In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1301

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT SHAWN ANDERSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.
No. 2:20-cr-20022-MMM-EIL-1 — **Michael M. Mihm**, *Judge*.

ARGUED SEPTEMBER 22, 2022 — DECIDED DECEMBER 15, 2022

Before WOOD, HAMILTON, and ST. EVE, *Circuit Judges*.

HAMILTON, *Circuit Judge*. After exchanging hundreds of messages with an FBI agent—who posed first as an 18-year-old woman and then as a 15-year-old girl—and driving to a planned rendezvous at a gas station, appellant Robert Anderson was charged with and convicted of attempted enticement of a minor in violation of 18 U.S.C. § 2422(b). Anderson has appealed on one issue: whether he offered sufficient evidence of entrapment to have the jury instructed on that defense. In

United States v. Mayfield, 771 F.3d 417 (7th Cir. 2014) (en banc), we clarified that legal standard. We held that a defendant who offers "some evidence" of both government inducement and his own lack of predisposition is entitled to have the entrapment defense submitted to the jury. *Id.* at 443.

As we explain below, the district court here erred by preventing Anderson from presenting his entrapment defense to the jury. On this record, a jury could find government inducement in the form of what *Mayfield* called "subtle, persistent, or persuasive conduct." As for predisposition, Anderson had no record of any sexual misconduct or any other offenses against children. It was the government agent, not Anderson, who first suggested a criminal liaison. Anderson repeatedly expressed reluctance, and the agent responded with persistent coaxing and persuasion. In the end, though, Anderson did agree to meet for sex someone he thought was an underage girl. We offer no prediction about whether his defense should succeed at trial, but under *Mayfield*, that was an issue for the jury, not the court.

I. *Factual and Legal Background*

A. *Enticement and Entrapment*

It is a federal crime for an adult to use a means of interstate commerce, such as communications over the internet, to entice a minor to engage in sexual activity. It is also a crime for an adult to use such means to attempt to entice someone he believes to be a minor to engage in sexual activity. 18 U.S.C. § 2422(b).

Entrapment by the government is a complete defense to the crime. To establish the defense, the accused must come forward with evidence that he was not predisposed to commit

the crime and that the government induced him to commit it. *Mayfield*, 771 F.3d at 442. Predisposition refers to whether the defendant was likely to commit the crime, even without government intervention. *Id.* Inducement means government solicitation of the crime "*plus* some other government conduct" that risks causing someone to commit the crime even if he would not have done so "if left to his own devices." *Id.* at 434–35 (emphasis in original). If the accused offers some evidence on both points, the defense should be submitted to the jury with instructions that the government has the burden of disproving entrapment beyond a reasonable doubt. *Id*. at 443.

Whether the accused raises the defense before or during trial, the judge's role is not to weigh the evidence for and against the defense. "[A]lthough more than a scintilla of evidence of entrapment is needed … the defendant need only point to evidence in the record that would allow a rational jury to conclude that he was entrapped." *Mayfield*, 771 F.3d at 440. We turn next to that record evidence.

B. *The Text Messages*

On Valentine's Day 2020, the FBI launched "Cupid's Arrow," a sting operation designed to identify and apprehend child predators. The FBI used an online dating application that adults often use to communicate via text to facilitate meetings for sex. The dating app restricts its users to those who say they are 18 or older.

The FBI paid an unidentified 30-year-old civilian to contribute a photograph of herself. The FBI edited the photograph to make her look younger and used it to create a profile for a fictional "Bailey" who claimed she was 18 years old. Playing the role of "Bailey" was an FBI agent. The agent

would later reveal to Anderson that the fictional "Bailey" was supposedly only 15 years old.

Before that disclosure, Anderson had exchanged messages with the person claiming to be 18 years old. The sting operation comprised nearly 300 texts back and forth over two days. We need not quote them all, but we summarize them with a focus on those where Anderson showed some evidence of entrapment, in terms of both government inducement and his own lack of predisposition.

The evidence shows that it was the agent who first proposed sex with an underage partner. After the agent claimed to be only 15, the agent invited Anderson at least eleven times to meet privately for sex. More often than not, when Anderson expressed reluctance about going to prison and fears about leaving behind his young daughter, the agent persisted and promised to "keep a secret."

On the first day, February 14th, Anderson and the agent tentatively expressed a mutual interest in sex. All this occurred when "Bailey" was presenting herself as 18 years old, using a photograph of a 30-year-old, and all before "Bailey" revealed she was supposedly only 15.

The conversation continued on and off over two days discussing, most often through euphemisms, the topic of sex. In response to Anderson's question about a possible pregnancy, the agent said that "Bailey" was 15. The agent then asked to meet, the first of at least eleven direct requests for sex. Anderson expressed reluctance for fear of going to prison.

The two of them exchanged more pleasantries, and the agent then suggested for the third and fourth times meeting at "Bailey's" home. Anderson then asked for pictures and

offered to take "Bailey" on a ride. The agent clarified that "Bailey" was "Not really looking to just hang out lol."

To be sure, Anderson did not respond to "Bailey's" claim to be only 15 by terminating the conversation immediately, as he should have. After the agent told Anderson that "Bailey" was 15, he asked "Bailey" whether she was on "any kinda protection at all," asked her to send a photograph of her breast, promising to delete it, and asked, "How do you like sex," among other lewd and disturbing comments.

Yet Anderson also expressed reluctance, repeatedly, expressing fear of going to prison and thinking of the welfare of his daughter if he were to follow through to meet "Bailey" for sex. Whenever he did, the agent continued to press him to "come over." After more text messages on a second day, Anderson finally agreed to meet, provided they met at a public place, a nearby gas station. The fictional "Bailey" was not there, but officers arrested Anderson. He was charged with attempted enticement of a minor under 18 U.S.C. § 2422(b).

The government moved in limine to bar an entrapment defense at trial. The district judge, after explicitly weighing the evidence for and against the defense, granted the motion. Anderson took his case to trial without an entrapment jury instruction nor any mention of entrapment at trial. The jury found him guilty as charged. Anderson now appeals the district court's decision to bar his entrapment defense. Because the district court determined before trial that Anderson would not be allowed to present an entrapment defense, our review is *de novo*, meaning without deference to the district court's views. *United States v. Garcia*, 37 F.4th 1294, 1302 (7th Cir. 2022). Our role is to view the evidence in the light most favorable to the accused, i.e., without weighing the evidence

or deciding how we think a jury should rule on the entrapment defense. *Mayfield*, 771 F.3d at 441 ("Accepting the facts in [the defendant's] pretrial proffer as true and drawing reasonable inferences in his favor….").

II. *The Law of Entrapment Under Mayfield*

Mayfield explained in detail the substance and procedure of the law of entrapment. We summarize here. "Entrapment is a defense to criminal liability when the defendant was not predisposed to commit the charged crime before the intervention of the government's agents and the government's conduct induced him to commit it." 771 F.3d at 420. We decided to rehear *Mayfield* en banc to clear up "confusion in our entrapment jurisprudence," in terms of both substance and procedure. *Id.*

Substantively, we described the doctrine of entrapment as having two elements—government inducement and a lack of predisposition—two "conceptually related but formally and temporally distinct" features. 771 F.3d at 420. Procedurally, *Mayfield* held that a defendant who offers "some evidence" of each element of the defense is entitled to have the defense submitted to the jury. *Id.* Both elements are rooted in Supreme Court decisions dating back nearly a century. See *Jacobson v. United States*, 503 U.S. 540 (1992); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrell v. United States*, 287 U.S. 435 (1932).

A. *Substantive Law*

1. *Inducement*

Entrapment under *Mayfield* consists of two substantive elements, inducement by the government and a lack of predisposition in the defendant. "Conduct by the government's agents amounts to inducement if, considering its character

and the factual context, it creates a risk that a person who otherwise would not commit the crime if left alone will do so in response to the government's persuasion." *Mayfield*, 771 F.3d at 443.

Inducement means more than that the government merely solicited, suggested, or created the "ordinary" opportunity to commit the crime. *Id.* at 434. Inducement requires "the character and degree of the government's persistence or persuasion, or the nature of the enticement or reward," to exceed the typical enticements and temptations the crime or criminal actors pose to a defendant. *Id.* at 433. "Ordinary" thus means "something close to what unfolds when a sting operation mirrors the customary execution of the crime charged." *Id.* (citation omitted). To go beyond ordinary, "inducement means government solicitation of the crime *plus* some other government conduct…." *Id.* at 434. We explained in *Mayfield* that the "other conduct" may be:

- repeated attempts at persuasion,
- fraudulent representations,
- threats, coercive tactics, or harassment,
- promises of reward beyond that inherent in the customary execution of the crime,
- pleas based on need, sympathy, or friendship, or
- any other conduct by government agents that creates a risk that a person who otherwise would not commit the crime if left alone will do so in response to the government's efforts.

Id. at 435. Most relevant in this case are "repeated attempts at persuasion" in the face of reluctance. *Mayfield* also noted the risk that "subtle and persistent artifices and devices" may create a risk that an "otherwise law-abiding person would take the bait." *Id.* at 434.

2. *Predisposition*

Beyond inducement, the accused must also offer evidence that he was not predisposed. "Predisposition … refers to the likelihood that the defendant would have committed the crime without the government's intervention, or actively wanted to but hadn't yet found the means." *Mayfield*, 771 F.3d at 436.

Not being predisposed is not the same as not even being tempted. As we said in *Mayfield*, "a person who resists his baser urges is not 'predisposed' simply because he experiences them." 771 F.3d at 436. On this point, *Mayfield* followed the Supreme Court in *Jacobson v. United States*, where the Court explained that "a person's inclinations and 'fantasies … are his own and beyond the reach of government….'" 503 U.S. 540, 551–52 (1992) (citation omitted). Hence, we explained in *Mayfield*, a "mere desire, urge, or inclination" to engage in criminal conduct generally is not enough: "'[T]he principal element in the defense of entrapment [i]s the defendant's predisposition to commit *the* crime'—not just *any* crime." 771 F.3d at 438, quoting *United States v. Russell*, 411 U.S. 423, 433 (1973) (emphasis in original). The focus is "on the defendant's circumstances *before* and *at the time* the government first approached him with a proposal to commit the crime." *Id.* at 442 (emphasis in original).

In evaluating the defendant's past and present conduct for predisposition, we examine:

- the defendant's character or reputation;
- whether the government initially suggested the criminal activity;
- whether the defendant engaged in the criminal activity for profit;
- the nature of the inducement or persuasion by the government; and
- whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion.

Mayfield, 771 F.3d at 435. The most significant factor is reluctance overcome by government persuasion. *Id.* at 437, citing, among others, *United States v. Pillado*, 656 F.3d 754, 764 (7th Cir. 2011), and *United States v. Theodosopoulos*, 48 F.3d 1438, 1444 (7th Cir. 1995). At the risk of emphasizing the obvious, "reluctance … overcome by government persuasion" shows that the two elements of an entrapment defense — lack of predisposition and government inducement — are closely related. Reluctance can prompt further efforts at government persuasion that can rise to the level of inducement, supporting the entrapment defense.

Each factor on lack of predisposition, including reluctance, helps estimate how likely it was the defendant would have committed the crime if left to his own devices. *Mayfield* measures predisposition based not on *why* the defendant might or might not commit the crime but on *whether* the defendant would have committed the crime, more likely than

not, without the government's inducement. Predisposition is "not psychological" but "chiefly probabilistic." *Id*. at 428, citing *United States v. Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc); see also *id.* at 436 ("The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is *likely* that if the government had not induced him to commit the crime" the defendant would have done so.), quoting *Hollingsworth*, 27 F.3d at 1200 (emphasis in original).

Predisposition is inseparable from the risk-reward calculation a person might make. Our criminal-law system assumes that some people choose not to commit crimes not because they are moral but because the fear of punishment trumps the hope for reward or pleasure. *Jacobson*, 503 U.S. at 551 ("[T]hat most people obey the law … may reflect a generalized respect for legality or the *fear of prosecution*, but *for whatever reason*, the law's prohibitions are matters of consequence.") (emphasis added). Whether the defendant is reluctant because of a moral aversion, a fear of publicity, or a fear of punishment, *Mayfield* requires reluctance to be about probability. The specific reason a defendant was reluctant to commit the offense does not matter. The reason need not be noble or moral. What matters is whether the defendant was reluctant to commit the offense at all.

B. *Procedure for the Entrapment Defense*

The accused is "entitled to present the defense at trial if he shows that *some* evidence supports it. This initial burden is not great; the defendant must produce some evidence from which a reasonable jury could find government inducement and lack of predisposition. If he can make this showing, the court must instruct the jury on entrapment and the

government must prove beyond a reasonable doubt that the defendant was predisposed to commit the charged crime, or alternatively (but less commonly), that there was no government inducement." *Mayfield*, 771 F.3d at 443 (emphasis added). "[E]ntrapment is an issue of fact for the jury." *Id.*; see generally *Mathews v. United States*, 485 U.S. 58, 63 (1988) (reversing denial of entrapment instruction: "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.").

III. *Analysis*

Returning to the detailed evidence in this case, we find some evidence of the absence of predisposition and the presence of inducement. The issue is not whether Anderson will win acquittal with an entrapment defense. Cf. *United States v. York*, 48 F.4th 494, 502 (7th Cir. 2022) (affirming conviction after jury was instructed on entrapment defense in similar case of attempted enticement of supposed minor in online sting operation). The issue is whether Anderson showed some evidence of the absence of predisposition and the presence of inducement. He did. The messages show some evidence of his own reluctance and lack of predisposition and some evidence of the government's subtle and persistent persuasion. Under *Mayfield*, he was entitled to present his entrapment defense and to have the jury decide whether the government had disproven entrapment beyond a reasonable doubt.

The text messages comprise the most important facts, to which we now turn in more detail, again focusing on those most favorable to the defense and giving Anderson the benefit of reasonable inferences. A holistic assessment of the case might convince the jury that the government did not entrap

Anderson. It also might not. *Mayfield* requires not a perfect defense but only "some" evidence to submit the issue to the jury. These messages were enough. Since a defendant most likely demonstrates his reluctance when the government solicits him, we focus most on those moments when the government proposed the offense.

A. *Some Evidence of Inducement*

After the agent revealed that "Bailey" was supposedly 15, Anderson expressed reluctance to commit the crime, several times in fact. Every time he did, the agent persisted, and nearly every time the agent promised to keep it a secret. Here is the critical exchange in which "Bailey" no longer claimed to be 18 but claimed to be only 15:[1]

Anderson**:**	Can get pregnant
Agent:	i could im 15 how old are you
Anderson**:**	45
Agent:	nice
	want to meet up
Anderson:	I don't want to go to jail
Agent:	me either lol. you would have to keep a secret
Anderson:	So would you
Agent:	if you don't tell anyone
Anderson:	Wouldn't

[1] To preserve the original tone of the exchange, the original typos and slang remain.

This was the first time the agent suggested Anderson commit the crime. Anderson's first response was to express reluctance to go to prison.

Later, Anderson expressed reluctance not only about going to prison. He also suggested fear for the welfare of his daughter if he did. Again, the agent suggested keeping their tryst a secret:

Anderson:	I have a little girl and don't want to go to jail
Agent:	Ok. You just wouldn't be able to tell anyone
Anderson:	I no

A few messages later, Anderson reiterated his fear of getting into trouble and the consequences for his daughter. And once more, the agent promised secrecy:

Anderson:	I can't get in trouble I have a little girl
Agent:	I would never tell that would be mean and cruel

Less than an hour before "Bailey" was supposedly set to meet Anderson, the agent invited Anderson to meet for the ninth time. Then, the agent appeared to employ guilt after Anderson expressed reluctance for a final time:

Agent:	well do you want to still?
Anderson:	I'm just thinking I'm worried I don't want to go to jail
	I'm sure you can understand that

Agent:	I do. just wish you would have told me earlier. I was excited. but I get it. good luck

Before this penultimate exchange, "Bailey" had repeatedly invited Anderson to meet at her home: "want to meet up" / "mom is out of town. you could come here" / "I'll be home if your still interested" / "Just let me know if you want to" / "… you can just come here" / "Want to just come here" / "shes gone if you want to comeover" / "you coming?" / "you don't come over now?"

After "Bailey" said "I … just wish you would have told me earlier," Anderson finally agreed to meet her in a public place: "If you meet me at [the gas station] I will come over. I'll get you a drink." The agent then invited Anderson to meet, privately, for the eleventh and final time, "ok. then we can come here. Can yiou get condoms to just to be safe."

This evidence would allow a jury to find inducement based on what *Mayfield* called the government's "repeated attempts at persuasion." 771 F.3d at 435. *Mayfield* prescribes no minimum number of times the government must invite the defendant to commit the crime. *Accord, United States v. Barta*, 776 F.3d 931, 937–38 (7th Cir. 2015) (ordering acquittal based on entrapment as a matter of law: "[T]here is no *per se* rule regarding the number of contacts or length of relationship it takes to constitute inducement."). But so many overtures would not necessarily be ignored. *Id.* at 938 ("It is not just the number of contacts … or the length of their relationship that amounted to inducement here. It was also the frequency of those contacts.").

Viewing the evidence in the light most favorable to the accused, i.e., without weighing the evidence, the many times the agent invited Anderson to a private meeting for sex and the agent's repeated promises of secrecy and use of guilt to overcome Anderson's reluctance add up to "some evidence" of inducement in the form of subtle and persistent persuasion.[2]

B. *Some Evidence of Lack of Predisposition*

Beyond inducement, the accused must offer evidence that he was not predisposed, for "*no* level of inducement can overcome a finding of predisposition." *Mayfield*, 771 F.3d at 433 (emphasis in original). Anderson offered some evidence that he was not predisposed to commit this crime. He had no prior criminal record of sexual misconduct, let alone sexual misconduct targeting a minor. A jury could reasonably find doubt about predisposition in the text messages, and Anderson's

[2] The dissenting opinion emphasizes the relatively short time over which Anderson and "Bailey" exchanged messages to argue there was no inducement here. Time is certainly a factor, but so too is the sheer number of text messages exchanged here, with Anderson's repeated expressions of reluctance or fear of consequences and the agent's repeated efforts at persuasion and promises of secrecy. We rejected per se rules for time or number in *Barta*, and it would not be consistent with *Mayfield* or the Supreme Court precedents to impose them. We agree with the dissenting opinion here and with our recent decision in *United States v. Mercado*, 53 F.4th 1071 (7th Cir. 2022), that the government's use of a supposedly adults-only application and a photograph of an adult did not, by themselves, take this attempted sting into the realm of government inducement. See *post* at [29–31]; *Mercado*, 53 F.4th at 1082. In other words, the fact that the government attempted an online sting is not, without more, sufficient to require an entrapment instruction. We also do not rest our decision on the fact that the agent-Bailey portrayed herself as sexually experienced. We agree with the dissenting opinion and *Mercado* on that point.

conduct cannot as a matter of law be severed from the government's inducement.

Anderson had no prior criminal record of this kind. No evidence indicates Anderson has sexually abused his three-year-old daughter or has had any other interest in underage girls. His last two encounters with the law were driving-under-the-influence and trespassing charges nearly twenty years earlier. They did not preclude his entrapment defense. See *Mayfield*, 771 F.3d at 438 ("[A] defendant with a criminal record can be entrapped.").

C. *The Government's Arguments*

We have so far presented the evidence most helpful to Anderson's entrapment defense. The government characterizes the text exchanges, including Anderson's expressions of reluctance and caution, much more harshly. The government marshals evidence of Anderson's sexual interest in "Bailey" from two distinct times: before the agent told Anderson that Bailey was 15, and after.

We discount the texts exchanged before the agent revealed "Bailey's" supposed young age. Before Anderson learned "Bailey" was 15, his interest in a sexual encounter with an adult was both legal and irrelevant. Consensual sex appears to be a primary reason adults use this dating app at all. The government also suggests Anderson ought to have known Bailey was a minor from the profile picture alone, after using a photographic filter "to make the adult source look even younger." That is, at best, an argument the government can make to the jury. The agent also sent Anderson a follow-up photo of the 30-year-old woman, apparently photographically unaltered.

The government also suggests that when the agent mentioned that "mom" was out of town, Anderson should have known that "Bailey" was a minor. That's another jury argument. A mother can live with an adult child, who may prefer a sexual rendezvous when her mother is not home. The government also argues that asking whether "Bailey" could become pregnant was really a "reference to whether or not she had reached the age of sexual maturity." Maybe, but pregnancy and birth control are natural topics between adults. These are matters the government may argue to a jury, but they do not defeat the entrapment defense as a matter of law.

Evidence after the agent revealed that "Bailey" was underage is the proper focus for the entrapment defense, but Anderson's messages remain tangled with the government's own influence. The government notes that the agent presented Anderson "with multiple opportunities to withdraw from the conversation and [he] chose not to do so." That is true. Moreover, after text messages concluded the first day without any agreement to meet for sex, it was Anderson who started the conversation the next day. These facts might help to defeat his defense at trial. See *Mayfield*, 771 F.3d at 437 (because ''there is little direct evidence of the defendant's state of mind prior to interaction with [g]overnment agents[,] … we must instead rely upon indirect proof available through examination of the defendant's conduct after contact with the agents") (citation omitted). But these facts do not stand separate from the messages "Bailey" contributed. Those include the eleven times the agent invited Anderson to meet. And they include the agent's many other innuendos—"moms out of town so secret fun lol" / "Not really looking to just hang out lol" / "that's why I like you … you get me and your sweet."

"All this evidence must be considered with care," we said in *Mayfield*, because "the defendant's later actions may have been shaped by the government's conduct." 771 F.3d at 437. "[T]he greater the inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime in question." *Id.*, quoting *Hollingsworth*, 27 F.3d at 1200. For those not predisposed, the less inclined to commit the crime, the more enticement it will likely take. Evidence that the government made overture after overture after overture before the defendant agreed to commit the crime may suggest both inducement and lack of predisposition.

From all these text messages, reasonable jurors could draw different inferences. The government will of course be entitled to present its very different interpretation of the evidence, but once the accused came forward with "some" evidence of entrapment, the weighing was for the jury, not the court.[3]

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[3] On appeal, the government also relies on information from Anderson's presentence report, which was not available when the district court granted the government's motion in limine. The presentence report summarized a text exchange between Anderson and a then-adult woman fantasizing about having sex with her when she had been 17, years earlier. Even if this information had been available at trial, it would not have changed the result of this appeal. First, at the time of the text exchange, the woman was an adult, and there is no evidence that Anderson acted out this fantasy. See *Jacobson*, 503 U.S. at 551–52 ("a person's inclinations and 'fantasies … are his own and beyond the reach of government'"). Second, to prove attempted enticement of a minor, the government must prove "enticement into any sexual activity for which any person can be charged." 18 U.S.C. § 2422(b). The government based its prosecution of Anderson on aggravated criminal sexual abuse under Illinois law. Under that statute, the age of consent is 17, so even acting on that reported fantasy would not have been criminal. See 720 ILCS 5/11-1.60(d). Finally, even

D. *The District Court's Ruling*

A district judge deciding whether to give an entrapment instruction is not a trier of fact: "the court must accept the defendant's proffered evidence as true and not weigh the government's evidence against it." *Mayfield*, 771 F.3d at 440. "[T]he trial judge cannot weigh the competing evidentiary proffers and accept the government's as more persuasive than the defendant's." *Id.* at 442.

The district court erred here by weighing the conflicting evidence. In deciding the government's motion in limine, the judge noted the five factors *Mayfield* considers for predisposition and weighed the evidence for and against Anderson. The judge noted there was no evidence that Anderson had engaged in any similar prior criminal activity or other indicia of character prone to this offense.

The judge then observed—but incorrectly—that Anderson first suggested the criminal activity. As noted above, it was actually the agent who first invited a meeting after revealing that "Bailey" was supposedly just 15. See supra at 12–13. The judge then weighed the defendant's reluctance: "The defendant expressed some reluctance to go to the home, but then came up with an alternate plan." The judge did not evaluate inducement using the low bar of "some" evidence: "Nothing in this record that I'm aware of, nor would there be at trial, that, that his reluctance was overcome only by repeated government inducement or persuasion." Finally, the judge

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if this information were deemed to weigh in favor of predisposition, it would still have to be weighed against other information tending to show a lack of predisposition. As explained in the text, that weighing is for the jury rather than the judge.

weighed these factors against each other by "[t]aking all of that into account" and ruled that he would not instruct the jury on entrapment. *Mayfield* reserves this weighing for the jury.

E. *Case Comparison*

We base our decision here primarily on *Mayfield* and the Supreme Court precedents it built upon. The government has relied on some earlier cases from this circuit and decisions by other circuits that are either not precedential or apply a more demanding standard than we do under *Mayfield*.

For example, the government relies on another online enticement sting case, *United States v. Knope*, 655 F.3d 647 (7th Cir. 2011), where we affirmed the denial of an entrapment instruction. The facts in *Knope* were quite different from this case. That defendant required no persuasion and showed no reluctance. He offered no evidence of government inducement, just an invitation to commit the crime, and we explained there that all the predisposition factors showed that the defendant was predisposed. *Id*. at 661. *Knope* does not help the government here.

Another pre-*Mayfield* case quoted an earlier case to the effect that ''persistence … in the absence of coercion … does not establish inducement.'' *United States v. Plowman*, 700 F.3d 1052, 1059 (7th Cir. 2012), quoting *United States v. Higham*, 98 F.3d 285, 290 (7th Cir. 1996) (affirming jury's rejection of entrapment defense). *Plowman* is consistent with *Mayfield* and our decision here. The defendant in *Plowman* never expressed reluctance but was instead the instigator of the bribery scheme in that case. 700 F.3d at 1059–60. *Plowman* did not endorse *Higham*'s coercion requirement, and *Higham* did not

apply the low *Mayfield* bar of "some evidence" of entrapment. In any event, *Mayfield* made clear that inducement does not require coercion. Persistent persuasion may be enough to show entrapment, as we have repeatedly noted.

A more recent decision by this court in another online enticement sting helps to mark the line between sufficient and insufficient showings to obtain an entrapment instruction. In *United States v. Mercado*, 53 F.4th 1071 (7th Cir. 2022), an FBI agent pretended to be a 15-year-old girl on an adults-only internet application. After exchanging text messages with the agent for several days, the defendant went to a house to meet the fictional girl for sex, but was arrested and, like Anderson here, charged with attempted enticement. Mercado sought an entrapment instruction but was denied. We affirmed, relying on facts that are decisively different from this case.

Our opinion in *Mercado* carefully summarized the *Mayfield* standard calling for "some evidence" of both inducement and lack of predisposition, including recognition that repeated attempts at persuasion can show inducement. *Id*. at 1080, 1082. Mercado argued that the agent's text messages amounted to inducement, but we rejected that argument based on a close review of the messages that Mercado and the agent exchanged. As we said in *Mercado*, the details are important. *Id*. at 1075. It was Mercado, not the agent, who introduced explicit sexual content into the conversation. He did so repeatedly and quite graphically after being told the agent was only 15. Our opinion recognized that a defendant may show entrapment if he repeatedly declined persistent government pressure, but Mercado could not show that he did so. Instead, he initiated the conversations, made them explicitly sexual after being told the agent was 15, and did not show any

reluctance or need for the government to persist. *Id*. at 1082. On those quite different facts, Mercado was not entitled to an entrapment instruction, while Anderson was.[4]

The cases the government cites from other circuits, most of which are non-precedential, are inconsistent with *Mayfield* and its reading of Supreme Court precedents permitting a defendant to show "some" reluctance because he fears punishment. *United States v. Hood* concerned an appeal from denying a motion for acquittal based on entrapment, which relied on similarly unpublished Sixth Circuit authority disqualifying from consideration a defendant's reluctance "from a fear of getting caught." 811 Fed. App'x 291, 298 (6th Cir. 2020) (citation omitted). Even then, in *Hood* the court had submitted the entrapment defense to the jury. *Id.* at 293. *United States v. Unrein* relied on Eleventh Circuit authority disqualifying a defendant's fear of a government sting as merely a

[4] We also recently issued a non-precedential order affirming a district court's refusal to give an entrapment instruction in this same sting operation in *United States v. Dean*, No. 21-2736, 2022 WL 11587950 (7th Cir. Oct. 20, 2022). We rarely address such non-precedential orders in precedential opinions, but we make an exception in this case because *Dean* involved the same "Cupid's Arrow" sting operation and was tried to the same district judge who tried Anderson. As in *Mercado*, the facts in *Dean* were quite different from those here. Dean mentioned just once a concern that he might be communicating with law enforcement. He expressed no other reluctance. He tried to rendezvous with the fictional minor for sex within an hour of first making contact. Likewise, Dean offered no evidence of government behavior beyond ordinary solicitation. *Id.* at *2. The absence of evidence supporting an entrapment defense in *Dean* contrasts decisively with Anderson's repeated expressions of reluctance and "Bailey's" persistent persuasion over two days. We do not hold here that Anderson was entrapped as a matter of law, but unlike Dean, his entrapment defense had some evidence supporting it.

demonstration of "his criminal intent." 688 Fed. App'x 602, 609 (11th Cir. 2017). Likewise, *United States v. Shinn* discounted the defendant's reluctance since "his only hesitation with their meeting was the risk that they might be discovered." 681 F.3d 924, 930 (8th Cir. 2012). And finally, *United States v. Cawthon*, 637 Fed. App'x 804, 806 (5th Cir. 2016), is easily distinguishable, for that defendant did not show any reluctance and did not require any persistent persuasion. The court's opinion seems to have relied on Fifth Circuit entrapment cases requiring a higher standard for entrapment than we have applied since *Mayfield*. See *id*., quoting *United States v. Theagene*, 565 F.3d 911, 920 (5th Cir. 2009) (reversing denial of entrapment instruction).

None of the government's cases applied *Mayfield*'s low bar of "some" evidence of a lack of predisposition. Nor do their rejections of reluctance based on fear of being caught reflect Supreme Court precedent. Recall that the Supreme Court wrote in *Jacobson*: "that most people obey the law … may reflect a generalized respect for legality or the *fear of prosecution*, but *for whatever reason*, the law's prohibitions are matters of consequence." 503 U.S. at 551 (emphasis added). "Some" evidence of reluctance, for whatever reason, noble or base, satisfies *Mayfield*'s criteria to demonstrate lack of predisposition.

This case and this circuit's *Mayfield* jurisprudence are closer to the First Circuit's decision in *United States v. Pérez-Rodríguez*, 13 F.4th 1 (1st Cir. 2021). There, as here, a government agent encountered the defendant in an online dating app. *Id.* at 9. The agent and the defendant discussed a sexual encounter with the agent's fictional young boyfriend. *Id.* at 9–11. The First Circuit held that the district court erred when it denied an entrapment instruction. *Id.* at 24. The First Circuit

explained that "the government first suggested the sexual abuse of a minor" and that the defendant "encountered law enforcement on a forum intended to be used only by adults." *Id.* at 22.

Consistent with *Mayfield*, and perhaps going a little further than we did in *Mayfield*, the First Circuit applied a "charitable" threshold for giving an instruction on the entrapment defense, one that "is not a very high standard to meet." *Id.* at 19 (citation omitted). The defendant in *Pérez-Rodriguez* offered considerably less evidence of reluctance and government inducement than Anderson did. See *id*. at 23, 27 (summarizing evidence of reluctance and inducement). The most important common ground between the cases was the two defendants' expressions of reluctance to go forward with the criminal conduct first proposed by the government and the government's continued efforts to persuade them to do so despite that reluctance. The most important factual difference is that Anderson expressed reluctance far more times than Pérez-Rodriguez did and showed greater government persistence in persuading him to go forward with the criminal tryst.

Conclusion

Anderson came forward with "some evidence" of government inducement to commit the crime and of his own lack of predisposition to commit the crime. Under *Mayfield*, he was entitled to have the court instruct the jury on his entrapment defense. We cannot say whether a jury would acquit Anderson. He was not entrapped as a matter of law. The government's actions here fell short of the extensive campaigns of enticement in *Jacobson*, 503 U.S. at 550 (defendant entrapped as a matter of law after being "the target of 26 months of repeated mailings and communications from Government

agents and fictitious organizations"), or in *Barta*, 776 F.3d at 934–36 (finding entrapment as a matter of law where government's persistent inducement lasted months and defendant repeatedly showed reluctance to go along with criminal proposal). The judgment of the district court is REVERSED and the case is REMANDED for a new trial in which Anderson should be permitted to present his entrapment defense.

ST. EVE, *Circuit Judge*, concurring in part and dissenting in part.

I agree with the majority that Mr. Anderson offered sufficient evidence of his own lack of predisposition and that the district court erred in deciding that issue as a matter of law. But a defendant must offer "some evidence" of *both* prongs of the entrapment defense to require an entrapment instruction at trial. I respectfully dissent from the majority's opinion as to the government inducement prong. I would hold that Mr. Anderson failed to offer "some evidence" of inducement and affirm the district court on those grounds.

I.

Where, as here, the district court precluded a defendant from submitting an entrapment defense to the jury before the trial began, the Seventh Circuit "review[s] a district court's refusal to give an entrapment jury instruction *de novo*," *United States v. Pillado*, 656 F.3d 754, 763 (7th Cir. 2011) (quoting *United States v. Hall*, 608 F.3d 340, 343 (7th Cir. 2010)); *see also United States v. Garcia*, 37 F.4th 1294, 1302 (7th Cir. 2022). The Court does so "bearing in mind that the question [of] whether a defendant has been entrapped is 'generally one for the jury, rather than for the court.'" *Pillado*, 656 F.3d at 763 (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)). Since our authoritative statement on entrapment instructions in *Mayfield*, however, we have consistently held that "[t]he inducement inquiry, [as compared to the predisposition inquiry], may be more appropriate for pretrial resolution; if the evidence shows that the government did nothing more than solicit the crime on standard terms, then the entrapment defense will be unavailable as a matter of law." *United States v. Mayfield*, 771 F.3d 417, 441 (7th Cir. 2014).

"[T]he fact that government agents initiated contact with the defendant, suggested the crime, or furnished the ordinary opportunity to commit it is insufficient to show inducement." *Garcia*, 37 F.4th at 1301 (quoting *Mayfield*, 771 F.3d at 434). Rather, as the majority notes, inducement requires normal solicitation of a crime "*plus* some other government conduct that creates a risk that a person who would not commit the crime if left to his own devices will do so in response to the government's efforts." *Mayfield*, 771 F.3d at 434–35. Those "plus factors" can include the following:

> [R]epeated attempts at persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward beyond that inherent in the customary execution of the crime, pleas based on need, sympathy, or friendship, or any other conduct by government agents that creates a risk that a person who otherwise would not commit the crime if left alone will do so in response to the government's efforts.

United States v. Blitch, 773 F.3d 837, 844 (7th Cir. 2014) (quoting *Mayfield*, 771 F.3d at 435).

"[T]here is no *per se* rule regarding the number of contacts or length of relationship it takes to constitute inducement," *United States v. Barta*, 776 F.3d 931, 937–38 (7th Cir. 2015), "and each entrapment defense, must be judged on its own facts." *Id.* at 938. On my reading, the facts of Mr. Anderson's case do not include even "some evidence" of government behavior that went beyond solicitation. Without more, he was not entitled to an entrapment defense.

II.

The majority primarily notes the government's eleven invitations that Mr. Anderson "come over" to have sex with "Bailey" as "repeated attempts at persuasion," pushing the government action from solicitation to inducement. The opinion further points to the initial presentation of "Bailey" as an adult woman interested in having sex with Anderson as a source of confusion. And finally, the majority cites *United States v. Pérez-Rodríguez*, 13 F.4th 1, 20 (1st Cir. 2021), contending that the First Circuit's reasoning in that case supports a requirement for a jury instruction for Mr. Anderson. These arguments do not persuade.

A. Repeated Attempts at Persuasion

The majority relies on "Bailey's" eleven suggestions that Mr. Anderson "come over" to see her and her promises to keep any meetings between the two a secret as "some evidence" of "repeated attempts at persuasion."

But these examples do not move the needle from government solicitation to inducement. First, they happened within twenty-four hours. While inducement *can* happen within one day, a survey of our caselaw shows that such cases are exceedingly rare. And when we have found "some evidence" of inducement in such a short period of time, much more forceful persuasion has been present—like screaming or obscenities. *See Pillado*, 656 F.3d at 767 ("some evidence" of government inducement was found in a single day where the government agent screamed obscenities at the defendant who was hesitant to unload drugs from a government vehicle and leveraged a relationship with the defendant's landlord to convince him to continue). Where, as here, the persuasion is more subtle,

"repeated attempts at persuasion" usually require a government campaign measured in weeks or months, rather than mere days. *See United States v. Jacobson*, 503 U.S. 540, 550 (1992) (two years); *Mayfield*, 771 F.3d at 441 (three months); *Barta*, 776 F.3d at 938 (three months); *United States v. Plowman*, 700 F.3d 1052, 1059 (7th Cir. 2012) (five months was insufficient); *United States v. Theodosopoulos*, 48 F.3d 1438, 1447 (7th Cir. 1995) (three months and nine separate meetings did not establish inducement); *cf. United States v. Mercado*, 53 F.4th 1071, 1084 (7th Cir. 2022) (government contact "occurred over five days, rather than over many weeks" and therefore did *not* establish inducement).

Absent more forceful conduct, the short-lived behavior cited by Mr. Anderson does not show the "more than a scintilla of evidence" of inducement required to warrant an instruction on entrapment.

B. Fraudulent Representations

The majority opinion also references the government's initial presentation of "Bailey" as an adult as part of its entrapment analysis. Mr. Anderson's counsel argued that this fell into the category of "fraudulent representations." At oral argument, he relied on the fact that he met "Bailey" on MeetMe—an app that is intended for adults only—and that "Bailey" was depicted using photographs of a 30-year-old woman. The resulting confusion about age, he insists, is the type of "fraudulent representation" that the *Mayfield* Court warned against. That argument is squarely foreclosed by our recent decision in *Mercado*, 53 F.4th at 1082–83.

In *Mercado*, we considered a strikingly similar case. Just like Mr. Anderson, the *Mercado* defendant met an FBI agent

posing as a fifteen-year-old girl on the MeetMe app. *Id.* at 1074. Like in this case, the two moved the conversation to text message the very same day. *Id.* at 1075–76. And just as here, the profile that the FBI set up used photos of an adult woman, rather than of an actual fifteen-year-old girl. *Id.* at 1082–83. We rejected the defendant's argument that the photos of an adult woman were confusing enough to constitute "fraudulent representations" under *Mayfield*:

> [R]egardless of how 'old' [the potential victim] looked in the photo, [the undercover agent] told [the defendant] right away that she was only 15 years old. Associating a photograph of an adult with the … profile did not present 'a risk that a person who otherwise would not commit the crime if left alone would do so in response to the government's efforts.'"

Id. at 1082; *cf. Barta*, 776 F.3d at 937 (finding "fraudulent representations" where the government repeatedly set fake deadlines and fabricated problems in order to convince the defendant that the bribes were necessary). Put differently, "fraudulent representations" are about what the government *actually says* to a defendant, not what the defendant chooses to believe.

Here, "Bailey" told Mr. Anderson in no uncertain terms that she was 15 years old. She did so thirty-four messages into a 253-message conversation. Perhaps the more important number is that "Bailey" told Mr. Anderson she was a minor just sixteen minutes after they moved their conversation from the MeetMe app to text message. *See Mercado*, 53 F.4th at 1075 (finding no fraudulent representation where agent informed defendant that she was a minor four minutes into text message conversation). Mr. Anderson, just like the defendant in

Mercado, knew within moments that he was speaking to a minor. Any initial belief that "Bailey" was an adult is not enough to overcome her early and unequivocal statements that she was not.

C. Normalization of Sexual Abuse

Finally, the majority notes some similarities between this case and the First Circuit's decision in *United States v. Pérez-Rodríguez*, 13 F.4th 1, 20 (1st Cir. 2021), including the use of a dating app and the fact that the government agent was the first to suggest sex with a minor. The similarities, however, end there. *Pérez-Rodríguez* found "some evidence" of government inducement where an FBI agent posed as an adult offering sex with a child and advised the defendant that sexual abuse would be enjoyable or even beneficial for a minor victim. *See Pérez-Rodríguez*, 13 F.4th 1, 20 (1st Cir. 2021). In other words, where one adult normalizes child sexual abuse for another adult, the First Circuit found that there is "potential to influence the mind of a person who is not predisposed to abuse children and convince him that sex with a minor is acceptable." *Mercado*, 53 F.4th at 1082 (citing *Pérez-Rodríguez*, 13 F.4th at 27). That same risk of undue influence is not present where, as here, the only one normalizing sex with a child is that child. Mr. Anderson repeatedly cites the fact that "Bailey" presented herself as "sexually experienced." But no law in this Circuit—nor any law cited from our sister circuits—suggests that a child's description of her own past sexual abuse constitutes undue influence, inducing a separate offender to abuse her again. We held as much in *Mercado*, and the same is true here.

For the foregoing reasons, I would affirm the district court's holding on the alternate ground that Mr. Anderson

has not offered the threshold evidence of government inducement required to mandate a jury instruction on entrapment.