

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KEITH JACOBSON, Petitioner V. UNITED STATES

CASE NO: 90-1124

PLACE: Washington, D.C.

DATE: November 6, 1991

PAGES: 1 - 52

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20540

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - X
KEITH JACOBSON, :
Petitioner :
v. : No. 90-1124
UNITED STATES :
- - - - - X

Washington, D.C.
Wednesday, November 6, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
12:59 p.m.

APPEARANCES:

GEORGE H. MOYER, JR., ESQ., Madison, Nebraska; on behalf
of the Petitioner.

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Respondent.

C O N T E N T S

| | | |
|----|-----------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | GEORGE H. MOYER, JR., ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | PAUL J. LARKIN, JR., ESQ. | |
| 6 | On behalf of the Respondent | 24 |
| 7 | REBUTTAL ARGUMENT OF | |
| 8 | GEORGE H. MOYER, JR., ESQ. | |
| 9 | On behalf of the Petitioner | 49 |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-1124, Keith Jacobson against the United
5 States.

6 Mr. Moyer.

7 ORAL ARGUMENT OF GEORGE H. MOYER, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. MOYER: Mr. Chief Justice, and may it please
10 the Court:

11 In February of 1985 the Government made my
12 client, Keith Jacobson, the target of an undercover sting
13 operation known as the American Hedonist Society. The
14 Government had no reason when it did that to believe that
15 Mr. Jacobson had committed a crime, was planning to commit
16 a crime, or was engaged in a course of criminal conduct.

17 Between February 1985 and June 1987 the
18 Government targeted Mr. Jacobson in five different and
19 separate undercover operations, the object of each of
20 which was to determine if he was receiving or trading
21 sexually explicit photos depicting children through the
22 mails. After the third operation concluded on October 16,
23 1986 when Mr. Jacobson broke off correspondence with one
24 Calvin Comfort, the Government's chief witness and a
25 postal inspector masquerading as a Carl Long, the

1 Government had even less reason to believe that Jacobson
2 was likely to commit a crime than it did when it started
3 with the American Hedonist Society more than a year
4 earlier.

5 Just the same, Jacobson was included in
6 Operation Looking Glass. That was sting number 5 in March
7 of 1987, and was finally, after 28 months of Government
8 effort, induced to receive a single magazine depicting a
9 child engaged in sexually explicit conduct.

10 I contend that Mr. Jacobson was entrapped as a
11 matter of law. I contend that where the defendant's
12 predisposition to commit the crime charged in the
13 indictment, to engage in criminal conduct, does not appear
14 before Government agents target him. The Government has
15 failed to prove that the defendant is guilty beyond a
16 reasonable doubt. I also contend that where the defendant
17 has been offered numerous opportunities to break the law
18 and he has not done so, the Government should leave him
19 alone.

20 Entrapment cases decided that, by this court
21 have --

22 QUESTION: Mr. Moyer, refresh my recollection.
23 Was the jury permitted to find entrapment in this case but
24 did not?

25 MR. MOYER: Entrapment was submitted to the jury

1 and they did find --

2 QUESTION: The jury found --

3 MR. MOYER: -- that the defendant was not
4 entrapped. In other words, there was a jury verdict of
5 guilty, Your Honor.

6 QUESTION: But you say that it shouldn't have
7 been up to the jury that there was entrapment as a matter
8 of law?

9 MR. MOYER: There was entrapment as a matter of
10 law, and I say that the jury verdict in this case, Your
11 Honor, is fatally flawed because the Government was
12 permitted to offer to the jury evidence that Mr. Jacobson
13 suffered from a weakness, that he had a sexual desire to
14 look at pictures, sexually explicit pictures of boys, and
15 that he was a homosexual. This is not the subject of the
16 inquiry. The inquiry --

17 QUESTION: Well, why doesn't that tend to prove
18 that he was disposed to commit the crime? It doesn't have
19 to establish it in its entirety. It's just one element of
20 proving that he was disposed to commit the crime.

21 MR. MOYER: The Government developed this
22 evidence, Your Honor, through sexual survey, attitude
23 surveys and undercover correspondence with Mr. Jacobson
24 after the Government initially included him in the
25 American Hedonist Society. The cases have always held

1 that the predisposition of the defendant must appear
2 before he begins to interact with the Government agents,
3 before they contact him, before anything at all is done.

4 QUESTION: Is that what the instructions said to
5 the jury?

6 MR. MOYER: No, I don't think it is.

7 QUESTION: Well, what did, was there an
8 objection to the jury charge?

9 MR. MOYER: There was an objection to the jury
10 charge, Your Honor, and there were instructions offered.

11 QUESTION: About entrapment?

12 MR. MOYER: That's right. There was an
13 objection to the jury charge on entrapment and there were
14 instructions offered which would define predisposition and
15 also which would define inducement, and the trial court
16 did not give those instructions.

17 QUESTION: Well, Mr. Moyer, do you take the
18 position that the Government must always prove
19 predisposition in these entrapment cases by establishing
20 events that occurred before the Government started its
21 sting operation?

22 MR. MOYER: The cases indicate, Your Honor --

23 QUESTION: Is that your position?

24 MR. MOYER: And that is my position.

25 QUESTION: And isn't that virtually the same,

1 then, as requiring reasonable suspicion or reasonable
2 grounds to believe that this particular individual is
3 suspect?

4 MR. MOYER: Yes, Your Honor, that is, and I
5 intend to argue that as I proceed with my --

6 QUESTION: We didn't grant certiorari on that
7 question, I guess.

8 MR. MOYER: The question was, upon which you
9 granted certiorari, Justice O'Connor, was whether or not
10 he was entrapped as a matter of law. And --

11 QUESTION: As a matter of law. You think that
12 incorporates your first question as presented on
13 certiorari?

14 MR. MOYER: Well, the question was, was he
15 entrapped as a matter of law where he does not meet the
16 attorney general's guidelines for inclusion in an
17 undercover operation and where he does not meet the
18 guidelines established by the Postal Service for inclusion
19 in the operation.

20 QUESTION: If you're correct in your position
21 that the events have to have occurred before the
22 Government sting operation, then I suppose some of these
23 sting operation pawn shops and so forth that are set up in
24 various communities are operating illegally, then, in your
25 view?

1 MR. MOYER: Not in my view, Your Honor, and I
2 think that that situation can be readily distinguished
3 from the situation where the Government goes out, finds a
4 suspect on a list somewhere, out of the telephone book
5 actually if the Eighth Circuit's opinion is to be
6 followed, and the situation in which the Government so
7 structures the undercover operation that it is reasonably
8 clear that persons who are drawn to the operation are
9 predisposed to commit the crime. For instance --

10 QUESTION: Well, wait, how did they get
11 him -- they got his name, as I understand it, because of
12 his purchase of material which would not have been illegal
13 at the time he originally purchased it, but which would
14 have been illegal after this act was passed that made --

15 MR. MOYER: The petitioner does not concede --

16 QUESTION: You don't concede that, but that's
17 the Government's contention.

18 MR. MOYER: That's the Government's contention,
19 that's correct.

20 QUESTION: These, what is it, Bare Boys I and
21 Bare Boys II books that purported to be just books about
22 nudist colonies.

23 MR. MOYER: Child nudist magazines is the way
24 they were described.

25 QUESTION: That's right. Suppose we agree with

1 the Government that those books would violate the law
2 later passed. Would you then concede that there was
3 adequate reason to pursue your client?

4 MR. MOYER: No, Mr. Justice, I would not, for
5 this reason --

6 QUESTION: Even though the Government would then
7 know he had an appetite for what was, what was illegal?

8 MR. MOYER: If I may answer your question by an
9 analogy, suppose the Government in the interest of the
10 health of all of us in the United States, particularly
11 those like me who have asthma, banned smoking completely.
12 Now then, would the Government then be permitted under an
13 undercover operation to find the list of Philip Morris
14 customers and offer Philip Morris cigarettes to these
15 customers in a plain brown wrapper?

16 QUESTION: Well, I think there's a little
17 difference between what you might call a malum prohibitum
18 and a malum in se. I don't think the proper analog would
19 be cigarettes, but perhaps cocaine. If that were
20 originally not illegal and then made illegal, you think
21 the Government could not target people who were known
22 prior users of cocaine?

23 MR. MOYER: Well, I think this was a malum
24 prohibitum crime here, receive child pornography, or at
25 least that's the way the district court regarded it.

1 QUESTION: Um-hum.

2 MR. MOYER: What you're doing there is offering
3 me an example that involves a pernicious substance, and
4 indeed I don't disagree that child pornography is subject
5 to Government control. That isn't my point.

6 QUESTION: But you don't think it's pernicious?

7 MR. MOYER: Excuse me?

8 QUESTION: But you don't think it's pernicious?

9 MR. MOYER: Child pornography can be pernicious,
10 yes, sir, Your Honor.

11 QUESTION: But not -- only after it's outlawed?

12 MR. MOYER: If Your Honor please, my point is
13 that you cannot assume that somebody is going to engage in
14 criminal activity, knowing that it's criminal, just
15 because he has engaged in that activity when it was legal.
16 And the --

17 QUESTION: It depends on what the activity is.
18 If it's that kind of an activity, just as if it would have
19 been cocaine, I think one may, one may suspect this is a
20 person who does not care that much about societal norms.
21 You don't think that's a reasonable suspicion?

22 MR. MOYER: If Your Honor please, the substance
23 was not illegal for him to obtain, or that is to say the
24 books were not illegal for him to obtain. Now you're
25 asking me to assume that these books meet the test of the

1 statute and they show a child engaged in a sexually
2 explicit conduct. Nevertheless and irrespective of
3 whether they do or not --

4 QUESTION: I don't want you to concede that.
5 We're assuming that for purposes.

6 MR. MOYER: Yeah, for the purposes of the
7 hypothetical. Nevertheless, it was not and it had never
8 been a crime to receive this type of material through the
9 mail, and under the decisions of this Court in Stanley it
10 was not a crime to possess it and the State of Nebraska,
11 it had not adopted a statute making it illegal to possess
12 child pornography until well after this case was tried in
13 the district court for the District of Nebraska in Omaha.

14 So therefore the Government has to assume from
15 the fact that Mr. Jacobson did something that the
16 Government has to concede, indeed stipulate, did not
17 violate the law, that he will violate the law later. And
18 then after they made that assumption and they targeted him
19 for these undercover operations they offered him
20 opportunities to purchase child pornography, and there is
21 nothing in the evidence or in the record that indicates
22 that he ever did that.

23 QUESTION: It seems to me you are requiring more
24 than mere suspicion that he is the type of person who
25 would violate the law. You require that they know that he

1 had violated the law before. Is that --

2 MR. MOYER: That he -- I -- I am sorry.

3 QUESTION: Is that what you require, that they
4 have to suspect that he has violated the law before?

5 MR. MOYER: I don't think that the guidelines
6 that were adopted by the attorney general quite go that
7 far. I think subparagraph (a) of those guidelines say
8 that there has to be a reasonable indication based on
9 information developed through informants or other means
10 that the subject is engaging, has engaged, or is likely to
11 engage in illegal activity of a similar type. And I think
12 that is the rule that Judge Heaney was trying to arrive at
13 when he required a reasonable suspicion based upon an
14 articulable fact in his panel opinion.

15 QUESTION: Well, here it was activity of a
16 similar type, if we accept the hypothesis, but it was not
17 yet illegal, and you say that makes the difference?

18 MR. MOYER: That makes the difference, that the
19 Government is assuming that he will break the law. And
20 then, Your Honors, the Government --

21 QUESTION: Do you have authority for that
22 proposition?

23 MR. MOYER: If Your Honor please, I think that
24 the early cases that we cite in our brief all say that
25 before anything at all is done with respect to the

1 Government, with respect to the defendant. Furthermore
2 the Devitt and Blackmar instruction, the standard
3 instruction on entrapment, has stated that same language,
4 and that instruction has been given and given and given
5 and approved repeatedly by numerous of the circuits.

6 QUESTION: What, what's an example of one of the
7 early cases that you just referred to in your answer to
8 Justice Kennedy?

9 MR. MOYER: May I answer that, Your Honor, by
10 referring to footnote 3 on page 26 of the brief?

11 QUESTION: Your brief?

12 MR. MOYER: Yes, Your Honor. In which we point
13 out, there is a strip cite there, of numerous cases in
14 which the Devitt and Blackmar instruction --

15 QUESTION: These are all -- none of these are
16 from this Court, are they?

17 MR. MOYER: Those are not from this Court, Your
18 Honor. These cases are from the circuit courts.

19 QUESTION: Courts of appeals?

20 QUESTION: But your point is the Government
21 should have some, some kind of a suspicion that he, that
22 the target is likely to break the law by a certain course
23 of conduct?

24 MR. MOYER: That's correct.

25 QUESTION: It isn't that he was likely -- that

1 some time he was engaging in this activity, but he is
2 likely to continue it even though --

3 MR. MOYER: He knows it's against the law.

4 QUESTION: -- even though he knows it's illegal?

5 MR. MOYER: Even though he knows it's illegal.

6 That's correct. Now I think this Court said in the
7 Matthews case that in an entrapment situation where the
8 defendant treated -- pleaded entrapment, that the
9 defendant could -- would -- could consistently take the
10 witness stand and say that I did not intend to commit a
11 crime and that I was induced to commit the crime by the
12 Government, and he would not necessarily be lying when he
13 said that.

14 And in fact Mr. Jacobson in this case did just
15 that. He took the witness stand and he said the
16 Government induced me to buy this, and I had no idea that
17 I was committing a crime when I did it.

18 I think that the evidence also reflects, Your
19 Honor, that --

20 QUESTION: Well, does the statute require a
21 knowing receipt?

22 MR. MOYER: The statute requires that he know
23 that it is child pornography. There was an --

24 QUESTION: All right. So I take it, then, the
25 jury just disbelieved that. I mean, that's an element of

1. the offense.

2. MR. MOYER: The statute, Your Honor, does not
3. require that he know that the receipt is a crime. It only
4. requires that he know he is receiving child pornography.

5. QUESTION: That he knows that it's child
6. pornography. All right.

7. MR. MOYER: And we argued that the jury should
8. have been instructed that he had to receive, knowingly
9. receive child pornography, knowing that it was a crime,
10. and the trial court rejected that instruction, so the jury
11. never determined that issue.

12. QUESTION: Excuse me, if -- he doesn't have to
13. know it's a crime in order to be convicted, right?

14. MR. MOYER: That is correct.

15. QUESTION: Well then why --

16. MR. MOYER: And that is what -- excuse me, Your
17. Honor. That is what the district court ruled. We took
18. issue with that.

19. QUESTION: Um-hum.

20. MR. MOYER: With that ruling, and that was a
21. point that we briefed and argued rather strenuously in the
22. Eighth Circuit.

23. QUESTION: In addition to knowing that it's
24. pornography he has to know that, that it's child
25. pornography, he has to know that it's illegal to receive

1 child pornography?

2 MR. MOYER: That's right, Your Honor. That's
3 the contention that we made.

4 QUESTION: You didn't bring that point here,
5 though.

6 MR. MOYER: That was one of the issues, I think,
7 that we put in our petition for cert.

8 QUESTION: Well, your petition for certiorari
9 simply says the question you are raising is were, was your
10 client entrapped as a matter of law.

11 MR. MOYER: That was --

12 QUESTION: You just lost on your submission. So
13 if the case comes here, I guess this point is against you.

14 MR. MOYER: I'm sorry, Your Honor, I don't
15 understand the question.

16 QUESTION: Well, you raised the issue below and
17 you lost on it, that, on the question of knowing
18 illegality.

19 MR. MOYER: That's correct, Your Honor.

20 QUESTION: You lost on it. You didn't bring
21 that issue here.

22 MR. MOYER: I petitioned it here, but cert was
23 not granted on it, I believe.

24 QUESTION: Oh, okay.

25 QUESTION: Suppose we agree with the lower court

1 that ignorance of the law is no excuse, which tends to be
2 the rule. Suppose we agree with them. Then the
3 Government -- why does the Government have to show that
4 this is a person who not only acquired child pornography
5 before, but also acquired it before knowing it was in
6 violation of the law? Why does it have to prove that
7 since in order to convict you don't have to prove that he
8 knew it was in violation of the law? All you have to
9 prove is that he received child pornography.

10 MR. MOYER: Because you run the danger of
11 manufacturing crime and ensnaring people who would
12 otherwise not do what the statute prohibits them from
13 doing except by the Government inducement and the
14 Government persuasion. And I think that's --

15 QUESTION: So under your position if someone
16 uses marijuana, say in the Netherlands where it's legal,
17 that's irrelevant as to whether he is disposed to use it
18 here? I find that very difficult to accept.

19 MR. MOYER: I don't mean to suggest that the
20 fact that he has an appetite doesn't have some
21 significance, but what I think that the defense of
22 entrapment has always intended, and what was said in
23 Sorrells, is that the Government must have some reason to
24 believe that he is engaged or willing to commit the crime
25 charged in the indictment. The fact that somebody uses

1 marijuana in Denmark where it's legal, or the Netherlands
2 where it's legal, does not necessarily mean that when they
3 come to the United States they will use it. But when the
4 Government targets them five times and works on them for
5 28 months they may well induce that to happen, even
6 though --

7 QUESTION: Well, the question is one of
8 relevance, whether or not -- you're telling us it's just
9 irrelevant.

10 MR. MOYER: I'm sorry, Your Honor. I don't mean
11 to leave the impression that it is irrelevant. That is of
12 some significance. But I am saying that entrapment has
13 always focused on the willingness of the individual to
14 commit the crime, to engage in a course of criminal
15 conduct, and has not -- I think the case that puts it
16 best, Your Honor, is the Sherman case in which this Court
17 said that the Government may not play on the weakness of
18 an innocent party in order to induce them to commit a
19 crime. And that, of course, is what they are doing here.

20 They are identifying, through sexual surveys,
21 which they send to the defendant after they begin their
22 undercover operation, whether or not he has a sexual
23 preference for, I think the phrase was preteen sex. And
24 he got a 2 on that, 1 being the most interested and 2
25 being interested.

1 QUESTION: How many numbers were there?

2 MR. MOYER: I think five.

3 QUESTION: Five?

4 MR. MOYER: The fifth one is I don't know, and I
5 think the fourth one is I am not interested, and the third
6 one is I am somewhat interested. So they had those two
7 responses. And then they had a letter from him in which
8 he said that his sexual preference was young guys, 18
9 plus, doing their thing together. And what they focused
10 on was the 2 that said that he was interested in preteen
11 sex or teenage sexuality I think one of them was phrased,
12 and they worked on that. And they repeatedly offered him
13 opportunities to buy child pornography.

14 I think when you look at the inducement in the
15 case it has always been a requirement that the, in the
16 lower courts, that the defendant show some reluctance to
17 commit the offense. In this case the Government had to
18 prod the defendant to respond to the second sexual
19 attitude survey, then --

20 QUESTION: Excuse me, I thought he responded to
21 all of these quite promptly, with one --

22 MR. MOYER: No, sir, Your Honor.

23 QUESTION: -- exception.

24 MR. MOYER: No, sir, Your Honor. I don't think
25 that is the case. It's a little confusing in the record,

1 but the exhibits in this case that begin with the 100
2 number are defendant's exhibits during the
3 cross-examination of the Government's principal witness,
4 who was Calvin Comfort. Defendant's Exhibits 102 and 103
5 were produced. Now, 102, or, I see, 103 was a blank
6 sexual attitude survey, one that hadn't been filled out,
7 and the Government agent testified that he had gotten that
8 blank sexual attitude survey from the Government agent.

9 And then Exhibit 102 was a later letter that the
10 Government agent had sent him, posing as a Gerri Ellis of
11 the Heartland Institute for a New Tomorrow, in which she,
12 or that is the Government agent, said, you didn't answer
13 the sexual attitude survey and won't you please help us.
14 We are an organization that believes in sexual freedom and
15 freedom of choice, and we need the --

16 QUESTION: I thought he wrote that he hadn't
17 gotten the sexual attitude survey. I thought that's what
18 had happened, but then --

19 MR. MOYER: Excuse me, Your Honor. He did not
20 write that. He never sent that letter to the Government
21 agent. That letter was in his home when the home was
22 searched, and it was in our possession at the trial and we
23 produced it. He typed that on the letter, but then he
24 never sent it. He just sent back the completed sexual
25 attitude survey after they prompted him to send it in.

1 And we, we produced the letter to show that they had
2 prompted him.

3 Another time that, of course, that he evidenced
4 reluctance was when the American Hedonist Society sent him
5 a list of supposed persons who supposedly had the same
6 sexual interests as he had, and he did not correspond with
7 any of them. At that juncture the Government itself
8 prompted him by initiating the correspondence under the
9 guise of Carl Long.

10 I think even more significantly, however, was
11 the American Hedonist Society undercover operation. The
12 Hedonist Society had a letter called, The Little Light, a
13 newsletter that he was supposed to get quarterly, and the
14 postal inspector testified that he put his name on the
15 mailing list and that he started to send him the
16 newsletter. And then he was asked what did the American
17 Hedonist Society offer its members, and he responded child
18 pornography.

19 Now, when they searched Mr. Jacobson's home they
20 didn't find any newsletters, and we didn't. We looked, we
21 couldn't find any ourselves. And apparently he had thrown
22 away all these newsletters which offered child pornography
23 in the form of advertising which the postal inspectors had
24 of course planted in the magazine, and he never responded
25 to one of their ads, although I think the Court does have

1 Exhibit 119(a) in which he did fill out an ad that he
2 wanted to place but again which he never sent to the
3 American Hedonist Society.

4 So by the time they get down here to this last
5 operation, the Operation Looking Glass in which he finally
6 buys the child pornography, they have tried him three
7 different times and they have been unable to induce him in
8 any of these three different undercover operations to buy
9 child pornography. And if he got eight newsletters, which
10 would be approximately the right number, between the time
11 that he was enrolled in the Looking Glass survey and the
12 time that he was enrolled in the Looking Glass sting and
13 the time that he was enrolled in the Hedonist survey, then
14 he would have been solicited in some way, in some form,
15 for child pornography something like 8 to 11 times.

16 QUESTION: Did he testify as to the number of
17 times he was solicited and this sort of thing?

18 MR. MOYER: I don't believe he did, Your Honor.
19 I think we take that inference from the testimony of the
20 Government's agents and their cross-examinations.

21 QUESTION: He did testify in some other aspects
22 of the case, did he not?

23 MR. MOYER: He testified, yes, to his, to some
24 other aspects of the case.

25 QUESTION: You're talking as though each contact

1 was a contact that offered him child pornography, and
2 that's not how I understand the record. Some of the
3 contacts just asked him about his attitudes and he
4 responded to some of those. It wasn't he was offered
5 child pornography 11 times, turned them down, and the
6 Government continued to nag him until he finally bought
7 one. There wasn't an offer every one of those 11 times,
8 was there?

9 MR. MOYER: No, sir, there was not. But there
10 were at least eight offers, and that is where the Carl
11 Long correspondence was leading, because that's how the
12 Carl Long tactic works. According to the agent who
13 employed it, you try to mirror the personality of the
14 individual with whom you are corresponding in order to
15 find out what their interests are and, if they are
16 willing, to get them to send you child pornography through
17 the mails. And they were unable to get Mr. Jacobson
18 sufficiently interested in the correspondence to even
19 continue to write to the Government agent.

20 Now, of course, the purpose of all this is plain
21 from the Government's brief and the amicus briefs. They
22 are trying to penetrate the child pornography underground.
23 They are trying to see if this man is a man who collects
24 child pornography and habitually sends it through the
25 mails to other persons who have similar pedophilic

1 interests. And the fact that he didn't continue the Carl
2 Long correspondence is pretty conclusive evidence that he
3 was not a member of the child pornography underground and
4 that he was not trading child pornography with other
5 persons with pedophilic interests.

6 And at that point we contend that even if there
7 was some evidence at the beginning that he had an interest
8 in this stuff, it was crystal clear to the Government that
9 he had not been breaking the law and was not breaking the
10 law and couldn't be induced to breaking the law after the
11 third sting operation, which was over a year after the
12 first one, and at that point he should have been left
13 alone. And --

14 Your Honor, I'd like to reserve the balance of
15 my time for rebuttal.

16 QUESTION: Very well, Mr. Moyer.

17 Mr. Larkin, we'll hear from you.

18 ORAL ARGUMENT OF PAUL J. LARKIN, JR.

19 ON BEHALF OF THE RESPONDENT

20 MR. LARKIN: Thank you, Mr. Chief Justice, and
21 may it please the Court:

22 The short answer to every argument that
23 petitioner has made here today and in his brief can be
24 found in the two magazines, Bare Boys I and Bare Boys II,
25 that were discovered during the May 1984 search of the

1 Electric Moon. Those magazines are demonstrably not, as
2 the dissent below said and as petitioner has again said
3 here today, mere nudist magazines. On the contrary, those
4 magazines consist almost exclusively of photographs of
5 teenage and preteen boys naked, posing spread-legged in
6 bed or in other poses that graphically focus on their
7 genitalia.

8 QUESTION: I happened to look through them and
9 most of them are boys standing up all by themselves.

10 MR. LARKIN: And yet in the covers on both
11 magazines and in several other of the pictures it is clear
12 that what you have is someone who is posed in a picture in
13 order to focus on the genitalia. That is not a mere
14 nudist magazine.

15 QUESTION: It's different from what your
16 description was, though.

17 MR. LARKIN: Well, a mere nudist magazine would
18 be, as I am told by the Postal Service, would be a
19 picture, for example, pictures of a nudist colony where
20 you have people, for example, of both genders and all ages
21 in all sorts of activities. These magazines clearly are
22 designed to focus on the genitalia of young boys.

23 QUESTION: Do you agree that it was not unlawful
24 to purchase them at the time they were purchased?

25 MR. LARKIN: It was not a violation of Federal

1 law, yes. I do not know, do not believe it was a
2 violation of State law.

3 QUESTION: May I ask you, since you say that's
4 the short answer to the whole case and since you concede
5 that at that time nothing illegal had transpired, take
6 Justice Kennedy's hypothetical of someone who regularly
7 used marijuana in a foreign country where it was lawful,
8 and you had nothing except that evidence to support the
9 predisposition count if you found the person eventually in
10 possession of marijuana that a Government agent had
11 somehow or other delivered to him. Would that prior
12 evidence be sufficient to establish predisposition?

13 MR. LARKIN: It's sufficient to allow the
14 question to go to the jury, yes. For example --

15 QUESTION: It's sufficient to establish it, too,
16 because --

17 MR. LARKIN: That's right. For example, it was
18 not a violation of Federal law prior to 1970 to consume or
19 possess with the intent to distribute or to distribute
20 LSD. So if a person throughout the sixties was a major
21 dealer in LSD he would have been distributing it at a time
22 when it didn't violate Federal law.

23 QUESTION: What if he just purchased one item 5
24 years earlier?

25 MR. LARKIN: Well, that may not be sufficient to

1 show that he possessed with the intent to distribute,
2 which is what you have to make out before you get to the
3 entrapment defense.

4 QUESTION: But here we don't have an attempt to
5 distribute. Mere possession is not -- you have to have a
6 parallel example, you have to have an offense consisting
7 of mere possession.

8 MR. LARKIN: Well, it's receipt, not mere
9 possession that we have here. And what we have here, it's
10 clear when you look at the magazines, is someone who is
11 willing to receive this type of material through the mail.

12 QUESTION: But of course he hadn't seen the
13 second set of magazines at the time he ordered them.

14 MR. LARKIN: When you say the second set, I'm
15 not sure which ones you mean.

16 QUESTION: The ones -- the crime he committed.

17 MR. LARKIN: That's right.

18 QUESTION: He had seen the 1984 magazine, but
19 that, he's not being put in jail or punished for that.

20 MR. LARKIN: That's correct.

21 QUESTION: He's being punished for a magazine
22 that he ordered without seeing it.

23 MR. LARKIN: Oh, yes. But there is no, he had
24 no doubt what it was, what it contained. If you looked at
25 page 9 of our brief you'll see we have quoted from the

1 Government exhibit that describes what that magazine
2 contains, and -- it's on the right-hand side and I'll read
3 it to you. The catalog described the contents of the
4 magazine as follows; 11-year-old and 14-year-old boys get
5 it on in every way possible. And I'll leave the rest for
6 the Court to read. There's no doubt that when he ordered
7 GX4, the magazine that led to his conviction, he knew what
8 he was getting through the mails, and he doesn't even
9 claim here in court today that he -- we somehow duped him
10 into believing that what he was receiving was not child
11 pornography.

12 As I understand his argument, his argument is we
13 somehow duped him into believing that it was legal to
14 receive child pornography. Well, the statute doesn't
15 require us to prove a willful element, which sometimes
16 shows up in other statutes where you have to show someone
17 not only committed acts that were a violation of the law,
18 but knew at the time he committed those acts that it was
19 illegal to do so. This statute doesn't require that. It
20 requires a knowing receipt --

21 QUESTION: No, I understand that, but I
22 understand your opponent to be arguing that predisposition
23 must rest on some evidence that he was willing to violate
24 the law and had previously, before the Government engaged
25 in the attempt to induce him to engage in this

1 transaction, had previously done something that he thought
2 was illegal. Do you have any cases that are like this in
3 the sense that the prior, that the activity prior to the
4 contact by the Government did not involve any knowledge of
5 illegality?

6 MR. LARKIN: No, what you're -- if what you're
7 asking is do I have any change in the law cases where on
8 day -- on a certain day something that was not previously
9 illegal became illegal, I don't have any case dealing with
10 that problem. But if, but I think what you have here is
11 not the type of material that is, it can be described as
12 innocuous, as Justice Scalia --

13 QUESTION: No, you're relying on evidence, and
14 maybe that's enough, of his knowledge after the Government
15 began its program. Prior to the Government's first
16 contact with him there is no evidence that he had ever
17 done anything knowing it to be unlawful, isn't that
18 correct?

19 MR. LARKIN: That's correct. But that's not
20 required.

21 QUESTION: And do -- well, I understand, but do
22 you have any cases saying it's not required?

23 MR. LARKIN: No. No. Because that problem --

24 QUESTION: So this, whichever way we go we're
25 going to have to make a little new law today.

1 MR. LARKIN: I suppose, on that point.

2 QUESTION: Yeah.

3 MR. LARKIN: Because normally what you have is a
4 situation where someone is engaged in a course of conduct
5 that is known to be illegal, and the question is just
6 whether this person committed the crime because the
7 criminal design was implanted in his head by the
8 Government or committed the crime of his own free will.
9 Now, in this case we think the evidence shows without a
10 doubt that he was predisposed, that a reasonable jury
11 could find that he was predisposed. As I said, those two
12 magazines themselves allow a reasonable jury to find that
13 he was predisposed.

14 QUESTION: You don't, I take it you are not
15 suggesting that the Government didn't need to have some
16 basis for targeting this man?

17 MR. LARKIN: Well, I am, I would be willing to
18 defend the proposition, and will do so now if you like,
19 that we don't need a reasonable suspicion before targeting
20 a sting. And I will defend that both in terms of
21 entrapment and in terms of the Constitution.

22 QUESTION: Is there some -- there is a
23 predisposition requirement, I suppose, but is that
24 satisfied just by the fact that he ultimately commits the
25 crime?

1 MR. LARKIN: It can be, yes. That it can be in
2 the terms that Judge Hand once used, ready complacence.
3 For example, if the Government sets up --

4 QUESTION: Well, let's assume in this case they
5 had no evidence, no indication that, any of this evidence
6 until they targeted him and then they finally induced him
7 to buy. That would be enough?

8 MR. LARKIN: That would be enough. That's
9 exact -- that's not all that different, I think, from the
10 example that Justice O'Connor mentioned of opening up a
11 pawn shop. It's not an uncommon practice to open up a
12 pawn shop to see who is going to bring in stolen items,
13 and there we don't have reasonable suspicion as to any one
14 person.

15 QUESTION: In fact isn't that a very common
16 practice throughout the country in an effort to find
17 burglar rings and so forth?

18 MR. LARKIN: Correct. And those sorts of
19 matters don't have a reasonable suspicion focusing --

20 QUESTION: Well, I know, but that's passive
21 Government conduct. They set up the pawn shop all right,
22 but the only people who come in are people who are
23 interested in doing something. But how about just
24 targeting a person and pursuing him?

25 MR. LARKIN: Well, Your Honor, this is not the

1 type of targeting and pursuing that the Court had in
2 Sherman, so I'm not really sure it's fair to use it in
3 that aggressive sense. This case is materially different
4 from Sherman, which is the only case where the Court has
5 ever held someone was entrapped as a matter of law.

6 QUESTION: Well, I ask you again, suppose that
7 they didn't have this evidence of his ordering these
8 magazines before but they just happened to target this man
9 and pursue him. They did, they contacted him time after
10 time. Finally he bought, and I take it -- and your
11 submission is that would be just fine.

12 MR. LARKIN: That would go to the jury, and it
13 would be up to the jury to decide whether --

14 QUESTION: Whether he had a predisposition.

15 MR. LARKIN: Correct. This case, as I started
16 to say, is materially different from Sherman. In Sherman,
17 to use the vernacular, the Government leaned on Sherman
18 and leaned on him hard. You had repeated face-to-face
19 contacts. Here, by contrast, all the contacts are through
20 the mail. There was no more burden on the petitioner than
21 is the burden on anyone who wants to get rid of material
22 they received through the mail they don't want.

23 QUESTION: Mr. Larkin, is this similar to some
24 of the sting operations involving public officials around
25 the country?

1 MR. LARKIN: Well, I do not think we have the
2 sort of mailings that go on in public official cases.

3 QUESTION: Well, you have somebody posing as
4 someone who wants a vote in exchange for financial
5 benefits.

6 MR. LARKIN: You can have that, and you can have
7 a situation in which you don't have everything happen in
8 the course of a short period of time like you would in the
9 pawn shop example. In the pawn shop example somebody
10 walks in, makes the sale, and that's it. It happened very
11 quickly. In other types of undercover operations it may
12 take longer. It may take longer because the person
13 involved is very cagey. And you can't, I think, criticize
14 the way the investigation is conducted by looking at it on
15 an ex post basis.

16 This is what the Postal Service knew when they
17 searched the Electric Moon in May of 1984. They knew the
18 petitioner had ordered Bare Boys I and II through the
19 mail, and they knew what was in Bare Boys I and II. If
20 you looked at page 21 of the transcript there's a
21 stipulation to that effect. In addition, Exhibit 1
22 attached to the affidavit in support of the search warrant
23 application contains a 2-page report summarizing the
24 search of Electric Moon that was sent out by the San Diego
25 postal inspectors.

1 The Postal Service also knew that people who are
2 interested in this sort of material oftentimes will trade
3 it amongst themselves through the mail, discreetly,
4 because this is a very clandestine opportunity. They will
5 sometimes produce this material themselves using children
6 as the actual actors and victims, and they will sometimes
7 also use this type of material as a means of enticing,
8 seducing, instructing, and then molesting and blackmailing
9 children. The Postal Service --

10 QUESTION: But there's no evidence that this man
11 did any of those things, is there?

12 MR. LARKIN: I'm not accusing him of that, but
13 the point is this. You can't --

14 QUESTION: And probably by the time, by
15 2 -- after 2 years of investigation the Government was
16 reasonably convinced there was no danger of any of that,
17 wasn't there?

18 MR. LARKIN: I don't think it's fair to say --

19 QUESTION: He never, he never mailed any
20 pictures back, he never described that kind of activity,
21 he denied having engaged in that kind of, the pedophilia
22 itself.

23 MR. LARKIN: Your Honor, the responses here are
24 no more inconsistent with the conclusion that he could
25 have been involved in the production of this material or

1 he could have been involved with child molesting than that
2 he wasn't. The Postal Service didn't know. And what,
3 just as you can't justify a search by the fact that
4 uncovers contraband and thereby retroactively render the
5 search lawful, you can't retroactively, I think, undo the
6 search that discovers, or an investigation that discovers
7 someone has broken the law simply because he hasn't
8 committed an even more heinous crime than you ultimately
9 discover.

10 The Postal Service just didn't have complete
11 knowledge, Your Honor. The only thing they could do when
12 they had the two magazines in their possession and knew
13 what they contained was engage in these sort of low-key
14 step-by-step contacts to find out if, for example, maybe
15 there was some horrible mistake made and petitioner's name
16 shouldn't have been on the mailing list. So they engaged
17 in this sort of conduct over time. The record doesn't
18 contain eight offers to sell child pornography. The
19 record contains the two, Produit Outaouais by the Custom
20 Service and the magazine that was sent out from the Postal
21 Service saying a part of Project Looking Glass by the Far
22 Eastern Corporation.

23 They engaged in this conduct in part, I think
24 it's reasonable to infer, to see if petitioner would send
25 them material through the mail, not simply to see if he

1 would purchase it. I mean, after all, petitioner did send
2 one thing through the mail. If you look at his response
3 to the second Carl Long letter you will see he sent the
4 magazine, part of the New York Native, through the mail to
5 Carl Long. So they had a variety --

6 QUESTION: Is that a -- just out of curiosity, I
7 didn't know about -- is that an illegal mailing?

8 MR. LARKIN: I do not believe that you could
9 charge the defendant, excuse me, the petitioner in this
10 case with sending that magazine because it didn't contain
11 the types of pictures that you would have. But I think
12 it's fair to say that it would certainly warrant your
13 interest given that -- the magazine itself and the stories
14 that are in it. So I think it's fair to say that what you
15 have here is not by any means a sort of overbearing type
16 of investigation that you had in Sherman.

17 I mean, the Far Eastern Trading Company that
18 mailed out the brochure and that mailed out the letter
19 beforehand describing the brochure wasn't trying to elicit
20 sympathy. It was trying to sell a product. Calchini, the
21 informant in the Sherman case, was trying to elicit
22 sympathy, and of a type that most people could succumb to.
23 It was a sympathy towards a person who was attempting to
24 go, a cleansing process to get rid of his drug addiction
25 but couldn't do it and was in the agonies of withdrawal.

1 And Sherman wound up breaking the law, and the Court said
2 he was entrapped as a matter of law.

3 That isn't remotely the type of case we have
4 here. As I said, these contacts are through the mail,
5 they're not face-to-face. There was no indication that
6 he --

7 QUESTION: What if they had been face-to-face
8 and instead of what is written on paper in the
9 correspondence it had been said orally? Would it be a
10 different case?

11 MR. LARKIN: No, because you also don't have the
12 reluctance that you did in the Sherman case. He responded
13 rather quickly --

14 QUESTION: Two and a half years isn't
15 reluctance. Two and a half years of failing to make a
16 purchase of this kind is not reluctance.

17 MR. LARKIN: No, because the, there was a great
18 deal of time in between these individual contacts. I
19 mean, these contacts didn't occur over the course of a
20 week or 2 weeks. He responded to the survey questions.
21 For example, petitioner is right that Defense Exhibit 102
22 wasn't sent back through the mails, but the survey was
23 sent back through the mails. It was sent back to HINT.
24 And all these other items were sent back. They didn't
25 indicate that he was reluctant.

1 At no time did he throw these in the garbage
2 can. At no time did he contact the police. These sort of
3 inducements, if you will, that the Government engaged in
4 here are not this type of inducements that would break
5 down the will of a reasonable person. And unless that's
6 true you don't even have inducement. Even if you do, I
7 think it's fair to say the initial evidence the Government
8 had here, as well as the evidence the Government acquired
9 during the course of this investigation, were ample to
10 raise a jury question on whether or not he was
11 predisposed. And they also, I think, amply satisfied any
12 reasonable suspicion standard that the Court could adopt.

13 QUESTION: Did they, did the jury instructions
14 define predisposition?

15 MR. LARKIN: They did not. They talked more in
16 terms of --

17 QUESTION: How about when there should be
18 evidence of a predisposition?

19 MR. LARKIN: Well, they didn't say when there
20 had to be evidence of predisposition, but what the jury
21 instructions did say, and they are at pages 11 to 12 of
22 the Joint Appendix, say that the predisposition had to
23 arise before the contacts. So to that extent the
24 instructions were about as favorable to the defendant as I
25 think he would want.

1 QUESTION: Before -- there had to have been a
2 predisposition before the contacts?

3 MR. LARKIN: The predis --

4 QUESTION: The jury must find that there --

5 MR. LARKIN: They had to find that he was
6 predisposed before the contacts.

7 QUESTION: Yeah.

8 QUESTION: Well, then the case does present the
9 question -- I hadn't quite realized -- does present the
10 question of whether legal conduct, you know, with the
11 same -- whether the legal conduct before any contact is
12 sufficient as a matter of law.

13 MR. LARKIN: Well, if the jury instruction --

14 QUESTION: It isn't necessarily found. They
15 necessarily have to have relied on the two 1984 --

16 MR. LARKIN: No, no, not -- because the jury
17 instructions in that respect are probably more favorable
18 to the defendant than they needed be. The important point
19 on predisposition, I think, is this. It's a causation
20 question. The Government can't cause the defendant to
21 commit the crime. If the predisposition arises in a
22 defendant because the Government implanted it in the
23 defendant, then the defendant is not predisposed and he is
24 not guilty.

25 But you can have a situation where you have an

1 undercover operation that goes on for a long period of
2 time and during this entire course of conduct there is
3 evidence of different types of transactions between the
4 parties and that evidence can be used by the defendant to
5 show that he was forced into committing this and he
6 wasn't --

7 QUESTION: Or it can be used to show that just
8 because he finally committed the crime that there, that he
9 was, prior to the first contact, predisposed.

10 MR. LARKIN: Well, that's right. The Government
11 can't lean on you and force you to commit a crime. That's
12 what the entrapment defense is designed to protect. But
13 that's not what we have here. We have a situation here, I
14 think, where the Government's evidence in this case,
15 considered as a whole, raised a legitimate question for
16 the jury to decide on this issue, and that --

17 QUESTION: Mr. Larkin, if the Bare Boys I and II
18 evidence was not found and they had just sent out general
19 mailers, would there have been entrapment, then, according
20 to instruction number 15 at page 11, because then there
21 would be no evidence that he had the predisposition before
22 the first contact.

23 MR. LARKIN: No --

24 QUESTION: So does your whole case depend on
25 Bare Boys I or II, or am I misreading the instruction?

1 MR. LARKIN: No, I think -- the way I would read
2 that, I think it is best read this way, is the state of
3 mind has to have arisen before that. But you can rely on
4 the evidence that occurs during this course of conduct to
5 determine whether back at the initial point he was
6 predisposed.

7 QUESTION: There was predisposition.

8 MR. LARKIN: See, the predisposition may have to
9 arise at that initial point, but that doesn't mean you
10 don't have to, you can't consider or you shouldn't
11 consider all the ensuing evidence. And all the ensuing
12 evidence in this case, I will be ready to admit, confirmed
13 what the Postal Service knew initially. There was reason
14 to suspect that petitioner was willing to purchase child
15 pornography through the mail. And as long as there is a
16 jury question, the district court properly let the case go
17 to the jury, and the Eighth Circuit properly affirmed it.

18 QUESTION: In other words the -- excuse me.

19 QUESTION: Go ahead.

20 QUESTION: In other words the contact can be
21 made even before there is evidence of predisposition?

22 MR. LARKIN: Yes. If, for example, the
23 Government, in, for example, Justice O'Connor's example,
24 sets up the pawn shop, you have contact before the
25 predisposition arises.

1 QUESTION: Well, I take it that, I take it that
2 it would be all right for the Government, then, to,
3 without any prior experience with the person, to target
4 that person and in the course of things offer him
5 something and the fellow says, is this legal, and the
6 Government says of course it is, and he buys. Would that
7 be evidence of predisposition?

8 MR. LARKIN: Well, the fact that he jumped at
9 the opportunity is evidence of predisposition. I mean, if
10 an undercover police officer --

11 QUESTION: But wouldn't that sort of qualify as
12 leaning on a fellow?

13 MR. LARKIN: It depends how he did that. The
14 undercover police officer --

15 QUESTION: He just asked, by the way, I don't
16 want to commit a crime, but is buying this stuff legal,
17 and the Government says sure.

18 MR. LARKIN: Well, sure, but in the narcotics
19 example --

20 QUESTION: Well, would that be leaning on him or
21 not?

22 MR. LARKIN: No. It would not.

23 QUESTION: So it would, so he, so there
24 wouldn't -- the conviction would stand?

25 MR. LARKIN: Correct.

1 QUESTION: But it would be leaning on him if it
2 were a crime of willfulness that he was charged with,
3 wouldn't it?

4 MR. LARKIN: You wouldn't be able, I think, in
5 that context to make out that he -- you might not be able
6 to make out that he knew it was illegal.

7 QUESTION: That's funny.

8 MR. LARKIN: But I don't think it would amount
9 to leaning on him in the sense that I am talking about.
10 It's not leaning on him to mislead him. It's leaning on
11 him to take advantage of his sympathies.

12 QUESTION: To mislead him to think it's legal
13 when it's illegal? You don't really think the Government
14 can do that, do you?

15 MR. LARKIN: Well, the Government can't do it if
16 a police officer in uniform says, it's okay to purchase
17 cocaine, go ahead.

18 QUESTION: Right.

19 MR. LARKIN: That's a crime for the police
20 officer to do that, because he is encouraging somebody to
21 break the law and he shouldn't. But if it's an undercover
22 officer and the undercover officer says to somebody this
23 is, you know, a new designer drug and it's not yet been
24 listed on the Attorney General's prescription list,
25 prohibited list, in that context the defendant I don't

1 think is able to say the Government misled him into
2 believing that he shouldn't have committed this crime.

3 QUESTION: Yeah, but it is on the list. It is
4 on the list and he says it isn't.

5 MR. LARKIN: That's right. Well, that doesn't
6 amount to the type of coercion that the entrapment defense
7 is designed to get at.

8 QUESTION: All right, but go back --

9 QUESTION: You just lost me, Mr. Larkin. I
10 think you've gone too far now. That's --

11 (Laughter.)

12 QUESTION: Go back to the related question of
13 what it shows about predisposition. If it's a willfulness
14 crime and your only evidence is that before he committed
15 the prior act he said is this -- I am sorry, and your only
16 evidence is that he committed acts which were not unlawful
17 at the time he committed them, that would not be
18 sufficient evidence of a predisposition to commit a
19 willfulness crime, would it?

20 MR. LARKIN: I think generally not, but it would
21 depend, for example, on the type of action. If it were
22 one, for example, that for some reason was a malum in se
23 or that caused a great deal of social harm I think it
24 would be fair to say that you, in some circumstances you
25 could leave it to the jury. Otherwise someone could make

1 these sort of contacts and with a wink and a nod just say,
2 oh, and it's perfectly legal --

3 QUESTION: Yeah, but malum in se crimes aren't
4 likely to be willfulness crimes.

5 MR. LARKIN: Well, that is true, but if there
6 were such a circumstance I wouldn't want to put beyond the
7 possibility that the situation could arise.

8 QUESTION: It would be a very peculiar
9 circumstance, though, wouldn't it?

10 MR. LARKIN: That's right.

11 QUESTION: I mean, that's highly unlikely.

12 MR. LARKIN: Most cases where you have a
13 willfulness crime you have a situation in which someone
14 has to know he is violating the law, and where someone
15 doesn't know he is violating the law you don't even get to
16 the entrapment defense because the Government wouldn't
17 have proven the basic elements of its burden to show that
18 the person committed the crime. But that isn't this case.

19 QUESTION: Our previous cases haven't parsed
20 this matter quite so finely, have they, made kind of a
21 minuet out of it. They have simply, in Sherman they
22 identified all the facts which led the Court to conclude
23 there was entrapment as a matter of law, but it didn't go
24 into a lot of discussion of what had to come first.

25 MR. LARKIN: No, no. And I'm not in any way

1 suggesting the Court has to in this case. This is not a
2 complicated case. The evidence in this case that we
3 introduced throughout the entire course of conduct we
4 think was sufficient to raise a jury question. That's all
5 that has to be decided here, because if you decide there
6 was a valid question for the jury, the district court
7 acted properly in submitting the question to the jury and
8 the Eighth Circuit acted properly in sustaining it.

9 QUESTION: But, yet, Mr. Larkin, let me just
10 follow up on something you said. First of all, if the
11 evidence that he engaged in a lawful but shabby
12 transaction back in 1984 is not sufficient because you
13 have to prove intent to violate the law, then you would
14 have to also support it by stuff like the language that
15 you called our attention to on page 9 which was shortly
16 before the actual purchase, which does, I have to agree,
17 is very strong evidence of a willingness to violate the
18 law at that time. But you say that must also prove a
19 willingness to violate the law before the Government began
20 its program back in 1985, I guess it was. Isn't that
21 right?

22 MR. LARKIN: I'm not sure I understand your
23 question.

24 QUESTION: Well, I think we have all finally
25 distilled the requirement that there must have been

1 evidence of a predisposition to violate the law before the
2 Government's first contact in 1985, which could be
3 established in one of two ways; by the original purchase
4 of a unlawful piece of material, and later by responding
5 to solicitations which were rather, plainly indicated
6 something illegal. But those were way, two and a half
7 years later. And so you have to say in effect from what
8 he did in 1987 you can reasonably infer that back in 1984
9 he was also then willing to violate the law. That's
10 really what you're saying is that that's a reasonable
11 inference.

12 MR. LARKIN: Well, I would say you have to, you
13 can make that inference, but I would also add, and I think
14 you have left out all the other evidence that came in
15 between.

16 QUESTION: Yes, but does any of the other
17 evidence between the original contact by the Government
18 and the final purchase in 1987 contain the same type of
19 graphic indication that it was probably illegal?

20 MR. LARKIN: I think the purchase from the
21 Customs operation, from Produit Outaouais, comes close,
22 but it is not as graphic as the one from the Postal
23 Service.

24 QUESTION: And that's, of course, the actual
25 material there is not in the record, is it?

1 MR. LARKIN: That's right, but what you have is
2 the order --

3 QUESTION: Right.

4 MR. LARKIN: -- the way it's described. You
5 don't have the actual material.

6 QUESTION: And when was that?

7 MR. LARKIN: That was in, I think, March of
8 1987.

9 QUESTION: Well, so there must be, there must be
10 some evidence -- I guess the judge has to be convinced
11 that there's enough evidence to show a predisposition
12 prior to the first contact, but that evidence doesn't have
13 to be evidence of facts or conduct prior to the contact?

14 MR. LARKIN: Correct. Correct.

15 QUESTION: And it -- well, that answers it. In
16 other words the Government doesn't have to know of that
17 evidence at the time that it makes the contact?

18 MR. LARKIN: Correct.

19 QUESTION: I thought you said you were, you
20 didn't concede that there has to be evidence of
21 predisposition before the first contact. I thought you
22 said you were willing to take that on but you don't really
23 think that's essential.

24 MR. LARKIN: It's certainly not essential.

25 QUESTION: What do you do about the pawn shop?

1 The Government sets up a pawn shop and I see the pawn
2 shop, I have no predisposition. I get to thinking about
3 it, gee, there's a pawn shop. I can take anything in
4 there, they don't know whether it's mine or not. And I,
5 and so I thereafter conceive the idea of stealing
6 something and bringing it to the pawn shop.

7 MR. LARKIN: I don't think --

8 QUESTION: Are you saying that that, that I have
9 been entrapped now because I did not have the
10 predisposition when I first --

11 MR. LARKIN: No, no. The evidence can be
12 acquired at a later point, it's just that it has to refer
13 back to that earlier point. You don't have to have --

14 QUESTION: His coming to the pawn shop shows
15 that he had a pre --

16 MR. LARKIN: Shows that he's predisposed --

17 QUESTION: He had a predisposition.

18 MR. LARKIN: -- to sell the material. You can
19 use the evidence during the course of conduct, as I
20 mentioned to Justice Kennedy.

21 Thank you.

22 QUESTION: Thank you, Mr. Larkin.

23 Mr. Moyer, you have 3 minutes remaining.

24 REBUTTAL ARGUMENT OF GEORGE H. MOYER, JR.

25 ON BEHALF OF THE PETITIONER

1 MR. MOYER: Thank you, Your Honor. Mr. Justice
2 Rehnquist, excuse me. Mr. Chief Justice Rehnquist, excuse
3 me.

4 To return to the question you asked me, Mr.
5 Chief Justice, I would call the Court's attention also to
6 page 13 of our reply brief in which we quote from Mr.
7 Justice Roberts' concurring opinion in Sorrells v. United
8 States where he says that it has been generally held where
9 the defendant has proved an entrapment it is permissible
10 to show in rebuttal that the officer guilty of incitement
11 of the crime had reasonable cause to believe the defendant
12 was a person disposed to commit the offense. This
13 procedure is approved by the majority opinion of this
14 Court.

15 QUESTION: Well, most of Mr. Justice Roberts'
16 opinion was not approved by the majority in Sorrells. And
17 again in Sherman the Court was asked to adopt his
18 concurring opinion in Sorrells and it refused to do that.

19 MR. MOYER: That's correct, Your Honor, and I
20 don't cite the concurring opinion for that proposition. I
21 cite it for the proposition that Mr. Justice Roberts there
22 mentions that the majority opinion in Sorrells recognizes
23 that the practice had been, at that time, at the time
24 Sorrells was decided, and I think your question went to
25 whether or not I had any authority from this Court, that

1 the majority opinion approved the practice of showing that
2 the officer guilty of incitement of the crime had
3 reasonable cause to believe the defendant was a person
4 committed, or predisposed to commit the offense. And that
5 is the point that I wish to make.

6 QUESTION: Mr. Moyer, I've been thinking, if we
7 adopted that proposition that you are urging on us, that
8 it's unlawful for the Government to approach a person
9 unless the Government knows in advance of approaching him
10 that he has the predisposition, then I guess the
11 Government couldn't put an ad in a magazine, you know,
12 that suggested that it has child pornography for sale.
13 Right? Because that ad would get to all sorts of people,
14 including people that don't have the predisposition, and
15 any conviction derived from that would be invalid. Is
16 that right?

17 MR. MOYER: Justice Scalia, I think you have to
18 distinguish between the subparagraph (a) sting that the
19 Attorney General describes in his guidelines and the
20 column (b) sting, or subparagraph (b) sting. I think the
21 ad is of the (b) sting variety and the pawn shop is of the
22 (b) sting variety. In other words, you're putting up an
23 opportunity for illegal activity which has been structured
24 so that there is a reason for believing that those drawn
25 to the opportunity are predisposed to commit it.

1 QUESTION: I don't see a whole lot of difference
2 between, you know, a throwaway in the mail and an ad in
3 the newspaper. I mean, they're both standard ways of
4 advertising the availability of something.

5 MR. MOYER: In this particular instance, Your
6 Honor, it's clear that Mr. Jacobson was the target of a
7 Government undercover operation. He had not committed any
8 crime before they targeted him, and that would clearly
9 fall under subparagraph (a) where the Attorney General has
10 said that there is a reasonable indication based on
11 information developed through informants or other means
12 that the subject is engaging, has engaged, or is likely to
13 engage in illegal activities of a similar nature.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Moyer.
15 The case is submitted.

16 (Whereupon, at 1:55 p.m., the case in the
17 above-entitled matter was submitted.)

18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-1124 - KEITH JACOBSON, Petitioner V. UNITED STATES

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

91 NOV 15 AM 11:25