NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ALVIN CELIUS ANDRE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Eleventh Circuit's Entrapment Jury Instruction is in Conflict With *Jacobson v. United States*, 503 U.S. 540 (1992) and the Majority of the Federal Circuits.

II. Whether the Eleventh Circuit Misapplies *Jacobson's* Predisposition Element by Permitting a Showing of a Defendant's "Ready Willingness" to Commit a Crime Instead of *Jacobson's* Requirement that Predisposition Focus on the Defendant *Before* Government Intervention.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Alvin Celius Andre respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-11486 in that court on May 8, 2020, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1). The judgment of the district court is contained in the Appendix (A-2). The proposed jury instruction submitted by the defendant to the district court is contained in the Appendix A-3. The pattern entrapment jury instructions of the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits are also contained in the Appendix A-4 through A-12, respectively.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on May 8, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1 and Clerk's Office COVID-19 Guidance (April 17, 2020). The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional provisions:

Fifth Amendment to the United States Constitution:

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 in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Mr. Alvin Andre ("Mr. Andre" or "petitioner") was charged through a superseding indictment with the following offenses allegedly occurring during the time period of January 10, 2018 – September 19, 2018: **(1)** attempted enticement of a minor to engage in illicit sexual activity in violation of 18 U.S.C. § 2242(b); and **(2)** attempted sex trafficking of a minor who was under the age of 14 in violation of 18 U.S.C. §§ 1591(a) and (b), 1594(a).

Trial was held on January 29-30, 2019. The government presented two FBI witnesses. One agent had posed as the father of a fictitious 10-year old girl in a government internet sting operation to apprehend child abusers. During trial, Mr. Andre had moved for a judgment of acquittal as to both counts of the indictment, and he had submitted a theory of defense jury instruction regarding entrapment. The court denied Mr. Andre's Rule 29 motions and utilized the Eleventh Circuit Criminal Pattern Instruction concerning entrapment, rather than Mr. Andre's proffered jury instruction. After deliberations, the jury found Mr. Andre guilty of the charges. Subsequently, the district court sentenced Mr. Andre to 40 years' imprisonment, consisting of 10 years on count I and 30 years on count II, to run consecutive to each other.

STATEMENT OF THE FACTS

I. Trial Testimony

At trial, the FBI presented testimony about a government internet sting

operation. As part of that operation, the lead agent, Matthew Fowler, placed an ad on Craigslist in the adult "Causal Encounters" section of the website. His ad was titled, "younger dad. MW4M." The "MW4M" was an abbreviation for "man woman for man." The body of the ad further stated, "Younger dad looking for other like-minded. Daughter here. Kik me. [kik user name redacted]. Love to meet others with similar interests."

The day after agent Fowler posted the ad he received a response from "Ride or Die" on kik. Ride or Die stated, "Hey, how are you doing. I have read your ad, so I wanted to see what up." Agent Fowler stated that he was looking for "others into youngggg." The exaggerated term "youngggg" was to indicate an interest in minors. When Ride or Die followed up with another question regarding how young, Agent Fowler explained that he had a daughter who was 9 years old. When Ride or Die tried to clarify if Agent Fowler was looking for someone, "to be a father to her?" Agent Fowler further elaborated that his daughter was available for sex, and he was "looking for other dads to share with."

In further text chats, the FBI agent and Ride or Die (later identified as Mr. Andre) engaged in text conversations that involved sexual banter. The parties also exchanged sexual pictures. The FBI agent sent the first picture and continued to send the vast majority of the sexually explicit pictures to Mr. Andre.

Initially, Andre engaged in text chats responding to texts that the FBI had sent regarding swapping children for sexual purposes. The agent attempted to set

up a meeting with Andre for January 2018 based on those conversations, but Andre never went to that meeting.

Agent Fowler suspected that Andre was merely role-playing, but he reinitiated the conversation and attempted to reschedule the meeting for later in January. To make the meeting easier, Fowler told Andre to forget trying to include another minor to swap, but instead, to just bring $100 to pay for the encounter with Fowler's fictitious daughter. Even though the plan was made easier by Fowler, Andre did not come to the agent's second meeting.

Undeterred, Fowler tried a third time, with significant incentives to induce Andre to meet. Specifically, Fowler stated that he was organizing a group of dads that would be swapping children on February 12, 2018, and that Andre was invited. He further told Andre to bring the $100 and he could have a sexual encounter with three underage girls. Although Andre expressed an interest, he again, failed to make himself available for any third meeting that Fowler tried to arrange. Thereafter, Andre stopped communications for approximately one month; a few texts were exchanged in March, but then the conversations ceased entirely for three months. This fading of the conversation confirmed to Agent Fowler that Andre was merely role-playing, and that he was not serious about having a sexual encounter with a minor.

June 21, 2018, was the next time that Andre and Fowler communicated. Andre texted Agent Fowler asking, "hey, how's it going?" After that,

communications between Fowler and Andre remained sporadic, but Fowler continued trying to set up a meeting with Andre anyway. Fowler initiated a conversation on September 10, 2018, for setting a new date for a meeting. Fowler indicated that he wanted to meet with Andre first, and possibly after, Andre could meet the fictional daughter. Fowler also confirmed that he was still willing to take the $100 for the encounter. Fowler continued to contact Andre and send him sexually explicit pictures up through the date of the meeting, which they had set for September 19, 2018.

On September 19, 2018, Fowler assembled a law enforcement team to conduct surveillance at the McDonalds that had been set as the meeting place with Andre. Fowler was equipped with a hidden camera to video tape his meeting at the McDonalds. Andre came to the McDonalds. After meeting with Fowler for a few minutes, Andre gave him $50, and Fowler suggested they leave. As they were exiting the McDonalds, other law enforcement officers arrested Andre.

At the arrest, police seized Mr. Andre's telephone and laptop computer. Although having seized these items, the government entered no evidence that would have indicated that Mr. Andre had an interest in or history of child pornography or indicia of child molestation on his phone or computer except for the texts with Agent Fowler. Such information on a phone was glaringly missing from the government's evidence because, as admitted by Fowler, a person's "whole life" is on the phone, and a phone is a "reflection of you."

II. Jury Charge Conference

The court discussed jury instructions with the parties. Specifically, the defense had submitted an entrapment instruction based on the Eleventh Circuit pattern instruction and *Jacobson v. United States*, 503 U.S. 540, 549 (1992). The defense instruction read as follows:

> "Entrapment" occurs when a government agent induces a Defendant to commit a crime that the Defendant was not already willing to commit.
>
> The Defendant has claimed to be a victim of entrapment regarding the offenses charged in the indictment.
>
> The law forbids convicting an entrapped Defendant.
>
> The Government must prove beyond a reasonable doubt that the Defendant was willing to commit the crimes charged in the indictment before this contact with the government agent and without the inducement of the government agent.
>
> If you have a reasonable doubt about whether the Defendant was willing to commit the crimes charged in the indictment before his contact with the government agent and without the inducement of the government agent then you must find the Defendant not guilty.

Andre, D.Ct. No. 18-60271-Cr-Scola (Defendant's Proposed Jury Instruction).

The court denied defendant's proffered jury instruction on entrapment, but instead used the Eleventh Circuit pattern instruction without any modification. The Eleventh Circuit pattern instruction stated:

> "Entrapment" occurs when law-enforcement officers or others under their direction persuade a defendant to commit a crime that the Defendant had no previous intent to commit.
>
> The Defendant has claimed to be a victim of entrapment

regarding the charged offense.

> The law forbids convicting an entrapped Defendant.
>
> But there is no entrapment when a defendant is willing to break the law and the Government merely provides what appears to be a favorable opportunity for the Defendant to commit a crime.
>
> For example, it's not entrapment for a Government agent to pretend to be someone else and offer – directly or through another person – to engage in an unlawful transaction.
>
> So a defendant isn't a victim of entrapment if you find beyond a reasonable doubt that the Government only offered the Defendant an opportunity to commit a crime the Defendant was already willing to commit.
>
> But if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty.

Eleventh Circuit Criminal Pattern Instruction, No. S13.1 (2016).

After the jury deliberated, it found Mr. Andre guilty of the charges in the indictment. Subsequently, Mr. Andre was sentenced to 40 years' imprisonment. Mr. Andre filed a timely notice of appeal.

On appeal, Mr. Andre argued that his convictions were improper because they were not supported by sufficient evidence. In relevant part, Mr. Andre raised the defense of entrapment and argued that the government failed to prove beyond a reasonable doubt that he had a predisposition to commit the crimes charged. He noted that all the evidence was based on the contemporaneous text chats that comprised the sting operation. Mr. Andre also argued that no evidence had been presented showing that he had a predisposition to commit the crimes charged before

he had contact with the government through its sting operation. And he further argued that the government completely failed to prove predisposition even though it had seized his electronic devices. Mr. Andre also argued that it was reversible error to deny his entrapment jury instruction which accurately set out the law. He argued that the Eleventh Circuit pattern instruction did not properly set out the elements of an entrapment defense under *Jacobson*.

The Eleventh Circuit affirmed Mr. Andre's convictions, finding that there was sufficient evidence of the crimes and that Mr. Andre had not been entrapped. *United States v. Andre*, 11th Cir. No. 19-11486 (May 8, 2020) at pp. 10-11. It found that predisposition was proven by Andre's ready willingness to commit the crimes. *Id.* at p. 11. The court also found that the Eleventh Circuit pattern instruction accurately and adequately set out the elements of Andres' entrapment defense. *Id.* at 7. Accordingly, the Eleventh Circuit affirmed Mr. Andre's convictions. *Id.* at p. 12.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Entrapment Jury Instruction is in Conflict With *Jacobson v. United States*, 503 U.S. 540 (1992) and the Majority of the Federal Circuits.

"[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. 58, 62-63 (1988). These two elements have proven to be difficult to define. *See United States v. Evans*, 924 F.2d 714, 717 (7th Cir. 1991). However, a consensus of courts has slowly developed common legal principles and concrete factors which help to define the elements of inducement and predisposition. The element of inducement has been defined as including "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship." *See, e.g., United States v. El-Gawli*, 837 F.2d 142 (3d Cir. 1988). Likewise, the element of predisposition has been clarified; it focuses on the defendant's disposition before governmental contact and includes the following factors: the defendant's character, reputation or criminal history; whether the government initially suggested the criminal activity; whether the defendant engaged in the criminal activity for profit; whether the defendant showed a reluctance to commit the crime that was overcome by persuasion by the government; and the nature of the inducement or persuasion that was used. *See e.g., United States v. Mayfield*, 771 F.3d 417, 434-36 (7th Cir. 2014) (*en banc*).

The primary element of an entrapment defense is "the intent or predisposition of the defendant to commit the crime, rather than [] the conduct of the Government's agents." *Hampton v. United States*, 425 U.S. 484, 488 (1976) (internal quotation marks and alterations omitted); *Mathews*, 485 U.S. at 63 (*citing United States v. Russell*, 411 U.S. 423, 433 (1973)) (The defendants' "lack of predisposition" is the "principal element in the defense."). Thus, "Where 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." *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992); *see also Jacobson* at 549 n.2 (""The sole issue is whether the Government carried its burden of proving that the defendant was predisposed to violate the law before the Government intervened.""); *see also United States v. Poehlman*, 217 F.3d 692, 703 (9th Cir. 2000) ("[T]he relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called ***pre***disposition.") (emphasis in original).

A defendant is "entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews*, 485 U.S. at 62. In petitioner's case there was no dispute that based on the government's case-in-chief there was sufficient evidence for the issue of entrapment to go to the jury. (*Andre*, 11th Cir. No. 19-11486 at p. 11). Further, the parties did

not dispute that there had been governmental inducement, rather, the dispute in petitioner's case focused on the element of predisposition. *Id*. ("the question before us is whether Andre was predisposed to commit his crimes before he was contacted by the government").

Having presented a valid entrapment defense, Andre was entitled to a jury instruction that accurately explained this defense and what constituted predisposition. *See United States v. Montanez*, 105 F.3d 36, 39 (1st Cir. 1997) (overturning conviction because entrapment instruction was misleading due to partial list of examples that were inapplicable to defendant's case and omitted examples that were pertinent to defendant's case, which created risk that types of examples limited the essential elements and applicability of the entrapment defense in defendant's case); *United States v. Kim*, 176 F.3d 1126 (9th Cir. 1999) (noting that language in jury instructions stating that defendant was "already willing to commit a crime," was frequent cause for invalidation of instructions because "already" is ambiguous, and standing alone, did not inform jury that it must examine the defendant's disposition before any contact with the government); *United States v. Burt*, 143 F.3d 1215, 1218 (9th Cir. 1998) (jury instruction defective under plain error standard because did not explicitly state that disposition had to be found before government contact); *cf. McDonnel v. United States* __ U.S. __, 136 S.Ct. 2355, 2373-75 (2016) (vacating conviction where jury instruction may have penalized innocent conduct where definition of "official act" was overinclusive); *Arthur*

Andersen LLP v. United States, 544 U.S. 696, 706 (2005) (overturning conviction where jury instructions "failed to convey the requisite consciousness of wrongdoing").

Although Andre offered a theory of defense instruction that clearly set out the black letter law as clarified in *Jacobson*, the district court refused that instruction, and instead, utilized the Eleventh Circuit's pattern instruction. The Eleventh Circuit's pattern instruction has failed to evolve with the clarifying principles of entrapment. It obscures *Jacobson's* requirements by defining entrapment in the negative, i.e. – three out of five paragraphs state what entrapment is not, rather than setting out a clear definition of what entrapment is -- and in doing so, it uses only one example of what entrapment "is not" that pertains to inducement and governmental conduct. *Eleventh Circuit Criminal Pattern Instruction S13.1* ("For example, it's not entrapment for a Government agent to pretend to be someone else and offer – directly or through another person – to engage in an unlawful transaction."). The pattern also obscures the government's burden of proof by utilizing the passive voice and burying the burden of proof within the confusing explanation of what entrapment "is not." Two critical points get lost in the Eleventh Circuit's pattern instruction: (1) a clear statement that predisposition must exist before the government contacts the defendant concerning the crime to be committed; and (2) the government's burden of proof beyond a reasonable doubt to prove predisposition. The Eleventh Circuit pattern instruction given by the district court stated:

"Entrapment" occurs when law-enforcement officers or others under their direction persuade a defendant to commit a crime that the Defendant had no previous intent to commit.

The Defendant has claimed to be a victim of entrapment regarding the charged offense.

The law forbids convicting an entrapped Defendant.

But there is no entrapment when a defendant is willing to break the law and the Government merely provides what appears to be a favorable opportunity for the Defendant to commit a crime.

For example, it's not entrapment for a Government agent to pretend to be someone else and offer – directly or through another person – to engage in an unlawful transaction.

So a defendant isn't a victim of entrapment if you find beyond a reasonable doubt that the Government only offered the Defendant an opportunity to commit a crime the Defendant was already willing to commit.

But if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty.

Eleventh Circuit Criminal Pattern Instruction, No. S13.1 (2016).

In contrast, Andre's jury instruction proffered to the court stated:

"Entrapment" occurs when a government agent induces a Defendant to commit a crime that the Defendant was not already willing to commit.

The Defendant has claimed to be a victim of entrapment regarding the offenses charged in the indictment.

The law forbids convicting an entrapped Defendant.

The Government must prove beyond a reasonable doubt that the Defendant was willing to commit the crimes charged in the indictment before his contact with the government agent and without the inducement of the government agent.

> If you have a reasonable doubt about whether the Defendant was willing to commit the crimes charged in the indictment before his contact with the government agent and without the inducement of the government agent then you must find the Defendant not guilty.

Andre's proffered instruction set out *Jacobson's* requirements clearly and concisely, it did not require the jury to think in the negative and try to apply a difficult legal concept based on what the legal concept "is not." It also avoided the skewing of legal concepts through overemphasis on one principle, example, or factor, and it made plain the government's burden of proof beyond a reasonable doubt.

The other circuits have used two main approaches for defining entrapment in compliance with this Court's *Jacobson* case. Some have set out this Court's law with clarifying factors and examples, while others have set out a basic statement of entrapment elements without much elaboration. Either approach is sufficient as long as it is accurate and not misleading.

The majority of circuits have found it useful to set out a set of factors from the case law that juries can consider in determining predisposition. ***First Circuit Pattern Crim. Jury Instruction 5.05*** (2019) (https://www.med.uscourts.gov/pdf/crpjilinks.pdf) ("You may consider such factors as: (a) the character or reputation of the defendant; (b) whether the initial suggestion of criminal activity was made by the government; (c) whether the defendant was engaged in the criminal activity for profit; (d) whether the defendant showed reluctance to commit the offense, and whether that reluctance reflects the conscience of an innocent person or

merely the caution of a criminal; (e) the nature of the persuasion offered by the government; and (f) how long the government persuasion lasted."); ***Third Circuit Pattern Crim. Jury Instruction 8.05*** (2018) (https://www.ca3.uscourts.gov/sites/ca3/files/Chapter%208%202018%20Rev%20final%20for%20posting.pdf) ("[You] should consider all the evidence, including any evidence about whether the government initially suggested the criminal activity; the nature of the government's inducement or persuasion; whether *(name)* was engaged in an existing course of criminal conduct similar to the offense charged; whether *(name)* was engaged in criminal activity for profit; and whether *(name)* showed a willingness to commit the offense or showed any reluctance that was overcome by repeated government inducement or persuasion *[and evidence of (name's) character or reputation, including a prior record of criminal convictions].*"); ***Sixth Circuit Pattern Crim. Jury Instruction 6.03*** (2019) (https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/Chapter%206_0.pdf) ("[S]ome things that you may consider in deciding whether the government has proved [predisposition]: (A) Ask yourself what the evidence shows about the defendant's character and reputation. (B) Ask yourself if the idea for committing the crime originated with or came from the government. (C) Ask yourself if the defendant took part in the crime for profit. (D) Ask yourself if the defendant took part in any similar criminal activity with anyone else before or afterwards. (E) Ask yourself if the defendant showed any reluctance to commit the crime and, if he did, whether he was overcome by

government persuasion. (F) And ask yourself what kind of persuasion and how much persuasion the government used."); ***Seventh Circuit Pattern Crim. Jury Instruction 6.04*** (2020) (http://www.ca7.uscourts.gov/pattern-jury-instructions /pattern_criminal_jury_instructions_2020edition.pdf) (In deciding whether the government has met its burden of proving that the defendant was predisposed to commit the crime, you may consider the defendant's character [, or] reputation [, or] criminal history; whether the government initially suggested the criminal activity; whether the defendant engaged in the criminal activity for profit; whether the defendant showed a reluctance to commit the crime that was overcome by persuasion by the [agent[s]; informant[s]; officer[s]]; and the nature of the inducement or persuasion that was used."); ***Ninth Circuit Pattern Crim. Jury Instruction 6.2*** (2020) (http:// www3.ce9.uscourts.gov/jury-instructions/node/379) ("In determining whether the defendant was predisposed to commit the crime before being approached by government agents, you may consider the following: 1. Whether the defendant demonstrated reluctance to commit the offense; 2. The defendant's character and reputation; 3. Whether governments agents initially suggested the criminal activity; 4. Whether the defendant engaged in the criminal activity for profit; and 5. The nature of the government's inducement or persuasion.").

Alternatively, other courts do not set out such lists of factors, but they set out basic legal concepts without much elaboration. Most of these circuits set out the salient legal principles in a concise and straightforward manner, explicitly

establishing the timing issue in *Jacobson* and the government's burden of proof. ***Fifth Circuit Pattern Crim. Jury Instruction*** *1.30* (2019) (http://www.lb5.uscourts. gov/viewer/?/juryinstructions /Fifth/crim2019.pdf) ("The burden is on the government to prove beyond a reasonable doubt that the defendant: . . . . 2. Had a predisposition or intention to commit that offense prior to being approached by a government agent."); ***Eighth Circuit Pattern Crim. Jury Instruction 9.01*** (2017) (http://juryinstructions.ca8.uscourts.gov/Criminal-Jury-Instructions-2017.pdf) ("The [government] [prosecution] has the burden of proving beyond a reasonable doubt that . . . . (1) the defendant was willing to commit . . . crime charged before [he] [she] was approached or contacted by law enforcement agents . . . ."). Cf., ***Third Circuit Pattern Crim. Jury Instruction 8.05*** ("It is the government's burden to prove beyond a reasonable doubt that . . . . *(name)* was predisposed, meaning that *(name)* was ready and willing to commit the offense before the government *[agents]* first *[approached]* spoke to *(him) (her)* about the crime. . . . ."); ***Sixth Circuit Pattern Crim. Jury Instruction 6.03*** ("[]The government has the burden of proving beyond a reasonable doubt that the defendant was already willing to commit the crime prior to first being approached by government agents . . . . ."); ***Seventh Circuit Pattern Crim. Jury Instruction 6.04*** (". . . . The government must prove beyond a reasonable doubt []: . . . . 2. The defendant was predisposed to commit the offense before he had contact with [government agent[s] . . . "); ***Ninth Circuit Pattern Crim. Jury Instruction 6.2***

("The government has the burden of proving beyond a reasonable doubt that . . . . [t]he defendant was predisposed to commit the crime before being contacted by government agents, ..."); *see also United States v. Kim*, 176 F.3d 1126 (9th Cir. 1999) (noting that language in jury instructions stating that defendant was "already willing to commit a crime," was frequent cause for invalidation of instructions because "already" is ambiguous, and standing alone, did not inform jury that it must examine the defendant's disposition before any contact with the government); *United States v. Burt*, 143 F.3d 1215, 1218 (9th Cir. 1998) (jury instruction defective under plain error standard because did not explicitly state that disposition had to be found before government contact).

The Tenth and Eleventh Circuits which tend towards a basic statement of legal principles without much elaboration differ from the rest of the circuit court instructions due to their failure to make clear *Jacobson's* timing issue or the government's burden of proof. Rather the Tenth and Eleventh Circuits describe predisposition by reference to a defendant who is "already willing" to commit the crimes charged. Moreover, both the Tenth and Eleventh Circuits obscure the government's burden of proof through use of the passive voice. The Eleventh Circuit goes one step further by defining entrapment in the negative and focusing on what "entrapment is not." ***Eleventh Circuit Pattern Crim. Jury Instr. S13.1*** (2020) (https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminal PatternJuryInstructionsCurrentComplete.pdf?rev Date=20200227); see also ***Tenth***

Circuit Pattern Crim. Jury Instr. 1.27 (2018) (https://www.ca10.uscourts.gov/sites/default/files/clerk/Jury%20Instructions%20Update%202018.pdf). The Tenth and Eleventh Circuits are not in step with *Jacobson* or the majority of the federal circuits. Petitioner's proffered instruction would have remedied that problem.

A proper instruction on entrapment is an important federal issue that implicates the Fifth and Sixth Amendments to the U.S. Constitution which encompass a defendant's right to present a defense. The doctrine of entrapment is a critical counterbalance for reconciling police action and the rule of law with our Constitutional rights. This court should grant the petition to correct the Tenth and Eleventh Circuit's approach and bring them into compliance with *Jacobson*, and to resolve the inter-circuit conflict.

II. The Eleventh Circuit Misapplies *Jacobson's* Predisposition Element by Permitting a Showing of a Defendant's "Ready Willingness" to Commit a Crime Instead of *Jacobson's* Requirement That Predisposition Focus on the Defendant *Before* Government Intervention.

The Court should also grant the petition for writ of certiorari to correct the Eleventh Circuit's misapplication of the predisposition doctrine. The Eleventh Circuit permits predisposition to be proven through evidence of a defendant's "ready commission" to commit a crime after the government has already made contact. This is legally erroneous under *Jacobson* and creates a circuit split on the issue.

As noted above, this Court's seminal case *Jacobson v. United States*, 503 U.S. at 548-49, changed the entrapment legal landscape and made explicit that "the

prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the critical act prior to first being approached by Government agents." *Jacobson* further stated that a defendant's "ready response to [governmental] solicitations cannot be enough to establish beyond reasonable doubt that [the defendant] was predisposed, prior to the Government acts intended to create predisposition, to commit the crime. . . ." *Jacobson*, 503 U.S. at 553. Thus, *Jacobson* establishes the exact opposite principle to determine predisposition in an entrapment defense than the one that the Eleventh Circuit utilized in Mr. Andre's case to uphold his convictions. *Compare Jacobson*, 503 U.S. at 553, *with Andre*, 11th Cir. Case No. 19-11486 at p. 11 ("Predisposition can be proven by the defendant's 'ready commission' of the charged crime" after contract with the government)*; see also United States v. Rutgerson*, 822 F.3d 1223 (11th Cir. 2016), *citing United States v. Brown*, 43 F.3d 618, 625 (11th Cir. 1995) (The Eleventh Circuit's "guiding principles" for evaluating an entrapment defense included: "Predisposition may be demonstrated simply by a defendant's ready commission of the charged crime.").

The Eleventh Circuit's reliance on a Andre's "ready commission" of a crime puts it in direct conflict with this Court's express legal principles set out in *Jacobson*, as well as other circuits. *See, Jacobson,* 503 U.S. at 553; *see also e.g.*, *United States v. Lopeztegui*, 230 F.3d 1000, 1003 (7th Cir. 2000) ("predisposition goes beyond the mere willingness to commit the crime, and also includes some consideration of the defendant's ability to carry it out."); *United States v. Hollingsworth*, 27 F.3d 1196,

1199-1200 (7th Cir. 1994) ("The willingness to commit the crimes to which the government invited them cannot be decisive. Predisposition requires more; . . . Predisposition is not a purely mental state, . . . the dictionary definitions of the word include "tendency" as well as "inclination," meaning that something in the prior experience of the defendant would make it likely that he would commit the crime without any government inducement); *United States v. Poehlman*, 217 F.3d 692, 700 (9th Cir. 2000) (noting that willingness to commit crime after contact with government was not evidence of predisposition; relevant inquiry was defendant's disposition "before he has any contact with government agents, which is doubtless why it's called ***pre***disposition.") (emphasis in original); *United States v. Kim*, 176 F.3d 1126, 1128 (9th Cir. 1999) (noting that language in jury instructions stating that defendant was "already willing to commit a crime," was frequent cause for invalidation of instructions because "already willing" is an ambiguous term, and standing alone, it did not inform jury that it must examine the defendant's disposition before any contact with the government). The Eleventh Circuit's erroneous application of *Jacobson* led to unlawful convictions of Mr. Andre in this case. While relevant evidence of predisposition may include the defendant's conduct both prior to and after contact with the government, it must be clear that the defendant's disposition to commit the crime was present before the contact. *Jacobson*, 503 U.S. at 553.

There was no evidence of predisposition in Mr. Andre's case. The instant

case was a government sting and the government relied only on the contemporaneous text chats between the agent conducting the sting and Mr. Andre. These text chats did not produce evidence that Mr. Andre had a predisposition to commit this crime before the government intervened with its sting operation. It was undisputed that it was the government that posted the ad; the agent who proposed the idea of sharing his daughter in sexual encounters; the agent who proposed meetings after engaging in role playing and fantasy texts about sex; it was the agent who peppered the texts with most of the sexually explicit pictures; it was the agent who injected the element of money into the transaction; and it was the agent who repeatedly suggested new times to meet, even after his efforts produced three failed attempts to meet with Mr. Andre over a nine-month period of time, and even though the text chats were sporadic with gaps of weeks and months, signaling a person who was not really interested, and who did not have intentions of going beyond internet fantasy dialogue.

In the typical case of this nature, the government proves predisposition by presenting evidence found on a defendant's electronic devices showing conversations, pictures, or websites that indicate a sexual interest in minors. *See e.g., Rutgerson*, 822 F.3d at 1235-36 (government produced evidence that defendant had accessed numerous ads for "young" prostitutes online before pursuing meeting with 15-year old fictitious prostitute); *United States v. Knowles*, 319 Fed. Appx. 547, 549 (9th Cir. 2009) (child pornography picture found on defendant's computer

constituted admissible evidence of predisposition of sex with underage girls in prosecution for enticement of a minor); *cf. Poehlman*, 217 F.3d 692 (lack of predisposition when government failed to produce evidence beyond emails produced during sting disclosing the defendant's independent interest in sex with children despite search of defendant's home). Mr. Andre's case is incredibly unique because the government actually seized Mr. Andre's phone and laptop computer at the time of his arrest. Had there been any texts or internet searches referencing minors on either of these devices, the government surely would have presented it. But no evidence of this kind was offered. The Eleventh Circuit's reliance on its misapplication of *Jacobson* resulted in the Eleventh Circuit's glossing over those exact points that established that Mr. Andre was wrongfully convicted because the evidence showing a predisposition to commit the crime before government contact was absent and insufficient. Because the Eleventh Circuit misapplied the standard for predisposition as articulated by this Court in *Jacobson,* and because this misapplication is also in conflict with other courts of appeals, *see e.g., Lopeztegui*, 230 F.3d 1000; *Hollingsworth*, 27 F.3d 1196; *Poehlman*, 217 F.3d 692; *Kim*, 176 F.3d 1126, this Court should grant Mr. Andre's petition for writ of certiorari on this issue.

CONCLUSION

Based upon the foregoing, this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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