No. _____

In the Supreme Court of the United States

JALIL LEMASON ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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Dated: July 1, 2021

QUESTION PRESENTED:

An undercover officer created a fake social media profile for a fictitious 18-year-old woman on a website where a user must expressly represent her age as being over 18. Mr. Robinson initiated contact with the fictitious profile and began a friendly relationship with the "18-year-old woman" and expressed interest in being the woman's pimp. Only after this relationship had been cultivated by the officer through months of communications, did the officer change the age of the fictitious woman to 17 and a half years of age. The undercover officers then continued communicating with Mr. Robinson and cultivating the relationship between the (now) 17-and-a-half-year-old fictitious woman and Mr. Robinson. During the communications, Mr. Robinson frequently made clear that he did not wish for commercial sex activities to begin until the "woman" attained majority. On that understanding, Mr. Robinson arranged for the "woman" to travel to California. When Mr. Robinson arranged to pick up the fictitious woman from a bus station, Mr. Robinson was arrested and subsequently charged with "Attempted Sex Trafficking of a Child" and "Transporting an Individual to Engage in Prostitution."

Under these facts, did the Tenth Circuit Court of Appeals err in determining that Mr. Robinson was not entitled to a jury instruction regarding the affirmative defense of entrapment as to the Attempted Sex Trafficking of a Child count because the Government "offered a chance to back out" of the potential crime—an exception absent from this Court's decisions on entrapment?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jalil Lemason Robinson, respectfully petitions this Court to issue a Writ of Certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit in *United States v. Robinson*, 993 F.3d 839 (10th Cir. 2021).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *United States v. Robinson*, 993 F.3d 839 (10th Cir. 2021). *See* Appendix A.

JURISDICTION

The Tenth Circuit issued its opinion denying relief on April 2, 2021. 28 U.S.C. § 1254(1) gives this Court jurisdiction to decide this Petition.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1591, which, like all other federal criminal statutes, is subject to an implied defense of entrapment, as explained in *Sorrells v. United States*, 287 U.S. 435, 448 (1932).

STATEMENT OF THE CASE

Since this Court's decision in *Sorrells v. United States*, 287 U.S. 435 (1932), this Court has frequently been called upon to reaffirm the doctrine of entrapment, and the principles upon which it is based. *See Sherman v. United*

States, 356 U.S. 369 (1958); *Mathews v. United States*, 485 U.S. 58 (1988); *Jacobson v. United States*, 503 U.S. 540 (1992). This Court has consistently held that, so long as there is "sufficient evidence for a reasonable jury to find in his favor," an accused is entitled to a jury instruction on entrapment and that entrapment is an issue for the jury. *Mathews*, 485 U.S. at 63 (citing *Stevenson v. United States*, 162 U. S. 313 (1896)); *Sherman*, 356 U.S at 377. This case asks this Court to reaffirm these principles in the face of disturbing and novel circuit court case law inroads, namely that when an accused has any post-inducement "opportunity to back out", the defense is invalid as a matter of law. This exception—wholly of certain courts of appeals' creation—threatens to fundamentally weaken criminal defendants' rights in the face of new and evolving law enforcement methods of governmental inducement.[1]

I. Facts Relevant to the Entrapment Defense

Evidence at the trial of Jalil Robinson established that a Government agent created a fictional account on a social-media platform called "hi5" using a paid female Confidential Human Source's photographs. (R. Vol. I, at 26-27).

[1] The issue is not hypothetical, and it is not confined to this case. In fact, it has broad applicability. "Jurors who serve in . . . cases [like this one] often express surprise that the defense doesn't argue entrapment." Michael Winerip, *Convicted of Sex Crimes, but With No Victims*, NY Times (Aug. 30, 2020), *available at* https://www.nytimes.com/2020/08/26/magazine/sex-offender-operation-net-nanny.html (last visited June 29, 2021). The scarcity of entrapment instructions in such cases is likely because of insurmountable barriers being applied, as here.

The officer's fictional undercover persona was initially named "Brooke." (*Id.*). To create an account on "hi5," an individual must certify that they are over 18. (*Id.*).

Jalil Robinson created an account with the site in September 2017 (R. Vol. VI, at 194), and, on December 13, 2017, Mr. Robinson first reached out to "Brooke," the Government's fictitious profile. Brooke's profile showed that she was 18 years old and from Aurora, Colorado. (R. Vol. VI, at 190, 375). The Government's undercover officer, Agent Tangeman, testified that Mr. Robinson would have had to manually search the Aurora, Colorado or Denver, Colorado area for women age 18 or older for Mr. Robinson to be connected with Agent Tangeman's fictitious account. (R. Vol. VI, at 195). Mr. Robinson testified that his search parameters on the social-media application were women, ages 18-35. (R. Vol. VI, at 517).

The Government's profile responded to Mr. Robinson. (R. Vol. VI, at 205). On February 2, 2018, Mr. Robinson made the first statement to "Brooke" that could possibly be interpreted as expressing a desire to work in the prostitution industry. (R. Vol. VI, at 210, 375). "Brooke" responded to Mr. Robinson on February 17, 2018, to tell him that she wanted to leave Denver, was interested in his work proposition and to ask how much money they could make, "Brooke" still did not tell Mr. Robinson she was under 18. (R. Vol. VI, at 211, 373).

The next day, more than two months after Mr. Robinson's initial message and after Mr. Robinson and "Brooke" exchanged approximately 90 text messages, "Brooke" told Mr. Robinson that she was a 17½-year-old named "Nikki." (R. Vol. II, at 289, R. Vol. VI, at 373-74). In exchanging subsequent messages, Mr. Robinson indicated that he was hesitant to enter into a pimp-prostitute relationship with "Nikki" until she was 18:

On February 18, 2018, Mr. Robinson stated: "But ***on your birthday*** we will be doing things bigger and better." (R. Vol. II, at 300, emphasis added).

On February 19, 2018, Mr. Robinson had a telephone call with "Nikki," in which he stated: "It's just, it's just, ***my only concern is, is because you are 17***." (R. Vol. II, at 311; emphasis added).

In the February 19, 2018 telephone call, Mr. Robinson stated: "I'm trying to . . . establish with you causes ***for you to be 18 and over***, but I still might if I could ***use a little bit of time that you got until your 18th birthday and stalling***, and you know teaching you how things go then by the time you do reach the age then you'll be perfection" (*Id.*, emphasis added).

On February, 20, 2018, Mr. Robinson stated "Yes, there's a lot for you to learn so *we're not gonna rush into everything*." (R. Supp. Vol. I, at 76, emphasis added).

On February 27, 2018, Mr. Robinson stated that he wanted to have all documents, including "Nikki's" birth certificate and Social Security card, by the time she turned 18 on August 1, 2018 (*Id.* at 118).

Mr. Robinson testified at trial that he did not intend to have "Nikki" engage in prostitution as a minor. (R. Vol. VI, at 537).

Mr. Robinson submitted proposed jury instructions on the issue of entrapment. (R. Vol. I, at 139-40, 178; R. Vol. II, at 48-49). At trial, Mr. Robinson requested an entrapment instruction as to Count 1. (R. Vol. VI, at 660). Mr. Robinson's counsel also argued on the record why Mr. Robinson was entitled to an entrapment instruction. (*Id.* at 660-61, 663-64).

The District Court declined to give a jury instruction on entrapment, concluding that:

- "A valid entrapment defense requires ***proof*** of" Governmental inducement and lack of predisposition.
- Mr. Robinson had not made a sufficient showing on inducement.
- The District Court did, however, find that the evidence on lack of predisposition was "equivocal."

(*Id.* at 664-66, emphasis added).

The effect of the agent's efforts on Mr. Robinson's sentence was massive. Evidence was presented in the lower court that another target of the same agent's efforts (using the same name and the same photographs)—but one as

to whom the agent did not bait-and-switch the age—received a sentence of twelve (12) months' imprisonment in the same court at close to the same time. Mr. Robinson was sentenced to 188 months' imprisonment.

II. Mr. Robinson's subsequent appeal

On appeal to the Tenth Circuit, Mr. Robinson renewed his argument that he was entitled to a jury instruction on the issue of entrapment as to Count I. Mr. Robinson argued that the District Court failed to view the evidence in the light most favorable to him and, further, erred in refusing to submit the factual issue of entrapment to the jury. *See Mathews*, 485 U.S. at 63; *Sherman*, 356 U.S. at 377; *Sorrells*, 287 U.S. at 452; *United States v. Russell*, 411 U.S. 423, 433-36 (1973).

Mr. Robinson further argued that the District Court failed apply the correct standard for Governmental inducement and failed to recognize that inducement may be subtle and need not take the form of outright pressure or coercion. *See*, *Russell*, 411 U.S. at 428 (explaining that, in *Sorrells*, "a federal prohibition agent visited the defendant while posing as a tourist and engaged him in conversation about their common war experiences," and that, "[a]fter gaining the defendant's confidence, the agent asked for some liquor, was twice refused, but upon asking a third time the defendant finally capitulated").

The Tenth Circuit Court of Appeals, in a published opinion, upheld the District Court's denial of Mr. Robinson's request for an entrapment jury

instruction. *United States v. Robinson*, 993 F.3d 839 (10th Cir. 2021). Principally, the Tenth Circuit relied upon its prior decision in *United States v. Munro*, 394 F.3d 865, 871-72, n.2 (10th Cir. 2005), for the proposition that, "no entrapment jury instruction was warranted where the government offered a chance to back out of the potential crime." *Robinson*, 993 F.3d at 847. The Court went on to explain that, "[w]hen the government disclosed Nikki was underage, it provided Defendant with an out he refused to take." *Id*. The Court further reasoned that, because Mr. Robinson continued to communicate with "Nikki," rather than withdrawing, there was no "inducement," and Mr. Robinson was not entitled to an entrapment instruction, thereby deciding the defense as a matter of law. *Id*.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals decided that Mr. Robinson was not entitled to a jury instruction on entrapment on the basis of its decision in *United States v. Munro*, which the Tenth Circuit described here as: "no entrapment jury instruction was warranted where the government offered a chance to back out of the potential crime." 993 F.3d at 847. This "chance to back out" standard constitutes a novel and insurmountable evidentiary barrier to the entrapment defense, is absent from this Court's authority, and bears no resemblance to the standards set forth by this Court in previous cases regarding the parameters of the entrapment defense. While the "chance to back

out" standard has been held to be a relevant factor to the question of entrapment in other circuits, only the Tenth Circuit, to Mr. Robinson's knowledge, has elevated this issue to dispositive status—eliminating the possibility of the defense whatever other evidence the accused has presented. The Tenth Circuit's view of entrapment in Mr. Robinson's case is plainly inconsistent with this Court's precedent and would essentially eliminate the defense. A writ from this Court is warranted in order to re-establish the appropriate standards for entrapment in the lower courts throughout the country and the Tenth Circuit in particular.

I. Mr. Robinson met his modest burden of production regarding evidence of inducement.

Properly applied, the question of entrapment here was one of fact that could only be resolved by the jury, not the Court as a matter of law. Mr. Robinson introduced evidence that satisfied the proper standards.

There are "two related elements" of entrapment: "Government inducement of the crime, and a lack of predisposition on the defendant's part to engage in the criminal conduct." *Mathews*, 485 U.S. at 59. "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." *Jacobson v. United States*, 503 U.S. 540, 549 (1992).

This Court's precedent has been consistent and clear: "[t]he question of entrapment is generally one for the jury, rather than for the court." *Mathews v. United States*, 485 U.S. 58, 63 (1988); *Sherman v. United States*, 356 U.S. 369, 377 (1958); *Sorrells*, 287 U.S. at 452; *United States v. Russell*, 411 U.S. 423, 433-36 (1973). In order to reach a jury, the defendant need only present "some evidence" that he was: (1) induced to commit the crime by a government agent; and (2) not otherwise predisposed to commit the crime. *Matthews*, 485 U.S. at 62-63; *see also*, *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986).

i. Mr. Robinson presented evidence of inducement.

The element of inducement requires an "objective inquiry" that "focuses on whether the government's conduct could have caused an undisposed person to commit a crime." *United States v. Kelly*, 748 F.2d 691, 697-98 (D.C. Cir. 1984). Established authority makes clear that "even very subtle governmental pressure, if skillfully applied, can amount to inducement." *United States v. Poehlman*, 217 F.3d 692, 701 (9th Cir. 2000); *see also Russell*, 411 U.S. at 428 (explaining that, in *Sorrells*, "a federal prohibition agent visited the defendant while posing as a tourist and engaged him in conversation about their common war experiences," and that, "[a]fter gaining the defendant's confidence, the agent asked for some liquor, was twice refused, but upon asking a third time the defendant finally capitulated").

The Government accessed a dating website, which by its terms is limited to persons over eighteen (18) years of age, and created a fake profile of "Brooke," an 18-year-old woman. Mr. Robinson reached out to "Brooke," reasonably believing that he was communicating with an adult. The agent communicated over 90 messages over a two-month time period to Mr. Robinson as an 18-year-old woman, carefully cultivating a relationship between two adults; in this relationship, the 18-year-old "Brooke" showed a willingness to enter into a commercial sex relationship with Mr. Robinson. Only after this relationship had been established, and after the illicit nature of the relationship had become firmly rooted, did agents fabricate that "Brooke" was supposedly still five months from her 18th birthday and was actually known as "Nikki." This bait-and-switch induced Mr. Robinson, who was not looking to be involved in criminal activity with a minor, to have unwittingly cultivated a commercial sex relationship with a "minor."

There is clearly some evidence that the Government induced Mr. Robinson into the "child" element of the charged offense, and there was certainly sufficient evidence to create a debatable fact question that only a jury could resolve. But the Tenth Circuit, relying on *Munro*, simply noted that Mr. Robinson was "provided…an out he refused to take." Under the license allowed by *Munro* and applied here, the Tenth Circuit ignored the evidence of inducement introduced by Mr. Robinson, and, instead, the Court simply

discussed evidence of conduct after the "out" that the Government offered Mr. Robinson. Respectfully, there is *always* some "opportunity" to back out—and was in every one of this Court's entrapment decisions where the defense was required to be submitted to the jury. If the identification of such an "opportunity" were enough, the defense would be a nullity—in contravention of this Court's authority and that of other courts of appeals.

ii. The element of predisposition.

The District Court found that evidence of Mr. Robinson's predisposition was "equivocal" and based its decision entirely on its finding of a lack of inducement. The Tenth Circuit did not opine on the element of predisposition, since it found that there was no evidence of inducement under *Munro*. *Robinson*, 993 F.3d at 847.[2]

[2] As to lack of predisposition, this Court has held that the critical question is whether the defendant was disposed to commit ***the offense in question*** before he was induced to do so by the Government. *See Jacobson*, 503 U.S. at 549; *see also Poehlman*, 217 F.3d at 703. In other words, the Government must prove that, if the defendant had been "left to his own devices," it is likely that he nevertheless would have committed the offense in question. *Jacobson*, 503 U.S. at 554. There was no evidence that Mr. Robinson had a predisposition to commit a prostitution-related crime ***with a minor.*** There was no such evidence presented at trial, and Mr. Robinson's past conduct—*prior to the events at issue*—indicated no intention to commit this offense with a minor.

II. The Tenth Circuit, contrary to the decisions of this Court, has erected an entirely new evidentiary hurdle for defendants seeking to invoke the defense of entrapment.

The Tenth Circuit Court of Appeals upheld the District Court's refusal to give an entrapment jury instruction on the basis that there had been no evidence of inducement because the government, "provided Defendant with an out he refused to take." *Robinson*, 993 F.3d at 847 (citing *United States v. Munro*, 394 F.3d 865, 871-72, n.2 (10th Cir. 2005)).

In *Munro*, the defendant, through internet messaging, arranged to meet an undercover agent—posing as a 13-year-old girl named Chantelle—for sex at a nearby elementary school. *Id*. at 868. Defendant was arrested at the elementary school with a loaded hand gun. *Id*. Defendant was convicted of using a computer to attempt to persuade a minor to engage in illegal sexual acts and carrying a firearm during the commission of a crime of violence. *Id*. Defendant appealed to the Tenth Circuit, with one of his contentions being that he was entitled to an entrapment instruction. *Id*. at 871. The Tenth Circuit Court of Appeals primarily held that Defendant had simply failed to produce sufficient evidence, but the Court also noted that, "the officer who posed as Chantelle testified that he gave Munro more than one opportunity to back out of the meeting, thus vitiating the need for an entrapment instruction." *Id*. at 871-872. The Tenth Circuit cites no authority for the proposition that an

"opportunity to back out" vitiates the need to submit a raised entrapment defense to a jury.

With Mr. Robinson's appeal, the Tenth Circuit has elevated this dicta from *Munro* into a rule of law, and has legally erected an entirely novel and insurmountable barrier for defendants seeking an entrapment jury instruction. Such a holding is in conflict with other courts of appeals. *See*, *e.g.*, *United States v. Mayweather*, 991 F.3d 1163, 1181, fn.20 (11th Cir. 2021) (declining to follow government's argument that evidence of a "chance to back out" was conclusive of entrapment issue); *United States v. McLean*, 702 Fed. Appx. 81, 86 (3rd Cir. 2017) (evidence of opportunity to back out is relevant to predisposition, but not dispositive); *United States v. Schuttpelz*, 467 Fed. Appx. 349, 354 (6th Cir. 2021) (opportunities to back out are relevant evidence of predisposition).

Defendants in the Tenth Circuit must not only show "sufficient evidence" of inducement and lack of predisposition, under *Munro* (and now *Robinson*) they must also show that there was no "opportunity to back out". Respectfully, this makes little sense as a workable legal standard and it is in plain and direct conflict with this Court's prior case law.

As a practical matter, it is difficult to imagine a circumstance in which a defendant hoping to plead entrapment would not have had an "opportunity to back out." In *Sorrells*, for example, the foundational example of entrapment, a

prohibition agent visited the home of the Defendant and, through cultivation of the defendant's friendship and "by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms" induced defendant into selling liquor to him. *Sorrells*, 287 U.S. at 439. It is also noted, however, that, in the course of the crime, "defendant left his home and after a few minutes came back with a half gallon of liquor for which the witness paid defendant five dollars." *Id*. Surely in the course of Mr. Sorrells' few minutes sojourn to obtain the liquor, he could be said to have had an opportunity to "back out" of the transaction; perhaps, in coming to the point of making the illicit transaction, Mr. Sorrells should have been struck by a sudden compunction of guilt and withdrawn from his wrongdoing. But this Court held has was entitled to the defense. Hypothetically, if, at the point of the transaction, the undercover prohibition agent had said, "Mr. Sorrells, are you sure you want to sell me this liquor?" would this chance to "back out" have legally undone all of the agent's prior efforts to induce Mr. Sorrells? *Sorrells*, with its exclusive focus on the officer's efforts to induce the defendant, suggests precisely the opposite. *Id*. at 444-45.

So too in *Sherman*, 356 U.S. at 371, another case in which this Court found there to be entrapment as a matter of law. After the initial acts of inducement, the defendant engaged in several illegal drug transactions; surely Mr. Sherman had an "opportunity to back out" over this period of time. The

"opportunity to back out" standard is so broad and undefined as to justify the denial of nearly any imaginable claim of entrapment, and it is clearly counter to the previous decisions of this Court regarding entrapment.

Moreover, as is evident in the Tenth Circuit's decision in Mr. Robinson's appeal, the "opportunity to back out" standard inappropriately focuses a Court's attention not on the evidence supporting an entrapment instruction, but on evidence adduced by the Government of a "chance to back out." *Robinson*, 993 F.3d at 847. Thus, the Tenth Circuit, under the reasoning of *Munro*, conducted its review of Mr. Robinson's entitlement to an entrapment jury instruction without once discussing Mr. Robinson's allegations of inducement. Instead, the Tenth Circuit merely noted that there had been a "chance to back out" and discussed Mr. Robinson's conduct subsequent to this "chance to back out".[3] *Munro*, and the inappropriate prominence it bestows upon the "chance to back out," eliminates any possibility of a defendant receiving an entrapment instruction, no matter the evidence of inducement that the defendant might adduce.

[3] It should be noted that, to the extent that evidence of a "chance to back out" and subsequent conduct is relevant, it is most logically relevant to a defendant's predisposition and is not relevant to inducement, which concerns *Government* conduct. *See Mayweather*, 991 F.3d at 1181; *McLean*, 702 Fed. Appx. at 86; *Schuttpelz*, 467 Fed. Appx. at 354.

CONCLUSION

For the reasons detailed in this Petition, this Court should grant a Writ of Certiorari to review the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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Dated: July 1, 2021

Appendix A

FILED
United States Court of Appeals
Tenth Circuit

April 2, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JALIL LEMASON ROBINSON, a/k/a Talk Big,

Defendant - Appellant.

No. 19-1256

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CR-00144-PAB-1)

Ryan A. Ray, Norman Wohlgemuth Chandler Jeter Barnett & Ray, P.C., Tulsa, Oklahoma, for Defendant-Appellant.

J. Bishop Grewell, Assistant United States Attorney (Jason R. Dunn, United States Attorney with him on the briefs), Denver, Colorado for Plaintiff-Appellee.

Before **HARTZ**, **MATHESON**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

"Talk Big" doubled as Defendant Jalil Lemason Robinson's handle on a dating website and his strategy for recruiting seventeen-year-old Nikki from Colorado to work for him as a prostitute on that same site. Promising a life of luxury, Defendant convinced

Nikki, who originally represented herself as eighteen-year-old Brooke, to come join him as his "business partner" in California. Little did he know he was communicating with an undercover officer posing as Nikki.

Defendant's actions led to a jury convicting him of attempted sex trafficking of a minor under 18 U.S.C. § 1591(a)—Congress' response to the growing problem of domestic sex trafficking. Defendant claims the government produced insufficient evidence to find him guilty of attempted sex trafficking of a minor. The record establishes the contrary. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm Defendant's conviction and sentence of 188 months' imprisonment.

I.

FBI task force officer, Agent Tangeman, created a fictional social media profile on a dating website. Tangeman's character—Brooke—claimed to be an eighteen-year-old from Aurora, Colorado.[1] Although Brooke had a profile on the adult dating site, the website could not guarantee her age because it relied on self-verification to confirm its users' ages. Defendant maintained a profile on the same website going by "Talk Big." Defendant promoted: "40 hours for 350 a week or 1500 a night, choose wisely." Through his profile, Defendant sought a business partner—meaning a prostitute—ideally

[1] We refer to Brooke/Nikki by these names at the appropriate times throughout the opinion even though she is not a real person. Agent Tangeman crafted Nikki's messages and he used a confidential source for the phone call.

age eighteen to thirty-five. Defendant contacted Brooke, but several weeks passed before she responded. Once in contact, their conversations quickly progressed.

Defendant offered Brooke a life of luxury as his "business partner" and offered to "show her the way" by taking her to a few strip clubs and sharing other resources. Intrigued, Brooke asked how much money she could make. His response, "Baby we can make hella money" and left her his number.

Brooke texted him the next day and broke the news that she was only seventeen years old and that her real name was Nikki. Despite learning Nikki's age, Defendant continued the conversation and his plans. When Nikki showed hesitation and fear, Defendant reassured her and promised a life of luxury. The next day, they talked on the phone to shore up plans for Nikki's eventual prostitution. Defendant said Nikki would need a fake ID for "safety" until she turned eighteen. Defendant said he was eager to teach Nikki to become "perfection" by the time she turned eighteen, and seduced her with promises of earning big money in a short amount of time. Portraying herself as vulnerable and eager to leave Colorado and make money, Nikki succumbed to Defendant's promise of a lavish life and agreed to travel to Defendant in California. As promised, Defendant showed up at a California bus terminal to meet Nikki. There, federal law enforcement agents confronted and arrested him. Authorities charged Defendant with attempted sex trafficking of a child and transporting an individual to engage in prostitution.

Defendant asserted at trial that he planned to keep things strictly platonic until Nikki's eighteenth birthday. But the jury did not buy it and found Defendant guilty on both counts.

II.

Defendant claims prosecutors presented insufficient evidence to support his conviction for attempted sex trafficking of a minor in violation of 18 U.S.C. § 1591(a). He also claims the district court erred by (1) denying his request for an entrapment jury instruction; (2) denying his request to compel the government to disclose its confidential source; (3) admitting Agent Tangeman's lay and expert testimony at trial; and (4) by failing to admit a trial exhibit in its entirety. Defendant finally contends he was prejudiced by cumulative error and received a substantively unreasonable sentence.

A.

Defendant claims the government presented insufficient evidence to convict him. We review de novo whether there was sufficient evidence to support a defendant's convictions. United States v. Isabella, 918 F.3d 816, 830 (10th Cir. 2019). In doing so, we view the evidence and any reasonable inferences drawn from it in the light most favorable to the government. Id. "We consider all evidence, circumstantial and direct, but we do not weigh the evidence or consider credibility of the witnesses." Id. (citing United States v. Rufai, 732 F.3d 1175, 1188 (10th Cir. 2013)). "We will reverse a conviction for insufficient evidence only when no reasonable jury could find the defendant guilty beyond a reasonable doubt." Id.

(citing United States v. Anaya, 727 F.3d 1043, 1050 (10th Cir. 2013)). "We will not uphold a conviction, however, that was obtained by nothing more than piling inference upon inference, or where the evidence raises no more than a mere suspicion of guilt." United States v. Rahseparian, 231 F.3d 1257, 1262 (10th Cir. 2000) (internal citations and quotation marks omitted) (first citing United States v. Fox, 902 F.2d 1508, 1513 (10th Cir. 1990); then citing United States v. Smith, 133 F.3d 737, 742 (10th Cir. 1997)).

To convict Defendant under 18 U.S.C. § 1591(a), the government had to prove beyond a reasonable doubt that: (1) Defendant knowingly attempted to recruit, entice, harbor, transport, provide, obtain, maintain, patronize, or solicit Nikki; (2) Defendant knew or recklessly disregarded that Nikki was under the age of 18 and would be caused to engage in a commercial sex act; and (3) the offense was in or affecting interstate commerce. Defendant admitted at trial that he knowingly recruited seventeen-year-old Nikki to engage in commercial sex acts. He contends, however, that the trial evidence did not demonstrate that he intended for her to engage in those commercial sex acts while still a minor. In considering his sufficiency claim, we first discuss the text message and phone call evidence from trial. Then we review Agent Tangeman's testimony.

1.

Although a short-lived digital connection, Defendant eagerly laid the foundation to gain Nikki's trust and helped plan her move. Defendant eased Nikki's apprehension about joining the "business" by telling her he would take care of her as he worked to develop a bond through their interactions on the dating app. He filled her mind with

dreams of making big money in a short amount of time. Defendant's messages and phone calls support the inference that he intended for Nikki to engage in commercial sex acts before she turned eighteen.

In their first substantial text message conversation, Nikki told Defendant that she was only seventeen years old. Even though he testified at trial that this disclosure made him hesitant to proceed, Defendant did not withdraw from the conversation. Instead, Defendant immediately responded, "We will talk more on us when I get there, just need you to hang tight until I get there, okay?"

To address this new-found information, Defendant suggested Nikki obtain a fake ID to use until her birthday for "safety." He said they should take the Greyhound bus from Colorado to California because she did not have an ID. Defendant then asked Nikki if her aunt would react negatively to her leaving the state because he did not want any problems. Nikki said there would be no problems if she checked in. Defendant responded: "I mean until your 18 then they can't say shit about where or how you do your Life"; "I just don't want any issues ya know"; and "We would have to keep things hella discreet." He later said: "But on your birthday we will be doing things bigger and better." At no point did Defendant withdraw his plans to bring Nikki to California. Rather, he dove deeper into the plan by suggesting Nikki needed a fake ID, ensuring her family would not miss her, and insisting things remain "hella discreet." From these statements, the jury could reasonably infer Defendant intended for Nikki to engage in commercial sex acts before she turned eighteen.

Defendant also insisted on talking to Nikki over the phone. To oblige, she called him the next day. Nikki disclosed she had a rough home life and that she could leave her aunt and uncle without issue. Defendant seemed concerned about her age, but said: "I still might if I could use a little bit of time that you got until your 18th birthday and stalling, and you know teaching you how things go then by the time you do reach the age then you'll be perfection." Defendant again brought up the need for a fake ID "for safety." He then described the rates for various types of "dates." Defendant offered to teach Nikki "what to do, when to do it, and how to do it." Within two weeks of their initial conversation and five to six months before her eighteenth birthday, Defendant bought Nikki a $224 one-way bus ticket so she could join him in California.

Throughout their correspondence, Defendant repeatedly asked Nikki to send him nude photos. When she refused, he said: "Guess you not gonna let me see what belongs to me." Defendant tried to convince the court that he requested the nude photos to establish Nikki was a real person. But the records showed that when Nikki remained reluctant to send nude photos, Defendant said, "Once we're together there's gonna be more than just taking pics."

Defendant's request for discretion, insistence she obtain a fake ID for "safety" and generally cautious approach support the inference that he intended for Nikki to engage in commercial sex acts as a minor. At trial, Defendant tried to explain Nikki needed the fake ID for use in legal activities—but fake ID use inherently leads to participation in illegal activity. Finally, he promised to make her perfection and commented that "more than just taking pics" would happen once they were together. Armed with this evidence,

a jury could reasonably infer Defendant intended for Nikki to engage in commercial sex acts before she turned eighteen.

2.

Besides Defendant's texts, phone conversations, and testimony, Agent Tangeman's expert testimony also supports the jury's conclusion that Defendant intended for Nikki to engage in commercial sex acts as a minor. Agent Tangeman is an investigator with the Arapahoe County Sheriff's Office, which assigned him to work with the FBI Innocence Lost Task Force ("Task Force"). In that role, he investigates crimes involving the sexual exploitation of children and human trafficking. Agent Tangeman explained on direct examination how pimps recruit trafficking victims, the types of individuals pimps seek, and the relationship that develops between pimps and victims. He emphasized how a pimp tells his victim that he will provide emotional support, material things, travel, and generally promise a lavish lifestyle. Defendant did just this throughout his communications with Nikki. In their extended messaging, Defendant told her "I promise if you stick around and really go hard for me I will bless you with everything I can possibly give you[.]" Defendant made most of these promises after he learned Nikki was a minor.

Agent Tangeman also discussed how pimps protect themselves when they know their recruit is a minor. For example, he discussed that pimps generally obtain a fake ID for the underage child to alleviate culpability. As an expert, Agent Tangeman opined that a pimp's request to delete messages and insistence on discretion are designed to protect themselves when pimping a minor. Defendant told Nikki she needed a fake ID, regularly

requested she delete messages, and had Nikki ensure her departure would not raise issues with her family. Agent Tangeman's testimony about how pimps treat underage recruits and Defendant's behavior support the reasonable inference that Defendant intended to have Nikki engage in commercial sex acts while still a minor. In addition, a different FBI special agent also testified that, in his experience, pimps did not wait to have their victim engage in commercial sex acts until they reached the age of majority. In reviewing all the evidence in a light most favorable to the government, we conclude evidence exists in the record sufficient to support the jury's determination that Defendant intended for Nikki to engage in commercial sex acts while still a minor.

B.

Defendant next appeals the district court's denial of his request for an entrapment jury instruction. We review the court's refusal to provide the entrapment defense jury instruction de novo. United States v. Scull, 321 F.3d 1270, 1274 (10th Cir. 2003) (citing United States v. Ortiz, 804 F.2d 1161, 1164 (10th Cir. 1989)). Because "'[t]he question of entrapment is generally one for the jury, rather than for the court,'" an entrapment jury instruction is appropriate only when a defendant produces "'sufficient evidence from which a reasonable jury could find entrapment.'" United States v. Vincent, 611 F.3d 1246, 1250 (10th Cir. 2010) (first quoting Mathews v. United States, 485 U.S. 58, 63 (1988); then quoting Scull, 321 F.3d at 1275). "For the purposes of determining the sufficiency of the evidence to raise the jury [instruction] issue, the testimony most favorable to the defendant should be accepted." Scull, 321 F.3d at 1275 (quoting United States v. Reyes, 645 F.2d 285, 287 (5th Cir. 1981)) (quotation marks omitted).

To prevail, Defendant must show that: (1) the government agents induced him to commit the offense; and (2) that he was not otherwise predisposed to commit the offense, if given the opportunity. See United States v. Ngyuen, 413 F.3d 1170, 1178 (10th Cir. 2005) (quoting United States v. Young, 954 F.2d 614, 616 (10th Cir. 1992)). "'[G]overnment conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense'" constitutes inducement. Scull, 321 F.3d at 1275 (quoting Ortiz, 804 F.2d 1161, 1165 (10th Cir. 1986)). "Evidence that a government agent solicited, requested or approached the defendant to engage in criminal conduct, standing alone, is insufficient to constitute inducement." Ortiz, 804 F.2d at 1165. Evidence that the government initiated contact with the defendant or proposed the crime does not rise to inducement. Id.

Defendant contends that the government's use of a dating website limited to persons over eighteen years old led him to reasonably believe he was talking with an adult when he started his conversation with Brooke/Nikki. Thus, he argues, the government's conduct (delay in disclosing Nikki was underage) shows agents induced him to engage in illegal conduct with a minor. We disagree.

When the government disclosed Nikki was underage, it provided Defendant with an out he refused to take. See United States v. Munro, 394 F.3d 865, 871–72, n.2 (10th Cir. 2005) (finding no entrapment jury instruction was warranted where the government offered a chance to back out of the potential crime). Despite learning Nikki's age, Defendant caused the relationship to progress. Far from ending things, Defendant kept communicating with Nikki, made plans to obtain her fake ID, and asked her to delete

messages and keep things discrete. He even bought her a bus ticket so she could move to California and live with him prior to her eighteenth birthday. He told her they could use the time awaiting her birthday to make her "perfection." He asked Nikki to send nude photos, and chastised her for her reluctance to send them. The government did not start these advancements and therefore, did not induce Defendant to engage in conduct with a minor. When the government does not induce the conduct, there can be no entrapment.[2]

Sufficient evidence does not support the conclusion that a reasonable jury could find entrapment. The evidence instead shows Defendant continued to engage in recruitment activity *after* he learned Nikki's real age. For this reason, the district court did not err in denying Defendant's request for an entrapment jury instruction.

C.

Defendant also appeals the denial of his request that the government disclose its confidential source's identity. "We review the denial of a defendant's motion for disclosure of an informant's identity for abuse of discretion." Vincent, 611 F.3d at 1251 (citing United States v. Martinez, 979 F.2d 1424, 1426 (10th Cir. 1992)). The government enjoys a privilege to withhold disclosure of a confidential source's identity due to a strong public interest in furthering effective law enforcement. Id. (citing United States v. Mendoza-Salgado, 964 F.2d 993, 1000 (10th Cir. 1992)). Disclosure is proper when the "'informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" Id. (quoting Roviaro v. United States,

[2] Because Defendant's entrapment argument fails on the inducement prong, we need not consider the predisposition prong.

353 U.S. 53, 60–61 (1957)). But when the identity is not relevant, helpful, or serves merely a cumulative purpose, we have not required disclosure. See Mendoza-Salgado, 964 F.2d at 1000–01.

Defendant claims his entrapment defense requires the government's disclosure of the confidential source's identity. Relying on Roviaro, Defendant asserts that because he raised a plausible entrapment defense, he may confront the confidential source to obtain information about his entrapment defense. Defendant, however, misreads Roviaro. In Roviaro, the confidential informant played an active role in the charged illegal activity. 353 U.S. at 58–59. There, the government sought to keep the informant's identity privileged, even though the informant could provide information about certain parts of the transaction not otherwise available to the defendant. Id. The court permitted disclosure of the confidential informant because the confidential informant's identity and testimony were highly relevant and material to the defense. Id. at 62–64.

Unlike Roviaro, the district court admitted transcripts of all conversations between the confidential source and Defendant into evidence. They had no other contact. Thus, the confidential source would have added nothing new and her testimony would have been unnecessarily cumulative. Even so, Defendant contends the confidential source could help him prove inducement. Defendant's continued contact and communication with Nikki after she disclosed her age shows the government did not induce Defendant. In fact, as discussed above, the opposite remains true. Moreover, disclosure and testimony from the confidential source would not add to the entrapment defense. Unlike in Roviaro, Defendant participated in all the conversations that included the confidential

source and never disputed that the transcripts the government provided to him accurately captured the words spoken between Defendant and the informant. Thus, unlike Roviaro, Defendant could not obtain any non-cumulative evidence from the confidential source. Thus, Defendant cannot show the district court abused its discretion in denying the motion to disclose the confidential source.

D.

Next, Defendant argues the district court erred in admitting Agent Tangeman's expert testimony. We review the decision to admit or exclude expert testimony for an abuse of discretion. United States v. Abdush-Shakur, 465 F.3d 458, 466 (10th Cir. 2006).

1.

Defendant contends the district court erred by allowing Agent Tangeman to provide expert testimony at trial about the pimping and prostitution culture. Defendant claims that because some of this testimony bore no relevance to the elements of the charged offense, the district court inappropriately admitted it under Federal Rules of Evidence 401, 403, and 702.[3] We disagree.

In urging reversal, Defendant relies on our decision in Abdush-Shakur where we held the district court did not abuse its discretion by excluding expert culture testimony

[3] Defendant briefly asserts that the generalities about pimps and pimping culture should have been excluded under these evidentiary rules. Because Defendant does not develop any argument in his opening brief specific to these rules, he effectively waives this argument. See United States v. Cooper, 654 F.3d 1104, 1128 (10th Cir. 2011) (quoting Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998) ("It is well settled that [a]rguments inadequately briefed in the opening brief are waived.") (internal quotation marks omitted)).

because it lacked relevancy to an element of the charged offense. Id. at 466–67. In that case, the government charged the defendant with attempted murder and possession of a prohibited object in violation of 18 U.S.C. §§ 113 and 1791(a)(2). Id. at 460. At trial, the defendant offered expert testimony about the "culture of violence" in federal penitentiaries to explain his violent retaliation toward a disrespectful officer. Id. at 466. The defendant claimed he intended only to wound the officer and not kill him and that the expert testimony explained his motive. Id. The court found the expert's testimony was not relevant to the defendant's case. Id. The court reasoned that while the defendant's proffered expert testimony might show a generic culture of violence in prisons and establish the defendant did not respond unusually for a prisoner, the testimony did not legally excuse his attack on the corrections officer by negating an element of the crime. Id. at 466–67. Because the expert testimony did not negate the mens rea, the district court properly excluded it because the testimony was not relevant. Id. at 467.

The government's use of cultural testimony differs here. Agent Tangeman's testimony provided a basis on which the jury could infer that Defendant recruited a vulnerable girl seeking structure and stability in her life. Unlike Abdush-Shakur, the government here used expert cultural testimony along with the communications between Defendant and Nikki to show that Defendant intended to have Nikki engage in commercial sex acts while still a minor. So, the expert testimony related to an element of the crime. For this reason, the district court did not abuse its discretion by allowing Tangeman to provide expert testimony on pimping and prostitution culture.

2.

Defendant next complains the district court improperly allowed Tangeman to testify as both a fact and expert witness without providing his requested jury instructions. We review the jury instructions given by the court, de novo "to determine whether, taken in their entirety, they correctly informed the jury of the governing law." Gust v. Jones, 162 F.3d 587, 596 (10th Cir. 1998) (citing Summers v. Mo. Pac. R.R. Sys., 132 F.3d 599, 606 (10th Cir. 1997)). Waiver occurs, however, when a party invites the error below. See United States v. Zubia-Torres, 550 F.3d 1202, 1205 (10th Cir. 2008).

Although Defendant now complains about the lack of a jury instruction on Agent Tangeman's expert and fact testimony, he did not object (and in fact agreed) to the jury instruction about Tangeman's testimony before the district court. He has therefore invited any error caused by the lack of instructions and has waived his right to challenge them. United States v. Cornelius, 696 F.3d 1307, 1319 (10th Cir. 2012) ("Under the invited error doctrine, this Court will not engage in appellate review when a defendant has waived his right to challenge a jury instruction by affirmatively approving it at trial.").

E.

At trial the government sought to enter its Exhibit 47, a 207-page document of comments, including comments from Defendant, from the online dating site, into evidence. Defendant objected, arguing that many pages of Exhibit 47 were not relevant and should be excluded. The court sustained the objection and, without further objection from defense counsel, required the government to admit only the relevant pages one at a

time. Ironically, Defendant now claims that the government's 207-page Exhibit 47 contained exculpatory statements and that the district court erred by not admitting those statements under Federal Rule of Evidence 106.

Defendant acknowledges his failure to present this argument to the district court and, requests that we review the district court's failure to admit (presumably sua sponte) these purportedly exculpatory statements for plain error. But plain error review is reserved for forfeited arguments, not arguments occasioned by the district court's adoption of a defendant's own erroneous suggestion. United States v. Carrasco-Salazar, 494 F.3d 1270, 1272 (10th Cir. 2007); see also United States v. Hardwell, 80 F.3d 1471, 1487 (10th Cir. 1996) ("A defendant cannot invite a ruling and then have it set aside on appeal."). Here, the government's proposed exhibit contained the exculpatory statements Defendant now says the district court should have admitted. But Defendant caused their exclusion through his own relevance objection to the district court. As a result, if the district court erred by not admitting evidence it did not know Defendant believed was exculpatory, the error was invited. And unlike forfeited arguments, which we review for plain error, invited errors are waived and we do not review them at all. See United States v. Cruz-Rodriguez, 570 F.3d 1179, 1183 (10th Cir. 2009).

F.

Defendant next argues that even if we determine the district court's errors were harmless, the aggregation of those errors leads to cumulative error. "Cumulative error cannot be predicated on non-errors." United States v. Oldbear, 568 F.3d 814, 825 (10th Cir. 2009). Nor can it be predicated on invited error. United States v. Lopez-Medina, 596

F.3d 716, 733 n.10, 741 (10th Cir. 2010). Because Defendant identifies, at most, invited error, we reject his cumulative error argument.

G.

Defendant lastly argues his sentence was substantively unreasonable. We review a sentence for reasonableness. United States v. Kristl, 437 F.3d 1050, 1053 (10th Cir. 2006). A sentence within the Guidelines range is presumed reasonable. Id. at 1054. On reasonableness review, we ask whether the district court abused its discretion. United States v. Smart, 518 F.3d 800, 805–06 (10th Cir. 2008).

Defendant contends his 188-month sentence is substantively unreasonable for two reasons. First, he argues his sentence resulted from Tangeman's alleged outrageous government conduct. Defendant asserts that decreasing Nikki's age to seventeen years old amounts to outrageous government conduct. It does not. "The outrageous conduct defense . . . is an extraordinary defense that will only be applied in the most egregious circumstances." United States v. Pedraza, 27 F.3d 1515, 1521 (10th Cir. 1994). "To succeed on an outrageous conduct defense, the defendant must show either: (1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime." Id. (citing United States v. Mosley, 965 F.2d 906, 908 (10th Cir. 1992)).

Defendant's claim that the government created the crime by misrepresenting Nikki's age lacks merit. The dating website only requires the participant to click and verify his or her age. This simple verification process allows minors to easily join the site. Defendant unreasonably assumes all users are at least eighteen years old. So the

government's decision to make Nikki a minor on a website that requires minimal age-verification does not amount to outrageous government conduct.

More importantly, Defendant reached out to Brooke/Nikki and put in motion the plan to pursue a "business partnership." And despite Defendant's claim that the government coerced him into the crime through Nikki's continued conversations and plans to meet, a review of the conversations in the appellate record shows the contrary to be true. The conversations continued long after Nikki revealed her true age. Defendant maintained contact, pressed to meet her, and bought her a bus ticket to California from Denver. Defendant claims Tangeman "induced" him to commit a different crime solely so the government could unfairly seek an enhanced sentence. But his claim is without merit. The government offered Defendant several opportunities to call off his plans with Nikki. Her admission to being seventeen years old was the most obvious one. Even so, Defendant continued communicating with her after the age revelation and cultivated their relationship for the future. Defendant provides no evidence that excessive government involvement existed in the creation of the crime nor does evidence support significant governmental coercion to induce the crime.

Defendant next argues his sentence is unreasonable because he accepted responsibility. Defendant believes he should get credit for admitting to his intent to prostitute Nikki when he believed her to be eighteen. Such an admission does not constitute acceptance of responsibility. Rather, as the district court properly found, Defendant's request for acquittal on both charged offenses shows he did not accept

responsibility. For these reasons, we conclude Defendant's sentence was not substantively unreasonable.

AFFIRMED.