of "Sandoval's consistent and successive efforts to act legally" during one conversation); *United States v. Lard,* 734 F.2d 1290, 1292, 1294-96 (8th Cir. 1984) (holding that the government had "ensnared Lard by implanting in him a law-breaking disposition that was not theretofore present" within a single conversation because a government agent "repeatedly implored" Lard, who "initially expressed reluctance to accept [the government's] solicitation" but ultimately agreed to make a pipe bomb); *United States v. Brooks,* 215 F.3d 842, 846 (8th Cir. 2000) (holding that the defendant was entrapped as a matter of law because, over a 24-hour period, the government was "unrelenting, accosting Brooks [an addict] time and again demanding that Brooks return some heroin to Walker," eventually cutting off Brooks's supply); *see also United States v. Beal,* 961 F.2d 1512, 1515, 1517 (10th Cir. 1992) (affirming the district court's finding of entrapment as a matter of law where the defendant "had his weakness played upon" and "was beguiled" by a government agent whose "attitude towards the defendant was, at least, persistent" in a "course of conduct [] [that] was completed over a period of approximately twenty-four hours.").

To be sure, some cases involve very short periods of inducement that (appropriately) do not amount to entrapment as a matter of law because the defendant exhibited zero reluctance when given the opportunity to break the law. *See United States v. Myers*, 575 F.3d 801, 807-08 (8th Cir. 2009) ("One searches the record in vain to find a moment when Myers resisted or hesitated when confronted with the opportunity to have a sexual encounter with a minor" over a 24-hour period; "when a defendant responds immediately and enthusiastically to his first opportunity to commit a crime, without any period of government prodding, his criminal disposition is readily apparent."); *United States v. Harvey,* 991 F.2d 981, 993 (2d Cir. 1993) (holding that defendant was not entrapped as a matter of law "[b]ased upon Harvey's *prompt* response to the government's single invitation to him to purchase child pornography[.]"); *United States v. Kussmaul*, 987 F.2d 345, 349-50 (6th Cir. 1993) (holding that the government introduced sufficient evidence of predisposition where the defendant "voluntarily and promptly responded to two contacts"); *United States v. LaChapelle*, 969 F.2d 632, 636 (8th Cir. 1992) ("because LaChapelle promptly and independently inquired about child pornography *without being pressured to do so in any way* and ordered such material at the first available opportunity, we are persuaded that the government did not entrap [him] as a matter of law.") (emphasis added). A complete lack of reluctance, coupled with an immediate response to the opportunity to commit the crime, is enough to establish predisposition.

But these cases are quite unlike Hood's case. Hood did not "promptly and independently" inquire about criminal activity, nor did he "promptly" or "immediately" respond to a single invitation to commit a crime, without any government pressure. The government agent was the first to suggest criminal activity in Hood's case, Pet. App. 4a, and it took three days of near-constant texting for Hood to acquiesce to the agent's invitation to discuss sex, during which the agent had to deploy a "psychologically graduated" campaign, "playing on [Hood's] weakness" as the campaign progressed "from innocent lure to frank offer" in order to induce Hood's participation in criminal activity. *Sherman*, 356 U.S. at 376; *Gendron*, 18 F.3d at 964. The agent accomplished this by fostering a sense of emotional closeness and welcome flattery, telling him, while pretending to be J.H., that his poetry gave her chills and made her feel special, that spending a night with him "in another world" sounded "so nice," and playing to his sympathy over her struggles with arthritis. When Hood wanted to slow down, the agent implicitly berated him, questioning his masculinity for not taking the lead. The agent then "took advantage of the sentiment aroused" by issuing a set of ultimatums requiring that Hood describe his sexual intentions at pain of severing the connection. *Sorrells,* 287 U.S. at 441. Later, with Hood still reluctant to meet, the agent put the real J.H. on the phone, who told him that she "loved his words" and "loved a lot of stuff" about him.

4. The court of appeals diminished the agent's emotional leverage in Hood's case because the relationship developed exclusively over social media and text message. Pet. App. 5a. But plenty of emotionally potent relationships develop over

the internet in today's virtual landscape. *See* Sabine Matook & Brian Butler, *Social Media and Relationships*, *in The International Encyclopedia of Digital Communication and Society* 1 (Robin Mansell & Peng Hwa Ang, eds., 1st ed. 2015) ("As the scale and scope of the internet have grown, online relationship, or relationships in which individuals interact entirely through computer mediated communications systems such as email, have become more common.").[7] Many, if not most, significant relationships now begin online.[8] There is now a massive body of research devoted entirely to the study of relationship formation over social media. *See, e.g.,* Jiawei Sophia Fu & Chih-Hui Lai, *Are We Moving Towards Convergence or Divergence? Mapping the Intellectual Structure and Roots of Online Social Network Research 1997–2017*, 25 J. Computer-Mediated Commc'n 111 (2020). For some, seeking connection over the internet can even become an addiction, amplifying a need to be liked tied to other mental health issues. *See* Mustafa Savci *et al.*, *Histrionic Personality, Narcissistic Personality and Problematic Social Media Use: Testing of a New Hypothetical Model*, Int'l J. Mental Health & Addiction (2019).[9]

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[7] *See also* Susan Sprecher, *Relationship Initiation and Formation on the Internet*, 45 Marriage & Family Rev. 761, 766 (2009) ("[I]t is very common for people to develop personal relationship with those with whom they communicate on the internet.").

[8] *See* Michael J. Rosenfeld, Reuben J. Thomas & Sonia Hausen, *Disintermediating Your Friends: How Online Dating in the United States Displaces Other Ways of Meeting*, Proceedings of the National Academy of Sciences of the United States of America (2019), https://www.pnas.org/content/116/36/17753.

[9] *See also* Robert S. Weisskirch & Raquel Delevi, *'Sexting' and Adult Romantic Attachment*, 27 Computers in Hum. Behav. 1697, 1700 (2011) ("some individuals, particularly those with anxious attachments, may feel the need to sext in order to preserve a relationship or maintain the interest of a romantic partner. The cell phone, then, may be providing a novel technological means for individuals with

Yet, even as the agent worked to arouse Hood's sentiments by way of this common form of rapid connection, Hood *still* exhibited reluctance. Some of Hood's reluctance was admittedly motivated by a fear of violating the law. However, contrary to the Sixth Circuit's inference that his "outward display of fear that he would be detected by law enforcement" constitutes "sufficient evidence from which a reasonable jury could conclude that he was predisposed to commit the instant offense[,]" Pet. App. 6a, this Court has explicitly recognized that unwillingness to commit a crime because it is criminal can indicate a lack of predisposition because "[a] person's inclinations and fantasies . . . are his own and beyond the reach of government." *Jacobson*, 504 U.S. at 551 (quoting *Paris Adult Theater I. v. Slatoni,* 413 U.S. 49, 68 (1973) ("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, whatever the reason, the law's prohibitions are matters of consequence."); *See also Sherman,* 356 U.S. at 375. This is a case where, in the face of reluctance, the government devoted substantial effort to "luring an obviously lonely and confused individual to cross the line between fantasy and

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attachment anxiety to express that anxiety through sexting."); L.D. Rosen *et al.*, *Is Facebook Creating 'iDisorders?' The link between clinical symptoms of psychiatric disorders and technology use, attitudes and anxieties*, 29 Computers in Hum. Behav. 1243, 1245 (2013) ("Text messaging has recently been implicated in signs of histrionic personality disorder, as a result of the current phenomenon known as 'sexting' . . . [.]. . . [Studies have revealed] that sexting could be considered a new manifestation of reassurance-seeking behavior, the primary diagnostic criterion for histrionic personality disorder and that sexting was associated with the disorder because of the need for sensuality and attention that typify histrionic personality disorder.") (internal quotation marks omitted).

criminality." *United States v. Poehlman*, 217 F.3d 692, 705 (9th Cir. 2000). At bottom, the Sixth Circuit's decision in Hood's case rested on the short period of government inducement, a factor it said outweighed entirely the psychologically graduated set of responses to Hood's noncriminal responses.

5. Finally, this focus on the length of the inducement "fails to contend with the seismic shifts in digital technology." *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018). Where it once took months to conduct a written correspondence, written communication now occurs almost instantaneously over online messages. As a result, close relationships develop very quickly. Persistence occurs by restarting a text conversation left untouched for just a few hours. Twenty-four hours can be an eternity in the world of texting.[10] Constant communication via mobile phone is a nearly universal practice now: This Court recognized in 2014 that 90% of American adults had cell phones, and that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time." *Riley v. California,* 573 U.S. 373, 395 (2014). In sum, if the events of *Jacobson* took place today, the government might have achieved its goal also in a matter of days. That an inducement took 26 months by snail mail in the year 1992 cannot bar the success of present-day entrapment

[10] *See* Jeffrey A. Hall & Nancy K Baym, *Calling and texting (too much)*: *Mobile maintenance expectations, (over)dependence, entrapment, and friendship satisfaction*, 14 New Media & Soc'y 316, 317 (2011) ("As a portable always-on device, the mobile phone encourages relational partners to be in perpetual contact. This may lead to *hyper-coordination* [] which is the experience of enhanced, anxiety-provoking relational dependence and engagement through the use of mobile technologies.").

defenses. This underscores the need for a fresh look at the doctrine of entrapment as a matter of law.

II. This case is an excellent vehicle for addressing this important question.

This case is an excellent vehicle to decide the question presented: Whether the government may prove predisposition, and thereby overcome entrapment as a matter of law, with proof that the inducement was of short duration, no matter the undisputed emotional pressure the government deployed. This question is important and timely. This Court has not considered the doctrine for nearly thirty years, while in that time, the rise of the internet has resulted in a cataclysmic shift in interpersonal communication and relationships, making way for law enforcement to induce the commission of crimes with unprecedented speed. Until this Court clarifies the application of entrapment as a matter of law in the modern era, the Sixth Circuit will continue to wrongly apply it, and other courts may begin to follow.

This case also squarely raises the question. The issue was fully briefed and argued below, and addressed in a written opinion that exemplifies how the Sixth Circuit has erroneously assigned dispositive force to a short period of inducement. As set forth above, the short duration of the agent's inducement was the linchpin of the Sixth Circuit's conclusion that the government had proved Hood's predisposition beyond a reasonable doubt, overcoming all other evidence of the government's instigation and emotionally manipulative encouragement, as well as Hood's law-abiding nature. The Sixth Circuit's length-of-time rule fails to account for the rapid-fire nature of electronic communication today, or its emotional reality for many.

Exploiting this reality, the government's campaign was subtle, well-aimed, psychologically graduated, and persistent, all in response to Hood's exhibited reluctance. As a result of the Sixth Circuit's erroneous approach, Hood is now serving a ten-year term of imprisonment for a conviction and subject to onerous conditions of supervised release—including a requirement that he register as a sex offender for life—that depends entirely on the agent's suggestion and encouragement of penetrative sex. This case thus presents the ideal opportunity for this Court to clarify that a person may be entrapped as a matter of law in a short period of time through a psychologically graduated campaign conducted online.

Should the Court agree that the Sixth Circuit's approach improperly favors the government when the duration of the inducement was relatively short, Hood has a meritorious claim of entrapment as a matter of law. The question is important, and this case presents the ideal vehicle to consider it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

JENNIFER NILES COFFIN
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979
Counsel for James Michael Hood

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