

**Enticers and Travelers:  
Law and Strategy In “Child Sex” Cases**

Winning Strategies Seminar

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**I. Introduction.**

**A. These Cases Are On The Rise.**

Since the Department of Justice began *Project Safe Childhood* in 2006, DoJ has dedicated significantly increased resources to child exploitation cases. As a result, the number of federal prosecutions for child exploitation crimes has increased dramatically. While child pornography cases are responsible for the bulk of the increase, the next largest categories are for internet enticers (18 U.S.C. § 2422) and interstate travelers (18 U.S.C. § 2423), which are the subjects of this presentation.

The law enforcement methodology for these cases is most often the “reverse-sting.” In a reverse-sting, a law enforcement officer poses as either a child or an adult intermediary with “sexual access” to a child. These operations are conducted most often by an *Internet Crimes Against Children (ICAC) Task Force*. ICAC Task Forces are federal/state task forces whose members go online to dubious or even not-so-dubious internet sites and try and find trouble. As of November 2011, there were 61 ICAC Task Forces across the country and they had arrested over 30,000 people since ICAC task forces were first formed in 1998. In FY 2011 alone, ICAC Task Forces were involved in 5,700 arrests across the country.<sup>1</sup>

**B. The Enticement and Traveler Statutes.**

The four major statutes in this area are:

- 18 U.S.C. § 1591 – Sex trafficking of children or by force, fraud, or coercion.
- 18 U.S.C. § 2422 – Coercion and enticement.
- 18 U.S.C. § 2423 – Transportation of minors. Includes engaging in illicit sexual conduct in foreign countries.
- 18 U.S.C. § 2241(c) – Aggravated sexual abuse.

These materials focus on §§ 2422 and 2423, as those are the two statutes that the

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<sup>1</sup> This information is taken from USDOJ, *Project Safe Childhood* Internet website: <http://www.projectsafechildhood.org>. See also <http://www.justice.gov/psc/fact-sheet.html>.

government uses most frequently and also that present the most opportunities for litigation.<sup>2</sup>

Thus, the “enticement and travel” cases can be divided into three basic categories: (1) alleged enticement cases prosecuted under 18 U.S.C. §§ 2422(a) or (b); (2) alleged travel cases prosecuted under 18 U.S.C. §§ 2423(a) or (b); and (3) cases that fall within both of the aforementioned categories, because the defendant allegedly enticed a minor *and* allegedly traveled across state lines with the intent to engage in sexual activity with the minor.

## **II. The Enticement Statute: 18 U.S.C. § 2422.**

The alleged enticement cases are prosecuted under § 2422(a), § 2422(b), or both. Under § 2422(a), a defendant may be prosecuted for “knowingly persuad[ing], induc[ing], entic[ing], or coerc[ing] any individual to travel in interstate or foreign commerce . . . to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempt[ing] to do so.” 18 U.S.C. § 2422(a). The maximum term of imprisonment prescribed in § 2422(a) is 20 years. The Sentencing Guidelines range for first-time offenders is generally 37-46 months’ imprisonment. *See* U.S.S.G. § 2G1.3.

Under § 2422(b), a defendant may be prosecuted for “using the mail or any facility of interstate or foreign commerce” to “knowingly persuade[], induce[], entice[], or coerce[] any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempt[ing] to do so.” 18 U.S.C. § 2422(b). In stark contrast to §§ 2422(a) and 2423(b), a conviction under § 2422(b) carries a mandatory minimum sentence of 10 years and a maximum penalty of life.

Because § 2422(a) is used more often in the prostitution context and less often in the “child sex” context, we will begin this outline with an analysis of § 2422(b). Also, as you will see, *many* of the topics addressed as part of the § 2422(b) discussion below are relevant to cases involving § 2423 (alone or in conjunction with § 2422(b)) as well. Thus, when defending against a charge under § 2423, you can reference the section below for helpful arguments.

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<sup>2</sup> AFPD Lisa Hay, from the District of Oregon’s Portland Office, has litigated § 2241(c), and has specifically challenged the government’s efforts to treat § 2241(c) as an intent crime. She has moved to dismiss several indictments for failure to allege that the defendant crossed state lines and actually engaged in a sexual act or attempted to do so. Because § 2241(c) is not a focus of this presentation, we encourage you to contact Lisa for guidance in this area.

**A. “Online” Enticement: 18 U.S.C. § 2422(b).**

**1. Legislative History.<sup>3</sup>**

Subsection (b) was added to § 2422 in 1996 when Congress passed the Telecommunications Act of 1996. The 1996 version of § 2422(b) read:

Whoever, using any facility or means of interstate or foreign commerce, including the mail, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.<sup>4</sup>

Two years later, the subsection was amended as part of the Child Protection and Sexual Predator Punishment Act of 1998, a bill that was described as “a comprehensive response to the horrifying menace of sex crimes against children, particularly assaults facilitated by computers.” H.R. Rep. No. 105-557, at 10 (1998). The bill’s legislative history reflects Congress’s concern with cyberpredators interacting with minors online and its goal of addressing computer-related crimes against children “by providing law enforcement with the tools it needs to investigate and bring to justice those individuals who prey on our nation’s children.” *Id.* Congress emphasized the dangers posed by cyberpredators developing online relationships with minors, including the possibility of cyberpredators manipulating and exploiting minors. *See id.* at 11-12 (noting fact that “‘cyber-predators’ often ‘cruise’ the Internet in search of lonely, rebellious or trusting young people. The anonymous nature of the on-line relationship allows users to misrepresent their age, gender, or interests. Perfect strangers can reach into the home and befriend a child.”). Congress highlighted the potential consequences of allowing cyber-relationships between predators and minors:

Recent, highly publicized news accounts in which pedophiles have used the Internet to seduce or persuade children to meet them to engage in sexual activities have sparked vigorous debate about the wonders and perils of the information

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<sup>3</sup> Much of this section is taken directly from Andriy Pazuniak, *A Better Way to Stop Online Predators: Encouraging a More Appealing Approach to § 2422(b)*, 40 Seton Hall L. Rev. 691 (2010).

<sup>4</sup> Congress has revised § 2422(b) three times since 1996 and each time raised the penalty for violating the statute. The maximum prison sentence under the original version of § 2422(b) was ten years. In 1998, Congress raised the maximum sentence to fifteen years. In 2003, a mandatory minimum of 5 years was added and the statutory maximum was set at 30 years. Finally, in 2006, Congress raised the mandatory minimum to 10 years and raised the statutory maximum to life imprisonment. The current version of § 2422(b) reads substantially the same as the 1996 version but for the increased penalties.

superhighway. Youths who have agreed to such meetings have been kidnapped, photographed for child pornography, raped, beaten, robbed, and worse.

*Id.* at 12. Members of the House in particular emphasized that the aim of the Protection Act was to punish “pedophiles who stalk children on the Internet.” *Id.* at 12. Congresswoman Jennifer Dunn was one of many representatives who forcefully asserted that the purpose of the Protection Act was to target cyberpredators who victimize children. During debate, Dunn stated that “[b]y severely punishing those who use computers to target children for sexual acts or who knowingly send children obscenity over the Internet, this bill cracks down on cyber predators and pedophiles.” 144 Cong. Rec. H4491, 4492-93 (daily ed. June 11, 1998) (statement of Rep. Dunn).

Further demonstrating Congress’s concern with the online interaction between sexual predators and minors, the initial draft of the Protection Act contained a provision that prohibited predators from contacting (or attempting to contact) minors “for the purpose[] of engaging in any sexual activity.” H.R. 3494, 105th Cong. § 2422(c) (as reported by House, Mar. 23, 1998).

During debate, congressional representatives discussed the importance of the provision and its underlying purpose of preventing predators from interacting with minors online. Representative Bill McCollum stated,

The key portion of this bill, and there are a lot of other things in it, is to make sure when there is contact made over the Internet for the first time by a predator like this with a child, with the intent to engage in sexual activity, whatever that contact is, as long as the intent is there to engage in that activity, he can be prosecuted for a crime.

144 Cong. Rec. H4497 (daily ed. June 11, 1998) (statement of Rep. McCollum). Echoing Representative McCollum’s sentiments, Representative Sheila Jackson-Lee stated that the Protection Act “would be a start to effectively prevent a predator from initiating a harmful relationship with a child from illegal sexual activity and to subjecting children to damaging pornographic material that our children can currently access.” *Id.* at 4493 (statement of Rep. Jackson-Lee). In the House Report accompanying the proposed contact provision, Congress explained the difference between § 2422(c) and the current/original version of § 2422(b):

Sec. 101. Contacting minors for sexual purposes. This section amends the federal criminal code by establishing a fine and up to 5 years in prison for anyone who, using the mail or any facility of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly contacts (or attempts to contact) an individual who has not attained age 18, or who has been represented to the person making the contact as not having attained age 18, for purposes of engaging in criminal sexual activity. *Under current law, the Federal Government must prove that a pedophile “persuaded, induced, enticed or*

*coerced” a child to engage in a sexual act. This standard allows the criminal to establish a prolonged, intimate and highly destructive relationship with the victim, involving explicit sexual language, without actually violating the law.* This new crime, which is similar to laws being enacted at the state level, establishes a lower penalty for initiating a harmful relationship with a child for the purpose of engaging in illegal sexual activity. Section 101 also clarifies that this provision is not intended to apply to minors who engage in consensual sexual activity with other minors.

H.R. Rep. 105-557, *reprinted in* 1998 U.S.C.C.A.N. 678, 678, *available at* 1998 WL 285821 (emphasis added). Thus, Congress recognized that given the statutory language of § 2422(b), a defendant could have a sexualized relationship with a minor (or fictitious minor) in the absence of criminal persuasion.

Both the House and Senate ultimately rejected the contact provision because it was too broad. *See* H.R. 3494, 105th Cong. § 2422 (as reported by House, Oct. 13, 1998 (amending previous version of the Protection Act by eliminating the proposed “contact” provision). During debate, Representative Alcee Hastings explained why the “contact” provision was rejected:

The original House bill was also too broad in that it made it a crime to contact or attempt to contact a minor. This was so broad that it would have covered a simple “hello” in an Internet chat room. Targeting attempts to make contact is like prosecuting a thought crime.

144 Cong. Rec. H10566, H10572 (daily ed. Oct. 12, 1998) (statement of Rep Hastings). In speaking to the Senate on the date it passed the Protection Act, Senator Patrick Leahy explained the decision to omit the proposed § 2422(c) prohibition on contact:

As passed by the House, H.R. 3494 would make it a crime punishable by up to 5 years’ imprisonment, to do nothing more than “contact” a minor, or even just attempt to “contact” a minor, for the purpose of engaging in sexual activity. This provision, which would be extremely difficult to enforce and would invite court challenges, does not appear in the Hatch-Leahy-DeWine substitute. In criminal law terms, the act of making contact is not very far along the spectrum of an overt criminal act. Targeting “attempts” to make contact would be even more like prosecuting a thought crime. It is difficult to see how such a provision would be enforced without inviting significant litigation.

144 Cong. Rec. 25,239 (1998) (statement of Sen. Patrick Leahy).

Despite rejecting the proposed contact provision, Congress nonetheless indicated that the primary goal of § 2422(b) remained to target and punish sexual predators who interact with minors online and attempt to lure the minors into dangerous sexual encounters. After striking

down the proposed contact provision, congressional representatives continued to declare their intent to “crack down” on cyberpredators. 144 Cong. Rec. H10566, 10574 (daily ed. Oct. 12, 1998) (statement of Rep. Dunn). For example, during debate Representative Alcee Hastings stated, “The legislation makes a number of important changes, principally by targeting pedophiles who stalk children on the Internet and by cracking down on pedophiles who use and distribute child pornography to lure children into sexual encounters.” *Id.* at 10571-72 (statement of Rep. Hastings). Senator Orrin Hatch articulated Congress’s primary concerns when he stated that Congress “must also be vigilant in seeking to ensure that the Internet is not perverted into a hunting ground for pedophiles and other sexual predators, and a drive-through library and post office for purveyors of child pornography.” 144 Cong. Rec. S12257, 12262 (daily ed. Oct. 9, 1998) (statement of Sen. Hatch). Representative Jerry Weller stated Congress’s intent more bluntly: “[W]e need to do everything we can to ensure that the weirdos, the whackos, the slimeballs, those who would use the latest technology to prey on children and their families, are stopped.” 144 Cong. Rec. H10566, 10572 (daily ed. Oct. 12, 1998) (statement of Rep. Weller).

Ultimately, the legislative history reflects Congress’s intent to target the middle ground between “a simple ‘hello’ in an Internet chat room” and arranging real-life sexual encounters with minors via online messaging. Though courts have grabbed onto the “comprehensive response” language in the House Report accompanying the Protection Act, it is fairly clear that Congress’s intent — and certainly the plain language of the statute — was to prohibit direct solicitation of minors online. Nowhere in the legislative history does it appear that Congress sought to target adult-to-adult communications via § 2422(b).

**Practice Tip:** You can use the statute’s legislative history in arguing that § 2422(b) requires direct contact with a minor and does not apply in cases involving adult intermediaries. You can also use it to argue that mere contact with a minor is not enough, even if the contact is sexually charged; persuasion, inducement, enticement, or coercion (i.e., some effort to bend the child victim’s will) is required. Both of these potential arguments are further addressed below.

## 2. Assessing Your § 2422(b) Case.

Section 2422(b) presents special issues and problems because of the wildly divergent approaches to this statute among the Circuits. Thus, at the outset of every § 2422(b) case, you should assess it by asking the following questions:

**Were your client’s persuasive communications over the Internet, on a phone, or through the mail?**

**NO.** If the persuasive communications were not via one of the three means specified in the statute (e.g., if they were face-to-face OR if they would have occurred face-to-face), § 2422(b) does not apply. *See* discussion *infra* at Part II.A.4.d.

**YES.** Move on to the next question.

**Were your client’s communications direct communications with a minor (real or fictitious) or were the communications with a so-called “adult intermediary?”**

- **Direct Contact.** If the communications were with a child or fictitious child, then the next question is:

**Do your client’s communications reflect an attempt to “bend the child-victim’s will?”**

*United States v. Laureys*, 653 F.3d 27, 40 (D.C. Cir. 2011) (Brown, J., dissenting). Merely agreeing to have sex with the minor is not enough. *See* discussion *infra* at Part II.A.4.c.

**NO.** If the communications **WERE NOT** of a persuasive nature, then you have a case you can litigate.

**YES.** If the communications **WERE** of a persuasive nature, then the next question is:

**Did your client take any “real-world” substantial steps, such as travel to meet the minor, towards having sex with the minor?**

**YES.** Then, along with direct Internet/phone/mail communications enticing a minor to engage in sexual activity, you are in plea territory.

**NO.** Then see *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008) (Posner, J.) (reversing § 2422(b) conviction in direct contact case based on lack of any real world substantial step). *See* discussion *infra* at Part II.A.3.c.

- **Adult Intermediary.** If the communications were with an adult intermediary, and you are in a Circuit that has clearly upheld the use of an adult intermediary in the § 2422(b) context, then you should still object to the use of the adult intermediary to preserve the issue for eventual Supreme Court review, but your real next question is:

**Were your client’s communications intended to *indirectly* bend the child-victim’s will?**

*United States v. Laureys*, 653 F.3d 27, 40 (D.C. Cir. 2011) (Brown, J., dissenting); *United States v. Nitschke*, No. 11-cr-138 (JEB), 2011 WL 7272456, at \*8 (D.D.C. Sept. 6, 2011) (“[T]he defendant’s persuasion must affect the minor, even if indirectly. In other words, the defendant must in essence be asking the adult to persuade the minor, thereby constituting indirect persuasion.”). *See* discussion *infra* at Part II.A.4.b.ii.

*NOTE:* If the communications do not reflect an attempt to indirectly persuade the child, then you may have a triable case, as the statute requires the criminal persuasion of a *minor*. However, some Circuits have upheld § 2422(b) convictions where the persuasion was of an adult intermediary only, without any finding that the defendant intended to indirectly persuade the minor. *See United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004), *United States v. Berk*, 652 F.3d 132 (1st Cir. 2011). *But see Nitschke*, 2011 WL 7272456, at \*8 (“[T]he defendant must in essence be asking the adult to persuade the minor, thereby constituting indirect persuasion.”). If your case involves persuasion of an adult intermediary only, as opposed to indirect persuasion of a minor, you should litigate the sufficiency of this evidence. You should also ask:

**Did the adult intermediary purport to have a relationship of supervisory control with the minor, e.g., was he/she purporting to be a parent or guardian?**

**NO**, then you have a good ground to litigate as the cases require this relationship. *See* discussion *infra* at Part II.A.4.b.iv.

**YES**, then ask:

**Did the case involve a real-world substantial step (such as travel) demonstrating that your client was intending to have sex with the minor?**

**YES**, then you may be in plea territory, but remember to preserve the objection to the use of the adult intermediary. *See* discussion *infra* Part II.A.4.b.i.

**NO**, then you have an excellent opportunity to litigate on behalf of your client, as there are very few cases in this category, *see, e.g., United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010), and they have come under heavy criticism as they are very poorly reasoned and unsupported by the language of the statute. *See, e.g.,* Korey J. Christensen, *Reforming Attempt Liability Under 18 U.S.C. § 2422(b): An Insubstantial Step Back From United States v. Rothenberg*, 61 Duke L.J. 693, 708 (2011) (stating that *Rothenberg* “mischaracterized precedent . . . runs contrary to the statute’s legislative history . . . offends foundational principles of criminal-attempt law [and] leads to absurd outcomes, potentially extending criminal liability to defendants in relatively benign circumstances.”). *See* discussion *infra* Part II.A.3.c.

**FINALLY**, in all cases, you must ask two questions about the underlying state law charged in your client’s indictment:

**(1) Does the state law underlying the § 2422(b) offense proscribe “sexual activity” as that term is defined in federal law?**

In *United States v. Taylor*, 640 F.3d 255, 259-260 (7th Cir. 2011), the court (Posner, J.) reversed the conviction because the conduct proscribed by state laws (fondling oneself and persuading a minor to fondle herself) was not “sexual activity” within the meaning of federal

law. See discussion *infra* at Part II.A.4.e.

**(2) Would your client’s conduct have in fact violated the state law?**

You should look at the state’s law as well as state court decisions interpreting it. For example, some state laws are not violated unless the minor is real (*i.e.*, non-fictitious). Consider raising this state law problem in connection with the viability of the § 2422(b) charge. See discussion *infra* at Part II.A.4.a.

**3. The Law of Attempt.**

Because most of the cases in this area involve “fictitious minors,” these cases are most often charged as attempts. Thus, it is important to understand the law of attempt as it applies to § 2422(b). The key is that, in the specific context of § 2422(b), your client’s communications must reflect an intent to entice. In other words, the replacement of a “substantial step” for the completed crime in this area does not lessen the government’s required quantum of proof concerning your client’s communications. Thus, for § 2422(b) attempts, the defendant’s actions will have been exactly the same, he just will not have succeeded because the minor was not real OR the minor was not persuaded (*e.g.*, he/she told his parents and they called the police).

**An attempt requires: (1) the necessary state of mind; and (2) a substantial step towards the commission of the offense.**

Under the law of attempt, the government must prove that the defendant had the necessary state of mind to violate the statute, and that he took a substantial step in the commission of the crime. See generally *Braxton v. United States*, 500 U.S. 344, 349 (1991) (stating that “[f]or Braxton to be guilty of an attempted killing under 18 U.S.C. § 1114, he must have taken a substantial step towards that crime, and must also have had the requisite mens rea”); *United States v. Washington*, 106 F.3d 175, 197 (D.C. Cir. 1997) (to establish attempt “the prosecutor must show that the defendant ‘acted with the kind of culpability’ otherwise required for the commission of the crime which he is charged with attempting,” and that he “engaged in conduct which constitutes a substantial step toward the commission of the crime”) (quoting *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974)). Mere preparation for an attempt is not enough. See *United States v. Buffington*, 815 F.2d 1292, 1301 (9th Cir. 1987) (“Mere preparation does not constitute a substantial step.”); *Mandujano*, 499 F.2d at 376 (“Preparation alone is not enough, there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature.”); *United States v. Manley*, 632 F.2d 978, 987 (2d Cir. 1980) (“A substantial step must be something more than mere preparation”). Instead, the defendant’s alleged substantial step towards the commission of the offense “must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a

reasonable doubt that it was undertaken in accordance with a design to violate the statute.”  
*United States v. Bailey*, 228 F.3d 637, 640 (6th Cir. 2000) (quoting *Manley*, 632 F.2d at 987-88).

If the government argues in your case that § 2422(b) criminalizes an attempt by your client to entice a minor at a future face-to-face meeting — *i.e.*, once the defendant meets the minor in person — that position reflects both a misunderstanding of attempt law as applied to § 2422(b) and a misreading of the statute. The reason a defendant in a § 2422(b) case involving a fictitious minor can be guilty of attempt instead of the completed crime is *not* because the defendant was planning to entice, but did not yet have the chance to make the required illegal communication. Instead, it is because the defendant did *attempt* the enticement through an illegal communication, but the attempt was not successful because the minor was not real. *See, e.g., United States v. Taylor*, 640 F.3d 255, 257 (7th Cir. 2011) (“It’s because [the purported minor] was actually an adult that the defendant was charged with and convicted of an attempt rather than a completed crime.”); *United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007) (“Yost was convicted of *attempt* under the statute because no actual minors were involved.” (emphasis in original)); *United States v. Gagliardi*, 506 F.3d 140, 145-46 (2d Cir. 2007) (“Section 2422(b) explicitly proscribes attempts to entice a minor, which suggests that actual success is not required for a conviction and that a defendant may thus be found guilty if he fails to entice an actual minor because the target whom he believes to be underage is in fact an adult.”); *United States v. Kaye*, 451 F. Supp. 2d 775, 782 (E.D. Va. 2006) (“Defendant has been charged with criminal attempt under the statute since there was no actual minor involved and, as such, the offense was not completed.”).

Thus, in a case charging an attempted violation of § 2422(b), any “substantial step” discussion is essentially beside the point. Because § 2422(b) punishes *communications* and not behavior, the attempt analysis must be viewed in that context. A defendant attempts to persuade, induce, entice, or coerce by making communications of that nature. He succeeds in persuading, inducing, enticing, or coercing by achieving the minor’s assent to sexual activity. If the minor does not assent, the very same communications still violate § 2422(b), as they constitute an attempt. Thus, the only difference between a direct violation of § 2422(b) and an attempted violation is whether the minor’s assent is achieved.

**a. Operative Intent: The Intent to Persuade, Not Intent to Have Sex.**

Under § 2422(b), the attempted conduct prohibited by § 2422(b) is *not* an attempt to have sex with a minor. “[M]ere contact for the purposes of engaging in illegal sexual activity . . . is not criminalized in 18 U.S.C. § 2422(b).” *United States v. Root*, 296 F.3d 122, 1230 (11th Cir. 2002) (internal quotation marks and ellipses omitted). In *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010), the Eleventh Circuit held that to prove the requisite intent under 18 U.S.C. § 2422(b), “the government must prove the defendant intended to cause assent on the part of the minor, *not that he acted with the specific intent to engage in sexual activity.*” *Id.* (internal quotation marks and citations omitted) (emphasis added). The court further stated that “[w]ith

regard to conduct, the government must prove that the defendant took a substantial step *toward causing assent, not toward causing actual sexual contact.*” *Id.* (emphasis added). As the Sixth Circuit stated in *Bailey*, the intent to entice and the intent to have sex “*are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.*” 228 F.3d at 639 (emphasis added). And, more recently, the same court noted in *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011): “Section 2422(b) . . . was designed to protect children from the act of solicitation itself—a harm distinct from that proscribed by § 2423 [which criminalizes an intent to engage in illicit sex].” *See also* Andriy Pazuniak, *A Better Way To Stop Online Predators: Encouraging A More Appealing Approach To § 2422(B)*, 40 Seton Hall L. Rev. 691, 721 (2010) (recognizing that § 2422(b) “does not target a predator’s attempt to have sex with a minor; it only targets his attempt to persuade”).

Thus, turning back to the attempt analysis, the requisite intent under § 2422(b) is not an intent to have sex with a minor, but rather an intent to “criminal[ly] persuad[e]” the minor to have sex. *Bailey*, 228 F.3d 637.

The case law under § 2422(b) supports this view. The courts of appeal appear to be in unanimous agreement that the intent requirement for § 2422(b) differs from the intent requirement for 18 U.S.C. § 2423(b), which requires the intent to have illicit sex, *e.g.*, sex with a minor. *See United States v. Douglas*, 626 F.3d 161, 164-65 (2d Cir. 2010); *Lee*, 603 F.3d at 814 (collecting cases from the First, Sixth, Eighth, and Tenth Circuits); *United States v. Hofus*, 598 F.3d 1171, 1178 (9th Cir. 2010) (recognizing, “like numerous other Circuits,” a distinction between an intent to persuade and an intent to commit a criminal sex act; and holding that in a prosecution under § 2422(b) an intent to persuade is the requisite intent). Accordingly, when reviewing § 2422(b) convictions upon challenges to the sufficiency of the evidence, courts have focused specifically on evidence supporting the defendant’s intent to entice or coerce, as opposed to the evidence supporting the defendant’s intent to have sex.

**b. Substantial Step: Travel Is Not A Substantial Step In A § 2422(b) Offense.**

A common mistake among appellate courts interpreting § 2422(b) is to characterize a defendant’s physical travel to meet the minor for sex as sufficient for the “substantial step” in the attempt analysis. Given the abundant case law correctly holding that the statute does not criminalize an attempt to have sex with a minor, characterizing travel as the substantial step is just wrong. Instead, the substantial step must be towards “knowingly persuad[ing], induc[ing], entic[ing] or coerc[ing]” the minor “using the mail or any facility of interstate commerce,” and travel cannot sensibly be characterized as a step towards that, as travel is not a communicative act and it also does not take place on the internet. *See United States v. Nitschke* 2011 WL 7272456, \*11 (D.D.C. Sept. 6, 2011) (“Travel, moreover, is not sufficient to establish a substantial step. . . . [T]ravel ultimately has nothing to do with this crime.”).

Under the law of attempt, the defendant's substantial step must be necessary to the consummation of the crime. *Manley*, 632 F.2d at 987-88; *see also United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007) (defendant's conversation with purported mother of fictitious daughters "b[ore] the familiar hallmarks of criminal attempt" because, *inter alia*, "they were necessary to the consummation of the crime" (emphasis added)). With the possible exception of the Seventh Circuit in *Gladish*, every circuit to consider the issue has held that § 2422(b) does not require any attempt at actual sexual activity, and, indeed, that an attempt to violate § 2422(b) is completed entirely through the defendant's communications, *e.g.*, online and/or via cell phone. *See, e.g., United States v. Goetzke*, 494 F.3d 1231, 1236 (9th Cir. 2007) (physical proximity or travel not necessary for § 2422(b) offense, and collecting cases); *United States v. Thomas*, 410 F.3d 1235, 1245 (10th Cir. 2005) (same); *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) ("[I]f a person *persuaded* a minor to engage in sexual conduct (*e.g.*, with himself or a third party), without then actually committing any sex act himself, he would nevertheless violate § 2422(b)." (emphasis in original)); *Bailey*, 228 F.3d 637 (sufficient evidence of substantial step in enticement offense where defendant sent emails to minors proposing oral sex but did not ever travel to meet girl). Thus, the defendant's physical travel is not "necessary to the consummation of" an offense under § 2422(b), and cannot constitute a substantial step in the crime under the law of attempt.

Notwithstanding the above, however, many courts have characterized travel as a part of the substantial step analysis. *See, e.g., United States v. Brand*, 467 F.3d 179, 202-04 (2d Cir. 2006); *United States v. Meek*, 366 F.3d 705, 720 (9th Cir. 2004) (finding a substantial step in defendant's "extensive sexual dialog, transmission of a sexually-suggestive photograph, repeated sexual references as to what Meek would do when he met the boy, and his travel to meet the minor at a local school"). Indeed, *Gladish* goes so far as to suggest that travel (or at least some other real world activity outside of cyberspace) is required. However, we are unaware of any case relying solely on the defendant's travel for the requisite substantial step. Moreover, the better reasoned cases have considered travel as relevant evidence of a defendant's intent to entice, but not as the required substantial step in the attempt analysis. *See, e.g., Goetzke*, 494 F.3d at 1236 ("Similarly, travel by a defendant to meet a potential victim is probative, but not required, to advance and verify an intent to persuade, induce, entice or coerce."). Thus, just because your client traveled to meet the minor does not mean he took a "substantial step" towards online enticement.

**c. Treating Speech Alone As Substantial Step: *Gladish* and the First Amendment.**

The weakest and most disturbing view of § 2422(b) is that the statute criminalizes mere conversations about child sex between two consenting adults without anything more. Although several courts have taken this view, the primary offender is the Eleventh Circuit in *United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010) ("In this case, Rothenberg's chats were specific instructions to adults with influence over young children; these graphic guides to sexual exploitation showed the adults both how, physically, to molest the children and how,

emotionally, to persuade the children to comply with the abuse. Accordingly, the chats constituted important actions leading to the commission of inducing particular children to engage in illegal sexual activity.” (quotations and brackets omitted)). The *Rothenberg* decision has been met with significant criticism for its deeply flawed analysis of § 2422(b). See, e.g., *Reforming Attempt Liability Under 18 U.S.C. § 2422(b): An Insubstantial Step Back From United States v. Rothenberg*, 61 Duke L.J. 693, 708 (2011) (stating that *Rothenberg* “mischaracterized precedent . . . runs contrary to the statute’s legislative history . . . offends foundational principles of criminal-attempt law [and] leads to absurd outcomes, potentially extending criminal liability to defendants in relatively benign circumstances.”).

If you have a case that follows the *Rothenberg* scenario (*i.e.*, adult-to-adult communications and no “real world” substantial step), you should argue that the indictment not only misconstrues § 2422(b), but also that it violates the First Amendment, because the only substantial step is adult-to-adult speech. In *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008), Judge Posner addressed the application of § 2422(b) to obscene speech. Significantly, *Gladish* was not even an adult intermediary case, but rather one where the defendant was communicating directly with a purported minor. Even in that context, Judge Posner directly rejected the government’s position that a person can violate § 2422(b) through communications alone. See *id.* (“Treating speech (even obscene speech) as the ‘substantial step’ would abolish any requirement of a substantial step. It would imply that if X says to Y, ‘I’m planning to rob a bank,’ X has committed the crime of attempted bank robbery, even though X says such things often and never acts. The requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air.”); *id.* at 648 (“You are not punished just for saying that you want or even intend to kill someone, because most such talk doesn’t lead to action.”). Although *Gladish* does not expressly invoke the First Amendment, a concern over criminalizing mere speech is clearly what animates its requirement of a “real world” substantial step.

As a result of the court’s concern over criminalizing speech alone, the Seventh Circuit in *Gladish* required the government to prove a “substantial step” that went beyond mere speech. While the court stated that “[t]ravel is not a *sine qua non* of finding a substantial step in a section 2422(b) case,” the court held that it must consist of something more than “a conversation in which the defendant unmistakably proposes sex.” *Id.* at 649. As the court stated:

The substantial step can be making arrangements for meeting the girl, as by agreeing on a time and place for the meeting. It can be taking other preparatory steps, such as making a hotel reservation, purchasing a gift, or buying a bus or train ticket, especially one that is nonrefundable ‘The defendant’s initiation of sexual conversation [to a minor] writing insistent messages [to a minor], and attempting to make arrangements to meet’ [the minor] were described as a substantial step in *United States v. Goetzke*. . . . We won’t try and give an exhaustive list of the possibilities.

But we disagree with the government’s suggestion that the line runs between ‘harmless banter’ and a conversation in which the defendant unmistakably proposes sex.

\* \* \*

[T]he fact that the defendant in the present case said to a stranger whom he thought a young girl things like ‘ill suck your titties’ and ‘ill kiss your inner thighs’ and ‘ill let u suck me and learn about how to do that,’ while not ‘harmless banter,’ did not indicate that he would travel to northern Indiana to do these things to her in person; nor did he invite her to meet him in southern Indiana or elsewhere. His talk and his sending her a video of himself masturbating (the basis of his unchallenged conviction for violating 18 U.S.C. § 1470) are equally consistent with his having intended to obtain sexual satisfaction vicariously.

*Id.* at 649-650.

The central principle *Gladish* relies upon is unassailable: that “[y]ou are not punished just for saying that you want or even intend to kill someone, because most such talk doesn’t lead to action.” *Id.* at 648; *see also* 1 Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 6.1 (2d ed. 2011) (“Several reasons have been given in justification for the requirement of an act. One is that a person’s thoughts are not susceptible of proof except when demonstrated by outward actions. But, while this is doubtless true in most instances, it fails to take account of the possibility that one might confess or otherwise acknowledge to others the fact that he has entertained a certain intent. Another reason given is the difficulty in distinguishing a fixed intent from mere daydream and fantasy. Most persuasive, however, is the notion that the criminal law should not be so broadly defined to reach those who entertain criminal schemes but never let their thoughts govern their conduct.” (internal citations omitted)); 2 KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 21:04 (6th ed. 2012) (“A defendant may not be found guilty of attempting to commit any crime, however, merely by thinking about it or even by making some plans or some preparation for the commission of a crime. The difference between conduct which violates the law and conduct which does not violate the law, in this regard, is what is referred to as ‘a substantial step’ towards the commission of a crime.”). It is therefore not speech that is criminalized, but the intended result, which in this case is “to persuade minors to participate in illegal sexual acts.” *Bailey*, 228 F.3d at 639; *see also United States v. Dhingra*, 371 F.3d 557, 561-63 (9th Cir. 2004) (rejecting overbreadth challenge because statute regulates conduct—inducement of minors for sexual activity—not speech).

Criminalizing mere communications without more—as the *Rothenberg* approach to § 2422(b) does—is impossible to distinguish from Judge Posner’s hypothetical concerning the idle threat to kill someone. This is particularly so when the discussions are with another consenting adult. Indeed, the fact that the discussions have been with minors or purported minors are exactly what courts have relied upon to ensure that § 2422(b) does not run afoul of the First Amendment. *See, e.g., United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007) (rejecting First Amendment challenge in direct contact case but noting that “legitimate inter-adult

communications are not proscribed by section 2422(b)"). The point here is that mere adult-to-adult discussions of committing a crime are protected by the First Amendment and should not be within § 2422(b)'s purview, particularly where there is no other "real world" step towards enticement of a child.

#### 4. Statutory Construction.

##### § 2422(b). Coercion and enticement ("Online")

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

##### a. Actual vs. Fictitious Child.

When § 2422(b) was enacted in 1996, the first round of statutory construction-type litigation to make its way to the Courts of Appeals challenged the government's ability to use a law enforcement officer posing as a fictitious minor (primarily over the Internet) to obtain convictions under the statute (pursuant to subsections (a) and (b)). This battle was valiantly fought, but it has been lost. No Circuit to have addressed the issue has ruled that § 2422 requires the existence and participation of an actual child; and, to the best of our knowledge, almost every Circuit has directly addressed the issue. Due to the statute's legislative history and the law of attempt, this is one of the only battles we believe to be decisively (and permanently) lost.

You still might be able to make an offshoot of this argument, however. In *United States v. Lundy*, – F.3d –, 2012 WL 1021795 (5th Cir. Mar. 28, 2012), the defendant argued *not* that the federal statute itself requires an actual child, but that certain underlying state statutes require the existence of an actual child *even in cases of attempt*. In *Lundy*, the defendant was charged under § 2422(b) with attempting to persuade, induce, entice, or coerce a fictitious 15-year-old girl (via Internet and cell phone) to engage in sexual activity "which would constitute the crime of statutory rape, for which [he] could be prosecuted under the laws of the State of Mississippi (Mississippi Code Annotated § 97-3-65(a))." *Id.* at \* 2. Under Mississippi law, however, a person who tries but does not succeed in having sex with a "faux child" is guilty of attempted statutory rape, which is an offense under Miss. Code. § 97-1-7 (the general attempt statute). *Id.* The defendant argued, essentially, that the government had mischarged the case, as the sexual activity the defendant attempted to engage in could not as a matter of law result in a charge under Miss. Code § 97-3-65(a), which requires an actual minor; thus the defendant's conviction should be vacated.

Construing the defendant’s argument as one based on factual impossibility, the Court rejected it, explaining that factual impossibility is simply no defense to the crime of attempt. Interestingly, the defendant specifically did not raise the issue of factual impossibility in his appellate briefing, as he attempted to frame the argument as one of statutory construction (discussing what conduct the “or attempts to do so” modifies) and a case of simple mischarging. You may want to pull the *Lundy* briefing and build on it. Though we can anticipate many courts agreeing with the Fifth Circuit, it is not a frivolous argument, as this issue is not as simple as the Fifth Circuit made it out to be.<sup>5</sup>

**Practice Tip:** Check the state statute underlying your client’s § 2422(b) charge to see if it requires the existence of an actual child for prosecution. If so, and the government has no other viable statutory alternative with which to charge your client via superceding indictment, you can attempt to raise a *Lundy*-type argument in a motion to dismiss. If the government could easily supercede, think about saving this issue for your Rule 29 motion or appeal.

**b. Adult Intermediary Cases.**

**i. Can You Challenge the Use of an Adult Intermediary?**

In most Circuits, the answer to this question is “no”; we think it is worth preserving the issue nonetheless, however, in the event the Supreme Court eventually weighs in on the proper interpretation of this statute, which it will. For those of you who practice in a Circuit where the adult intermediary issue is still an open question (*e.g.*, the D.C. Circuit), the following discussion, premised primarily on Judge Janice Rogers Brown’s dissenting opinion in *United States v. Laureys*, 653 F.3d 27 (D.C. Cir. 2011) should be helpful.<sup>6</sup>

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<sup>5</sup> See also *United States v. Godwin*, 399 Fed. App’x 484 (11th Cir. 2010) (because underlying state statute “can be committed by attempt and does not require a real child victim,” evidence sufficient to sustain § 2422(b) conviction); *United States v. Kaye*, 243 F. App’x 763, 766 (4th Cir. 2007) (“Because the Virginia Supreme Court explicitly ruled . . . that the absence of an actual child has no bearing on the crime of attempt under [Va. Code Ann.] § 18.2-370,” no actual child needed for violation of § 2422(b) with § 18.2-370 as underlying state statute).

<sup>6</sup> Judge Brown’s opinion appears as a dissent not because the majority disagreed with the substance of her analysis, but because it determined that the defendant — who had not raised the argument below *or* on appeal — had waived the issue that Judge Brown identified *sua sponte* on appeal. See *Laureys*, 653 F.3d at 39 (Brown, J., dissenting) (“The court does not attempt to defend the district court’s statement of the law on the merits, and there is no dispute that — if it is erroneous — the district court’s jury instruction was prejudicial. The court disagrees only with my conclusion that any error was plain.”).

“[I]n all statutory construction cases, we begin with ‘the language itself [and] the specific context in which that language is used.’” *McNeill v. United States*, 131 S. Ct. 2218, 2221 (2011) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Section 2422(b), 18 United States Code, states as follows:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2422(b).

In the D.C. Circuit’s most recent § 2422(b) decision, Judge Janice Rogers Brown explicitly acknowledged that — notwithstanding decisions from other courts of appeals — the question of whether a defendant can violate § 2422(b) by communicating exclusively with an adult is still open in that Circuit. *See Laureys*, 653 F.3d at 40 (Brown, J., dissenting) (“*Laureys*’s case does not require us to decide whether these courts were right to hold the requisite attempt to persuade a minor may be proven exclusively by communication with an adult.”). Though the question is an open one, the face of the statute supports only one answer: Section 2422(b) requires that a defendant communicate, via a facility of interstate commerce, directly with a minor — or attempt to do so. The statute’s plain language permits no other interpretation. As Judge Brown recognized in her dissent in *Laureys*: “Each verb of the statutory *actus reus* (“persuades, induces, entices, or coerces”) has a person as its object, and the statutory text leaves no doubt but that the personal object must be a minor.” 653 F.3d at 38 (Brown, J., dissenting). Because “[t]he preeminent canon of statutory interpretation requires [courts] to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there,’” there can be no doubt that § 2422(b) — on its face — requires direct internet/phone communication with a minor (or fictitious minor). *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Any contrary interpretation would be inconsistent with the plain language of the statute.

The Eleventh Circuit — the first circuit court to address this issue — held otherwise, however, in *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004). In holding that an individual could violate § 2422(b) by communicating with an adult intermediary only, the *Murrell* court went well beyond the plain language of the statute, relying instead on the policy argument that “the efficacy of § 2422(b) would be eviscerated if a defendant could circumvent the statute simply by employing an intermediary to carry out his intended objective.” *Id.* at 1287. Several courts of appeals have adopted this reasoning in subsequent opinions. *See, e.g., United States v. Douglas*, 626 F.3d 161, 164 (2d Cir. 2010); *United States v. Spurlock*, 495 F.3d 1011,

1014 (8th Cir. 2007).<sup>7</sup>

Though the policy argument raised in *Murrell* is a superficially appealing one, it ignores basic realities of federal criminal law. Aiding and abetting and conspiracy are two theories of criminal liability that already account for the *Murrell*'s court's concern and attach, by act of Congress, to any "offense against the United States." 18 U.S.C. §§ 2, 371.<sup>8</sup> Congress has made these statutes available to courts and prosecutors for precisely the reason identified in *Murrell*, *i.e.*, to criminalize the actions of those who use "intermediaries" to accomplish their criminal objectives. Thus, there is no need to torture the language of any individual statute to create liability where a defendant acts through another person — Congress enacted the aiding and abetting and conspiracy statutes expressly for this purpose.<sup>9</sup>

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<sup>7</sup> The Third Circuit appears to be the only court of appeals to base its adult intermediary jurisprudence on a rationale different than *Murrell*'s. In holding that § 2422(b) could be violated where the defendant acts through an adult intermediary, the court reasoned that the defendant's interactions with the adult were "substantial steps calculated to put him into direct contact with a child so that he could carry out his clear intent to persuade, induce, entice, or coerce the child to engage in sexual activity." *United States v. Nestor*, 574 F3d 159, 162 (3d Cir. 2009). Such a theory of liability is add odds with the plain language of the statute, however, as § 2422(b) makes clear that the act of persuasion itself must be accomplished or attempted "using the mail or any facility or means of interstate or foreign commerce," not via face-to face contact. *See* discussion *infra* at Part II.A.4.d.

<sup>8</sup> 18 U.S.C. § 2 states in full:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 states in full:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

<sup>9</sup> It is important to acknowledge, however, the well-established principle that a defendant can neither conspire with nor aid and abet an undercover law enforcement officer.

(continued...)

Further, as Judge Brown also recognized in *Laureys*, prosecutors have numerous other statutes — even beyond 18 U.S.C. §§ 2 and 371 and state-law crimes — with which to charge those who sexually abuse or attempt to sexually abuse children. In direct response to the policy argument presented in *Murrell*, Judge Brown noted:

[T]he *Murrell* court reasoned that the “efficacy of § 2422(b) would be eviscerated if a defendant could circumvent the statute simply by employing an intermediary to carry out his intended objective.” 368 F.3d at 1287. Not so. Congress very well could have decided that child victims are more vulnerable to online persuasion, inducement, enticement, and coercion than their adult guardians. The most sensible interpretation of subsection (b) is that Congress targeted the enticement of minors for that very reason. Congress has already provided a penalty for soliciting a child under age sixteen for sex crimes. *See* 18 U.S.C. § 2425. And other provisions penalize transporting “any individual” for sex crimes, *id.* § 2421, persuading “any individual” to travel for sex crimes, *id.* § 2422(a), transporting a minor for sex crimes, *id.* at § 2423(a), arranging such transportation, *id.* § 2423(d), traveling with the intent to engage in illicit sexual conduct, *id.* § 2423(b), engaging in the illicit sex act itself, *id.* §§ 2241–44, 2423(c), and attempting or conspiring to do so, *id.* at 2423(e). *Clearly, Congress has not left prosecutors powerless against child predators who do not entice their victims on the internet.*

653 F.3d at 42 (emphasis added). Thus, in addition to being an improper exercise of the judicial function, *see infra*, it is simply not necessary to stretch the language of § 2422(b) beyond its plain language.

Finally — and perhaps most importantly — when interpreting a statute, any resort to policy considerations is improper when the statute itself is unambiguous on its face. *See BedRoc Ltd.*, 541 U.S. at 183 (“[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.”); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not

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<sup>9</sup>(...continued)

*See, e.g., United States v. Iennaco*, 893 F.2d 294 (D.C. Cir. 1990) (“As a government agent, [the law enforcement officer] could not be a conspirator himself.”); *Kash v. United States*, 112 Fed. App’x 518, 520 (7th Cir. 2004) (“The [question is] whether it is possible to incur criminal liability for aiding and abetting what is not a crime, and of course the answer is easily “no;” no matter the government’s theory of the case, some crime (including an inchoate offense like the attempted robbery here) must be committed before criminal liability attaches.”). Congress is well aware of this legal impossibility, however, and could easily amend § 2, § 371, or any substantive statute to create liability in such circumstances. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of . . . [a] judicial interpretation of a statute . . .”).

arise and the rules which are to aid doubtful meanings need no discussion.”); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 451 (1987) (Scalia, J., concurring in judgment) (“[I]f the language of a statute is clear, that language must be given effect — at least in the absence of a patent absurdity”); *Garcia v. United States*, 469 U.S. 70, 75 (1984) (courts are bound to a statute’s language absent “extraordinary showing of contrary intent” in legislative history). Because § 2422(b)’s statutory text is clear and unambiguous — *see, e.g., United States v. Panfil*, 338 F.3d 1299, 1301 (11th Cir. 2003) (section 2422(b) is “not ambiguous”; “[i]ndeed, the language of § 2422(b) is clear”); *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) (“No . . . ambiguity problems exist with 18 U.S.C. § 2422(b).”) — its plain meaning must be given effect.<sup>10</sup> In the face of an unambiguous statute, policy is the business of Congress, not the courts. *See Laureys*, 653 F.3d at 42 (Brown, J., dissenting) (“Section 2422(b) is unique in targeting efforts to overbear the wills of children online. We have every reason to presume Congress meant what it said. Congress has not been reticent to amend § 2422(b) . . . . If Congress wishes to expand § 2422(b) . . . Congress does not need our help in rewriting the statute.” (internal citation omitted)).

Thus, courts that have interpreted § 2422(b) to permit the use of an adult intermediary — without resort to 18 U.S.C. § 2 or § 371 — have done so in direct contradiction to the plain language of the statute. To the extent this is an open question in your Circuit, it is important to urge your District/Circuit to adopt the reading most consistent with the statute’s plain language and hold that § 2422(b) requires direct communication between the defendant and a minor. *Cf. Laureys*, 653 F.3d at 40 (Brown, J., dissenting) (recognizing that “the errors of other courts do not immunize [a] district court . . . on plain error review” and further noting that the Circuit has “not hesitated to deem an error involving clear language plain, even when another circuit considered the provision ambiguous enough to defeat a finding of plain error” (internal quotation marks omitted)).

## ii. If An Adult Intermediary Is Employed, the Defendant’s

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<sup>10</sup> Even were the statutory language ambiguous, the rule of lenity would apply:

But when there are two equally plausible interpretations of a criminal statute, the defendant is entitled to the benefit of the more lenient one. “[T]he tie must go to the defendant.” *United States v. Santos*, 553 U.S. 507, 514 (2008); *see also Bell v. United States*, 349 U.S. 81, 83–84 (1955) (Frankfurter, J.). “This venerable rule [the ‘rule of lenity,’ as it is called] not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.” *Santos*, 553 U.S. at 514.

*United States v. Taylor*, 640 F.3d 255, 259-260 (7th Cir. 2011) (internal citations altered).

## **Communications Must Demonstrate an Intent to Entice a *Minor*, Not the Adult.**

Where the sexual communications are limited to those between the defendant and an adult intermediary, the only way the statute continues to make any sense is by requiring that the government prove that the defendant's communications were still intended to persuade a minor, but just indirectly. Along these lines, a recurring fact pattern in § 2422(b) cases is where the defendant offers things of value intended for the minor. *See, e.g., Douglas*, 626 F.3d at 162-63 (defendant told adult intermediary he would provide minor with "sex training" services without harm to minor and also repeatedly promised cash payments in exchange for access); *United States v. Lee*, 603 F.3d 904, 908-17 (11th Cir. 2010) (defendant sent adult intermediary graphic photos intended for minor girls, and also promised gifts). Another factor in adult intermediary cases under § 2422(b) is whether the defendant endeavored to persuade the adult to have sex with the minor. *See, e.g., United States v. Farley*, 607 F.3d 1294, 1300-306 (11th Cir. 2010). However, this line of cases seems wrong in given the statute's requirement of attempted persuasion of *a minor*.

Although this issue has not received much attention in the appellate courts, there have been several cases in our Circuit discussing the requirement of indirect persuasion of the minor in the adult intermediary cases.

### **1.) *United States v. Laureys*, 653 F.3d 27 (D.C. Cir. 2011)**

On August 19, 2011, Judge Brown of the D.C. Circuit issued a dissent in *United States v. Laureys* that definitively rejected the theory that an individual could violate § 2422(b) by persuading another adult.<sup>11</sup> *Laureys*, 653 F.3d at 37-42 (Brown, J., dissenting). Though the issue was not raised by appellate counsel, Judge Brown addressed *sua sponte* the district court's jury instruction in *Laureys*, which allowed for conviction under § 2422(b) if the government proved that the defendant knowingly attempted "to persuade *an adult* to cause a minor to engage in unlawful sexual activity." *Id.* at 37 (internal quotation marks omitted) (quoting jury instruction); *see also id.* (quoting latter portion of jury instruction that further explained, "[t]he government must only prove that the defendant believed that he was communicating with someone who could arrange for the child to engage in unlawful sexual activity"). As Judge Brown recognized, § 2422(b) requires the persuasion to be aimed at the minor him or herself, *not* the adult intermediary. Though the *per curiam* opinion determined that the court "need not wade into this question of statutory interpretation because [the defendant] has not raised it," *id.* at 32, Judge Brown found that the error was plain, that it affected the defendant's substantial rights, and that it seriously affected the fairness of the judicial proceedings against him. *Id.* at 38.

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<sup>11</sup> As noted, Judge Brown's opinion appears as a dissent not because the majority disagreed with the substance of her analysis, but because it determined that the defendant — who had not raised the argument below *or* on appeal — had waived the issue that Judge Brown identified *sua sponte* on appeal. *See supra* note 5.

Judge Brown easily rejected the government's claim that § 2422(b) permits a conviction based on attempted persuasion of an adult:

It is an open question in this circuit whether § 2422(b) permits a conviction for persuasion of an adult. I say it is an open question only in the sense that we have never addressed it; the plain meaning of the statute leaves no room for doubt about the answer. Section 2422(b) is unambiguously directed at persuasion of a minor.

*Id.* at 39. Looking to the plain language of the statute, Judge Brown noted that “[e]ach verb of the statutory *actus reus* (‘persuades, induces, entices, or coerces’) has a person as its object, and the statutory text leaves no doubt but that the personal object must be a minor.” *Id.* at 38. Thus, “[e]ven absent binding case law . . . an error can be plain if it violates an absolutely clear legal norm, for example because of the clarity of a statutory provision.” *Id.* (internal quotation marks omitted) (quoting *In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009)). Because the district court’s error was clear on the face of the statute alone, Judge Brown concluded that the court should have reversed the defendant’s conviction on its own motion. *Id.*

**2.) *United States v. Nitschke*, No. 11-cr-138 (JEB), 2011 WL 7272456 (D.D.C. Sept. 6, 2011)**

On September 6, 2011, soon after *Laureys* was decided, Judge James E. Boasberg of the United States District Court for the District of Columbia dismissed a § 2422(b) charge pretrial. *See Nitschke*, 2011 WL 7272456. In *Nitschke*, the court described the “novel question presented” as “whether an individual can be charged with using the internet to attempt to persuade or induce a minor to have sex where he merely tells an adult in an online chat he would like to join him in sex the adult has already pre-arranged with the minor.” *Id.* at \*1. The court answered that question in the negative, rejecting the government’s contention that the defendant’s apparent interest and willingness to engage in sexual activity with a minor was the legal equivalent of an intent to criminally persuade a minor. As the court stated in *Nitschke*, “[w]hile [the defendant’s] statements certainly demonstrate that Defendant had a sexual interest in minors, they do not demonstrate an intent to entice or induce the fictitious minor via the internet. The Government appears to equate ‘interest’ with ‘intent to persuade.’ Simple interest in prepubescent sex — or even an intent to engage in such acts — cannot be enough to establish an intent to persuade.” *Id.* at \*9; *see also id.* at \*10 (“[A] willingness and desire to have sex does not demonstrate an intent to persuade a minor via the internet. There are simply no facts that display anything beyond a ‘willingness and desire’ to join in the preexisting plan to meet the [] minor for sex.”).

On the issue of the adult intermediary, Judge Boasberg rejected the government’s position that one could violate § 2422(b) through persuasion of an adult alone. The court stated that, “[c]ases from other circuits that have addressed this issue have all found that the defendant’s persuasion must affect the minor, even if indirectly. In other words, the defendant must in essence be asking the adult to persuade the minor, thereby constituting indirect persuasion.” *Id.*

at \*8. As Judge Boasberg stated, “the focus is on the intent of the defendant through his communications to influence *the child’s* assent.” *Id.* (emphasis added).

**iii. Section 2422(b) Does Not Prohibit Agreeing or Arranging To Have Sex With A Minor Through an Adult Intermediary.**

- **There Is Absolutely No Indication In the Plain Language Of The Statute That Congress Intended For 18 U.S.C. § 2422(b) To Occupy The Field As An All-Purpose Sexual Abuse Statute.**

Section 2422(b) unambiguously criminalizes the use of facilities of interstate commerce to “knowingly persuade[], induce[], entice[], or coerce[]” a minor to have sex. 18 U.S.C. § 2422(b). As such, § 2422(b) “was designed to protect children from the act of solicitation—a harm distinct from that proscribed by [18 U.S.C.] § 2423(b).” *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011).

Notwithstanding the above, the government may take the position that § 2422(b) criminalizes all sexual abuse of a minor, or attempted sexual abuse, so long as a computer, cell phone, or the mail is even tangentially involved. Section 2422(b) was not intended to, and does not, occupy the field of sex crimes in this manner. To the contrary, the sweeping interpretation of § 2422(b) as criminalizing discussions between two adults about — or even making arrangements for — child sex is irreconcilable with the plain language of the statute, which criminalizes attempts to use a facility of interstate commerce to “persuade, induce, entice, or coerce” a minor. Indeed, it is notable that 18 U.S.C. § 2423(d), a subsection of the very next statute in Title 18, criminally punishes an individual who “for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct.” 18 U.S.C. § 2423(d) (emphasis added). Clearly, Congress knows how to criminalize the “arrang[ing]” or “facilitat[ing]” of sex with a minor when it wants to. The fact that Congress did not use those words in § 2422(b) shows that Congress simply did not mean for this particular statute to apply to the “arranging” of underage sex. *See United States v. Papagno*, 639 F.3d 1093, 1099 (D.C. Cir. 2011) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion.”).

- **The Government’s Interpretation Would Render The Penalty Structure Of § 2422(b) And Related Statutes Absurd.**

In addition, interpreting § 2422(b) to criminalize all interstate communications that involve sex with minors makes no sense in light of the penalty structure of § 2422(b) and related statutes. *See Staples v. United States*, 511 U.S. 600, 616 (1994) (noting that the potentially harsh

penalty can be considered when construing a statute). Under 18 U.S.C. § 2423(b), a person who travels to meet a minor for actual sexual conduct is subject to no mandatory minimum penalty and a statutory maximum of 30 years. 18 U.S.C. § 2423(b). The sentencing range under the United States Sentencing Guidelines, with credit for acceptance of responsibility, is 37-46 months imprisonment. U.S.S.G. § 2G1.3(a)(4). Under 18 U.S.C. § 2243(a), a person who in fact has sex with a minor 12 to 16 years old (and who is at least 4 years older) on federal property is subject to no mandatory minimum penalty, a statutory maximum of fifteen years, and a Guidelines range of 18-24 months (with credit for acceptance of responsibility). *See* 18 U.S.C. § 2243(a); see also U.S.S.G. § 2A3.2. Indeed, for both of the above offenses, there is also a two-level enhancement if a computer is used to “persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct,” which increases the sentencing range by six months. *Id.* §§ 2A3.2(b)(3), 2G1.3(b)(3). It therefore makes no sense that Congress would have intended to subject someone who merely discusses or arranges to have sex with a minor — but does not actually do it — to a ten-year mandatory minimum penalty and a life maximum. Surely Congress did not intend such absurd results.

- **In Legislating § 2422 Congress Expressly Rejected A Proposed Subsection Codifying The Government's View Of The Statute.**

Congress could very easily have enacted the statute the government often mistakes § 2422(b) for, if that was what Congress wanted to do — which it clearly was not. That statute would read in relevant part as follows:

Whoever, using the mail or any facility or means of interstate or foreign commerce...for the purpose of engaging in illicit sexual activity with any individual who has not attained the age of 18 years, and for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

Congress did not, however, enact such a statute — and in fact specifically expressly rejected it. Congress expressly rejected a proposed “§ 2422(c)” that would have made it a federal crime to communicate with a minor with the intent of having illicit sex. *See* Andriy Pazuniak, *A Better Way To Stop Online Predators: Encouraging A More Appealing Approach To § 2422(B)*, 40 Seton Hall L. Rev. 691, 696 (2010) (noting Congress’s rejection of statute proscribing contact with minors through facilities of interstate commerce “for the purposes of engaging in sexual activity”).

- **Finding That § 2422(b) Criminalizes Making Arrangements For Sex With A Minor Would Mark A Significant Transfer Of Power From Courts To The Department Of Justice.**

Finally, accepting the interpretation of § 2422(b) that criminalizes all sexual abuse involving a computer would then provide a basis for federal jurisdiction in every sex case

involving a minor (or fictitious minor) that even tangentially involves a cell phone or computer. Among the many state and local crimes that would now become violations of § 2422(b) are all cases of statutory rape (or attempted statutory rape) where a cellular phone call was made or a text message or email was sent. For example, because most states' statutory rape laws proscribe sex with someone who is under sixteen and four years younger, it would become a violation of § 2422(b) carrying a ten-year mandatory minimum sentence for a senior in high school (an 18-year-old) to send a suggestive email or text message to a freshman (a 14-year-old). The same applies to a 19-year-old who sends the email or text message to a 15-year-old. This is not a result that was remotely contemplated by Congress in enacting § 2422(b), which is titled "Coercion and enticement." 18 U.S.C. § 2422(b) (emphasis added). Moreover, it is not a result remotely supported by § 2422(b)'s statutory language or case law.

Even worse, because of 2422(b)'s draconian 10-year mandatory minimum, it would be prosecutors instead of courts that would set the sentences in this area. Where the government is not satisfied with the typical 36-47 month Guideline range in a traveling case under § 2423(b), for example, the government will simply demand that the defendant accept a Rule 11(c)(1)(C) plea to a sentence above the Guideline range or else face § 2422(b)'s 10-year mandatory minimum sentence. No defendant would ever go to trial under § 2422(a), § 2423(b), or any other federal sex offense without also facing § 2422(b)'s 10-year mandatory minimum. In essence, based on a clear misreading of the statute and its legislative intent, the government will have total control over dispositions and sentences in all cases involving attempted sex with a real or fictitious minor. There is no indication in the plain language of the statute that Congress intended for this particular statute to occupy the field of sex crimes in this pervasive manner.

#### **iv. Adult Intermediary Should Have Control or Custodial Access.**

Even if your Circuit law permits § 2422(b) prosecutions in cases with adult intermediaries, an additional fact must be present: The adult intermediary must have custody or control over the purported minor. *See Murrell*, 368 F.3d at 1287-88 ("Murrell's agreement with the father, who was acting as an agent or representative, implied procuring the daughter to engage in sexual activity."); *Lee*, 603 F.3d at 914-15 (defendant communicating with postal inspector posing as mother with access to her two minor daughters); *Nestor*, 574 F.3d at 160-61 (defendant communicating with purported minor's alleged stepfather); *Spurlock*, 495 F.3d at 1013-14 (defendant posing as mother offering daughters for sexual activity; "We do not believe the statute exempts sexual predators who attempt to harm a child by exploiting the child's natural impulse to trust and obey her parents."); *see also Douglas*, 626 F.3d at 164 (noting that a minor's "assent might be obtained . . . by persuading a minor's adult guardian to lead a child to participate in sexual activity. Accordingly, we join our sister circuits in holding that a defendant may commit criminal enticement pursuant to § 2422(b) by communicating with an adult guardian of a minor." (citing *Nestor*, 574 F.3d at 162; *Spurlock*, 495 F.3d at 1014; and *Murrell*, 368 F.3d at 1286-88) (emphasis added))); *Nitschke*, 2011 WL 7272456, at \*9 (distinguishing case from other indirect-persuasion cases by noting that UC never claimed to have influence or control over

the minor and concluding that “nothing in these communications . . . suggest[s] that Defendant would think he could induce the minor through [the UC’s] influence or control”). Thus, unless the adult intermediary is a purported parent or is in some other kind of supervisory or custodial relationship with the minor, § 2422(b) does not apply.

Also of note here is the 2-point sentencing enhancement under U.S.S.G. § 2G1.3(b)(3), which provides:

If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.

The Application Note for this section states:

Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor *or with a person who exercises custody, care, or supervisory control of the minor*. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

U.S.S.G. § 2G1.3(b)(3) cmt. n. 4 (emphasis added). This language provides additional support for the requirement of supervisory or custodial control.

**c. “Persuade, Induce, Entice, or Coerce.”**

**i. Push the True Meaning of These Terms.**

You need to make sure your defendant’s communications fit one of § 2422(b)’s verbs, which are all about “bend[ing] the child-victim’s will.” *Laureys*, 653 F.3d at 40 (Brown, J., dissenting). If it is just *agreeing* to have sex with a minor, that is not enough. Furthermore, the idea of sex has to come from the defendant, not the minor/undercover cop. As stated in a related context by the Second Circuit in *United States v. Broxmeyer*, 616 F.3d 120, 122 (2d Cir. 2010):

“Persuade,” “induce,” and “entice” are in effect synonyms. *See* The Random House Dictionary of the English Language 1076 (unabridged ed 1971). The idea conveyed is of one person “lead[ing]” or “mov[ing]” another “by persuasion or influence, as to some action, state of mind. etc.” . . .

These are words of causation; the statute punishes the cause when it brings about the effect. *Sequence is therefore critical*.

*Id.* at 125 (emphasis added).

## ii. The Meaning of “Induce.”

The word “induce” is definitely the problem-child of § 2422(b) for defense attorneys. For those cases that do not involve obvious persuasion of a minor — and *especially* in adult intermediary cases — the government’s best bet is to encourage the court to essentially excise the words “persuade[ ],” “entice[ ],” and “coerce[ ]” from § 2422(b) and instead focus on one word only: “induce.” Divorced from its statutory context, “induce” has the potential to radically expand the class of conduct otherwise proscribed by the plain language of the statute. Government efforts to broaden the scope of § 2422(b) in this manner should be met with great resistance.

As the Eleventh Circuit recognized in *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004), the word “induce” — viewed alone — is susceptible of two different meanings: (1) its primary definition, “to lead or move by influence or persuasion; to prevail upon”; or (2) a secondary meaning, “to stimulate the occurrence of; cause.” (citing *The American Heritage Dictionary of the English Language* 671 (William Morris ed., Houghton Mifflin Co. 1981) (alterations and internal quotation marks omitted)). Although § 2422(b) employs four nearly synonymous words in succession to describe its prohibited conduct, the *Murrell* court chose the definition of “induce” least compatible with its statutory context: “to stimulate the occurrence of: to cause.” To the best of our knowledge, the *Murrell* court is alone in explicitly adopting the secondary definition of “induce” in the context of § 2422(b). Judge Janice Rogers Brown of the D.C. Circuit expressly rejected the *Murrell* definition of that term in her *Laureys* dissent. Any briefing on this issue should include heavy citation to Judge Brown’s analysis in this regard. See *United States v. Laureys*, 653 F.3d 27, 37 et seq. (D.C. Cir. 2011) (Brown, J., dissenting).

Congress commonly uses a list or string of words to carve out a specific category of conduct it wishes to punish as criminal (or regulate in the civil context). See *Laureys*, 653 F.3d at 41 (Brown, J., dissenting) (“Congress often uses multiple words with overlapping meaning to capture a broad swath of conduct.”). When a listed word, viewed in isolation, is susceptible to more than one meaning, courts look first to its statutory context in order to provide the most sensible construction. “The canon of statutory construction *noscitur a sociis*, *i.e.*, a word is known by the company it keeps[,] is often wisely applied where a word is capable of many meanings in order to avoid giving unintended breadth to the Acts of Congress.” *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) (internal quotation marks omitted); *cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (goal of statutory construction is to ensure that “statutory scheme is coherent and consistent” (internal quotation marks omitted)).

For example, in *United States v. Williams*, 553 U.S. 285 (2008), the Supreme Court addressed a constitutional overbreadth challenge to 18 U.S.C. § 2252A, which punishes an individual who, *inter alia*, “advertises, promotes, presents, distributes, or solicits” child pornography or purported child pornography. To determine whether the statute captured a

substantial amount of protected speech, the Court’s first step was to construe its terms. 553 U.S. at 293 (“[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”). Looking to the “string of operative verbs” used to define the prohibited conduct, the Court found that, taken together, they had “a transactional connotation.” *Id.* at 294. Viewed in this way, it was clear that the statute penalized only speech accompanying a transfer or attempted transfer of child pornography from one person to another. *Id.*; *see also id.* at 299 (“The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it.”). Noting that two of the verbs — when read in isolation — had potentially broader meanings, the Court found that context was key:

For three of the verbs, [the transactional connotation] is obvious: advertising, distributing, and soliciting are steps taken in the course of an actual or proposed transfer of a product, typically but not exclusively in a commercial market. When taken in isolation, the two remaining verbs — “promotes” and “presents” — are susceptible of multiple and wide-ranging meanings. In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis* — which counsels that a word is given more precise content by the neighboring words with which it is associated. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); 2A N. Singer & J. Singer, *Sutherland Statutes and Statutory Construction* § 47.16 (7th ed.2007). “Promotes,” in a list that includes “solicits,” “distributes,” and “advertises,” is most sensibly read to mean the act of recommending purported child pornography to another person for his acquisition. *See American Heritage Dictionary* 1403 (4th ed. 2000) (def. 4: “To attempt to sell or popularize by advertising or publicity”). Similarly, “presents,” in the context of the other verbs with which it is associated, means showing or offering the child pornography to another person with a view to his acquisition. *See id.*, at 1388 (def. 3a: “To make a gift or award of”).

*Id.* at 294-95. Because “offers to engage in illegal transactions are categorically excluded from First Amendment protection,” the Court ultimately held that § 2252A was not unconstitutionally overbroad. *Id.* at 297, 299.

In defending the *Murrell* court’s definition of “induce,” the government will inevitably cite cases that stand for the proposition that no clause, sentence or word shall be superfluous, void, or insignificant. But this “cardinal principle of statutory construction,” in no way dictates the outcome advanced by *Murrell* — to construe “induce” so as to give unintended breadth to § 2422(b). First, most of the cases the government will cite did not involve the type of iteration displayed in § 2422(b) — or § 2252A as addressed in *Williams*. *Cf. Moskal v. United States*, 498 U.S. 103, 120-21 (1990) (Scalia, J., dissenting) (“Since iteration is obviously afoot in the relevant passage, there is no justification for extruding an unnatural meaning out of ‘falsely made’ simply in order to avoid iteration. The entire phrase ‘falsely made, forged, altered, or counterfeited’ is self-evidently not a listing of differing and precisely calibrated terms, but a collection of near synonyms which describes the product of the general crime of forgery.”). Second, as Judge

Brown recognized in *Laureys*: “That the most sensible definition of ‘induce’ overlaps with ‘persuade’ and ‘coerce’ does not render it superfluous.” *Laureys*, 653 F.3d at 41 (Brown, J., dissenting). To the contrary,

[t]he word “persuade” suggests the use of reason, but the word “induce,” though it can bear that meaning, may signify any force, such as trickery, that acts upon the will. For example, one may induce a person to donate to one charity by convincing her that she is donating to another.

*Id.* Finally, courts “have every reason to presume that Congress meant what it said.” *Id.* at 42. If Congress meant for “induce” to take on the secondary meaning of “cause,” it could very easily have used that term instead.<sup>12</sup>

Perhaps the strongest argument against construing “induce” to mean “to stimulate the occurrence of; to cause” in the context of § 2422(b) is the fact that it is a distinct outlier in doing so. While courts do agree that, in the context of § 2422(b), the word “induce” has a plain and ordinary meaning, *cf. Robinson*, 519 U.S. at 341 (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”); they *do not* agree that it is the meaning ascribed to it by *Murrell*. See, e.g., *United States v. Thomas*, 410 F.3d 1235, 1245 (10th Cir. 2005) (defining “induce” as “leading or moving by persuasion or influence . . . [a] synonym of induce is to prevail upon”); *United States v. Rashkovski*, 301 F.3d 1133, 1136-37 (9th Cir. 2002) (defining “induce” as “to move by persuasion or influence”); *Laureys*, 653 F.3d at 40 (Brown, J., dissenting) (finding the definition of “induce” as used in Eleventh Circuit’s opinion in *Murrell* to be “incompatible with that word’s statutory context”); *United States v. Engle*, --- F.3d ---, 2012 WL 641031, at \*2 n.3 (4th Cir. Feb. 29, 2012) (“The terms ‘persuade,’ ‘induce,’ and ‘entice’ appear in both statutes, but they are not statutorily defined. Being words of common usage, we accord them their ordinary meaning. In ordinary usage, the words are effectively synonymous, and the idea conveyed is of one person leading or moving another by persuasion or influence, as to some action [or] state of mind. . . . [W]e will refer to them interchangeably.” (internal citation and quotation marks omitted)).

The fact of the matter is that Congress could easily have decided — and in fact, through the statutory language it used in § 2422(b), *did decide* — that the type of defendant who would engage in the persuasion or enticement of a child is more culpable and deserving of far greater punishment than defendants who simply agree to or even arrange an underage sexual encounter. This explains exactly why Congress used the words it did and why it selected a particularly harsh penalty — a mandatory minimum of *ten years* — for offenders who engage in the enticement of a minor. See *Staples v. United States*, 511 U.S. 600, 616 (1994) (noting that the severity of the penalty assigned can be considered when construing a statute). Indeed, that Congress was

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<sup>12</sup> Judge Brown rejected the *Murrell* court’s definition of “induce” for several additional reasons based on syntax, legislative history, and policy.

specifically targeting this type of offender is the only way that § 2422(b)'s particularly harsh penalty makes any sense in the overall federal scheme for addressing sex crimes with minors. *See supra* at Part II.A.4.b.iii. If actually having sex with a minor is punishable by a statutory *maximum* of fifteen years, *see* 18 U.S.C. § 2243(a), then § 2422(b)'s ten-year mandatory minimum and life maximum makes sense only if the statute requires something greater — and significantly worse — than merely agreeing to that same sexual encounter.

### iii. How to Confront the “Willing” Minor Argument.

One problem when litigating these cases is the government argument that courts should not enforce the plain meaning of the statutory terms persuade, entice, induce, or coerce because to do so would expose the “willing minor” to abuse. The government argues— and at least one judge has accepted—that courts should essentially ignore the statutory language and punish any agreement to have underage sex, as to do otherwise would permit the victimization of the libidinous minor who needs no persuading. *See United States v. Paul David Hite*, Mem. Op. and Order, Mag. No. 12-145 (AK/RCL) (D.D.C. Mar. 9, 2012) (Dkt. No. 6).

This argument is based on the false premise that a defendant would only use “enticing” language when confronted with a reluctant minor. Defendants can and do attempt to persuade, induce, entice, and coerce non-reluctant (*i.e.*, a “willing”) minors. In fact, it happens all the time. The case *United States v. Herbst*, 666 F.3d 504 (8th Cir. 2012), perfectly demonstrates how a defendant can meet § 2422(b)'s required level of culpability even where the minor is seemingly willing. The fictitious 13-year old in *Herbst* gave the defendant every indication that she welcomed the defendant's enticing communications. The *Herbst* case features the following exchanges of communications between the defendant (“fixer234”) and the purported minor (“brookejg”):

fixer234: would you like a boy to finger you?  
brookejg: sure  
fixer234: for real?  
brookejg: yes  
fixer234: me?  
brookejg: yes if u wanna  
fixer234: really?  
brookejg: no I just said that lol

Ex. A at 3. And:

fixer234: if a boy gets inside you your going to get messy  
brookejg: probably  
fixer234: that ok?  
brookejg: nev had boy inside my yet  
brookejg: yes

fixer234: want to try it?  
brookejg: yes  
brookejg: no I just said that lol

*Id.* And similarly:

fixer234: I want to eat you bab[y]  
brookejg: yes  
fixer234: you want?  
brookejg: yes  
brookejg: I do.  
fixer234: then i'll finger you and lick you at the same time  
brookejg: sweet  
brookejg: nev[er] had that  
brookejg: cant wait

*Id.* at 5. As these communications amply demonstrate, a defendant can — very easily — violate § 2422(b) even when he or she is dealing with a so-called “willing” minor. The focus of § 2422(b) is on *the defendant’s* communications; not the sexual willingness (or lack thereof) of the minor.

As Judge Boasberg stated in addressing the analogous context of subsequent persuasion by a different adult:

The Government argues that the fact that [the undercover detective] had preexisting plans [to have sex with the minor] is immaterial because those plans did not involve Defendant. But this argument misses the point. Even if the plans did not originally involve the Defendant, there is no evidence that he intended to persuade the minor via the internet to have sex. *If there were, the Court would no doubt agree with the Government that § 2422(b) criminalizes a second adult’s enticement of a minor via the internet, even where that minor had already been enticed by another adult. There are just no facts to support such a theory here.*

*Nitschke*, 2011 WL 7272456, at \*9 (emphasis added). Thus, courts should not accept the false choice between enforcing the statute as written, on the one hand, and abandoning the “willing minor,” on the other.

**d. “Using the Mail or Any Facility of Interstate or Foreign Commerce.”**

In our view, § 2422(b) unambiguously requires that the offense, or the attempted offense, occur “using . . . any facility or means of interstate or foreign commerce.” 18 U.S.C. § 2422(b); *see also United States v. Thomas*, 410 F.3d 1235, 1245 (11th Cir. 2005) (required elements are

“*use of a facility of interstate commerce to knowingly persuade, induce, entice, or coerce*” a minor to have sex (emphasis added)); *United States v. Douglas*, 626 F.3d 161, 164 (2d Cir. 2010) (same); *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) (“Combining the definition of attempt with the plain language of § 2422(b), the government must first prove that Murrell, *using the internet*, acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex.” (emphasis added)). Thus, the required intent under § 2422(b) is not an intent to entice the minor in person at a face-to-face meeting, but rather to entice, as the statute requires, using a facility or means of interstate commerce. See *United States v. Laureys*, 653 F.3d 27, 39 n.2 (D.C. Cir. 2011) (Brown, J., dissenting) (“Even if [the] defendant intended at some point in the future to entice the fictitious child herself, there is no evidence that [the defendant] intended to use a facility of interstate commerce to do so.”); *United States v. Nitschke*, No. 11-138 (JEB), 2011 WL 7272456, at \*7 (D.D.C. 2011) (“The intent to persuade, moreover, must be an intent to persuade using a means of interstate commerce. . . . The statute thus does not criminalize an intent to persuade at some later point in person.”). By the same token, the substantial step in the attempt analysis must be a substantial step toward enticing a minor *using a facility or means of interstate commerce*, such as a computer or cell phone. A substantial step toward an enticement that does not use means of interstate commerce—such as travel—does not constitute an attempt to violate § 2422(b).

In light of the statutory requirement that the attempt to persuade occur using a facility or means of interstate commerce, any theory that a defendant violates § 2422(b) by “intending to attempt to entice” a minor at a future face-to-face meeting is not tenable. The requisite intent under § 2422(b) is the intent to entice a minor using facilities of interstate commerce, and all use of those facilities generally cease when a defendant gets up from the computer and leaves to meet the minor. For the same reason, the defendant’s alleged travel to the meeting place cannot constitute a substantial step (discussed further below), as physically traveling from one location to another is simply not a step in illicitly communicating with a minor (or the adult intermediary) on the Internet, on a cell phone, or in the mail.

The Third and Fifth Circuits are the only circuit courts to explicitly state that the persuasion, inducement, enticement, or coercion need not occur via a facility of interstate commerce. In holding that § 2422(b) could be violated where the defendant acts through an adult intermediary, the Third Circuit reasoned that the defendant’s interactions with the adult were “substantial steps calculated to put him into direct contact with a child so that he could carry out his clear intent to persuade, induce, entice, or coerce the child to engage in sexual activity.” *United States v. Nestor*, 574 F.3d 159, 162 (3d Cir. 2009). In *United States v. Caudill*, 709 F.3d 444, 446 (5th Cir. 2013), the Fifth Circuit stated: “Whether Caudill intended to persuade, induce, or entice [the minors] to have sexual contact when he met them at the hotel or he intended for the adult intermediary to persuade, induce, or entice them to have sexual contact with Caudill before he actually appeared at the hotel, Caudill’s conduct violated § 2422(b). He used the Internet in an attempt to arrange direct contact so that he could persuade, induce, or entice minor children to engage in sexual intercourse, or he used the Internet in an attempt to have an adult intermediary persuade, induce, or entice minors to have sexual relations with

Caudill.”<sup>13</sup> Such a theory of § 2422(b) liability is directly at odds with the plain language of the statute, however, as § 2422(b) makes clear that the act of persuasion itself must be accomplished or attempted “using the mail or any facility or means of interstate or foreign commerce,” not via face-to face contact.<sup>14</sup> 18 U.S.C. § 2422(b). *Nestor* is a very poorly reasoned opinion that even those who practice in the Third Circuit should consider resisting.

Notwithstanding the above, it may be in your interest to make a *Nestor*-type argument if your client did not travel. As a general matter, however, we have found that narrowing the relevant communications/conduct to the online/telephone conversations that actually occurred confines a court’s substantial step analysis and avoids the undue expansion of § 2422(b) in the context of adult intermediaries.

**e. “Sexual Activity.”**

The best (and perhaps only) opinion addressing what “sexual activity” means—and does not mean—under § 2422(b) is *United States v. Taylor*, 640 F.3d 255 (7th Cir. 2011) (Posner, J.). In that case, the Seventh Circuit, without arriving on an exact definition of the phrase, held that “sexual activity” did *not* include fondling oneself over a webcam, or encouraging a purported minor to fondle herself. *Id.* at 260. The court based its reasoning primarily on Congress’s definition of “sexual act” at 18 U.S.C. § 2246(2)(D), which defines a “sexual act” as “the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years.” *Id.* at 257. Since physical touching “would be impossible in an online chat room,” the *Taylor* court reversed the defendant’s § 2422(b) conviction, as the defendant’s conduct did not constitute enticing a minor to engage in “sexual activity” within the meaning of § 2422(b). *Id.*

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<sup>13</sup> *Caudill* does not contain much analysis with respect to this particular issue; but instead appears to conflate the face-to-face contact issue with its adult intermediary analysis. The case involved attempted persuasion of an adult (via the Internet) for access to minors. An undercover officer had posted a Craigslist ad, suggesting that he would rent out the daughters of his girlfriend.

<sup>14</sup> Admittedly, the quoted portion of *Nestor* is susceptible of two readings. The “direct contact” referenced could be made (1) “using . . . any facility or means of interstate commerce” or (2) face to face. If the former reading was intended, the court’s interpretation would arguably be consistent with the plain language of § 2422(b), while the latter would not. A review of the appellate briefs filed in *Nestor* reveals additional facts — which are not evident from the published decision, 574 F.3d at 161 (“We will not burden readers with the details of *Nestor*’s interactions with [the law enforcement officers] in their role as a stepfather to the young victim *Nestor* sought . . . .”) — that do not appear to support the former reading; *i.e.*, the defendant made no attempt to make direct internet/cell phone contact with the minor (by asking the minor’s stepfather for the minor’s email address or phone number). For this reason, you can assume that the court intended to criminalize face-to-face persuasion, as addressed above.

AFPD Lisa Hay, from the District of Oregon’s Portland Office, has litigated this issue. Specifically, she has challenged the government’s use of § 2422(b) to prosecute attempted conduct that would only constitute a state misdemeanor offense. Should the government attempt to use a state misdemeanor as the “sexual activity for which any person can be charged with a criminal offense,” you should contact Lisa for her briefing on this issue.

**f. Charging the Underlying Criminal Offense.**

Generally, the government cites a particular state (or federal, *see* 18 U.S.C. § 2427 below) statute in the indictment to establish the “sexual activity for which any person can be charged with a criminal offense” element of § 2422(b). If the government *does not* cite a specific statute, but instead simply tracks the language of § 2422(b), you should consider moving to dismiss for failure to identify the offense underlying the § 2422(b) charge. *See, e.g., United States v. Lanzon*, 639 F.3d 1293, 1297 (11th Cir. 2011) (noting that district court dismissed indictment for failure to specify which subsection of state law would have been violated by defendant’s alleged conduct).

AFPD Lisa Hay has also done briefing on this issue and will share her work product and thoughts upon request.

**§ 2427. Inclusion of offenses relating to child pornography in definition of sexual activity for which any person can be charged with a criminal offense.**

In this chapter, the term “sexual activity for which any person can be charged with a criminal offense” includes the production of child pornography, as defined in section 2256(8).

**5. Pretrial Litigation.**

**a. Motion to Dismiss.**

Many of the legal issues discussed above can and should be raised via a pretrial motion to dismiss. For example, whether an adult intermediary can be used and how are two issues that can and should be resolved pretrial, as they are not fact questions for a jury to decide. These particular issues should not be too difficult to have a court rule on pretrial, as they are obviously purely legal. *See, e.g., United States v. Barletta*, 644 F.2d 50, 57- 58 (1st Cir.1981) (“[A] district court must rule on any issue entirely segregable from the evidence to be presented at trial.”); *United States v. Jones*, 542 F.2d 661, 664-65 (6th Cir.1976) (district court must dispose of motions raising legal defense prior to trial if it can); *United States v. Adkinson*, 135 F.3d 1363, 1369 n.11 (11th Cir. 1998) (accord).

Taking one step further, you can also attempt to challenge, as we did in *Nitschke*, whether — as a matter of law — your client’s communications demonstrate persuasion, inducement, enticement, or coercion as a matter of law. *See Nitschke*, 2011 WL 7272456, at \*9-\*10 (“While [the defendant’s] statements certainly demonstrate that [he] had a sexual interest in minors, they do not demonstrate an intent to entice or induce the fictitious minor via the internet. The Government appears to equate “interest” with “intent to persuade.” Simple interest in prepubescent sex—or even an intent to engage in such acts—cannot be enough to establish an intent to persuade.”). Because § 2422(b) is concerned with Internet and telephonic communications, communications that will have likely been preserved in their entirety, the question of whether those communications can, as a matter of law, be held to violate § 2422(b) is often ripe for pretrial review. *See Nitschke*, 2011 WL 7272456, at \*5 (“The transcripts themselves provide the Court with all of the relevant undisputed facts to decide the Motion, and a trial will thus not assist the Court in determining whether the Government can prove to a reasonable juror that Defendant’s conduct violated § 2422(b). Although the Government insists that the Court should wait until trial, the Court finds that such a delay is unwarranted and would constitute a waste of judicial resources.”). While the government will likely object to a court’s consideration of a motion to dismiss on sufficiency grounds (and inevitably point out that “there are no motions for summary judgment in the criminal context), there is plenty of case law out there to help your cause.

Rule 12(b)(2) provides that: “A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.” The Supreme Court has interpreted the language of Rule 12 to permit pretrial resolution of a motion to dismiss the indictment when “trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.” *United States v. Covington*, 395 U.S. 57, 60 (1969).<sup>15</sup> While acknowledging the jury’s role in our criminal justice system as fact-finder, you’ll want to stress that, in many of these cases, there are simply no facts in dispute and thus no facts for a jury to find. Under such circumstances, pretrial disposition is both warranted and appropriate. *See, e.g., Covington*, 395 U.S. at 61 (where there is no “factual controversy,” motion to dismiss appropriate before trial unless the government can “show[] a need for further factual inquiries”); *United States v. Yakou*, 428 F.3d 241, 247 (D.C. Cir. 2005)<sup>16</sup>

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<sup>15</sup> Rule 12 has been amended several times since *Covington* was decided. As of 1969, the authorizing language of Rule 12 was found in subsection (b)(1), which read: “Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.” *See Covington*, 395 U.S. at 60. The Advisory Committee Notes to the 1974 and 2002 amendments make clear that the change in wording was stylistic only and no change in practice was intended.

<sup>16</sup> It is important to note that the D.C. Circuit in *Yakou*, and several other Circuits, have not addressed the specific question of whether a pretrial motion to dismiss on sufficiency grounds is appropriately considered when the government objects to the consideration. The  
(continued...)

(recognizing that “the existence of undisputed facts obviated the need for the district court to make factual determinations properly reserved for a jury”); *United States v. Phillips*, 367 F.3d 846, 855 n.25 (9th Cir. 2004) (district court may dismiss an indictment pretrial for insufficient evidence when the facts are essentially undisputed); *United States v. Brown*, 925 F.2d 1301, 1304 (10th Cir. 1991) (“It is permissible and may be desirable where the facts are essentially undisputed, for the district court to examine the factual predicate for an indictment to determine whether the elements of the criminal charge can be shown sufficiently for a submissible case.”); *United States v. Risk*, 843 F.2d 1059 (7th Cir. 1988) (accord); see also *United States v. Smith*, 866 F.2d 1092, 1097 (9th Cir. 1989) (one of the purposes of Rule 12(b) is “conservation of judicial resources by facilitating the disposition of cases without trial”); Shellow, *Speaking Motions: Recognition of Summary Judgement in Federal Criminal Procedure*, 107 F.R.D. 139-201(1985).

The Sixth Circuit’s opinion in *United States v. Levin*, 973 F.2d 463 (6th Cir. 1992), is particularly instructive. In *Levin*, the district court granted pretrial dismissal of a criminal indictment, over the government’s objection, where “the undisputed extrinsic evidence” showed that the defendants could not, as a matter of law, have formulated the necessary criminal intent. 973 F.2d at 469-70. In its colloquy with the government at the hearing on the defendant’s motion, the district court observed: “[I]f this is your evidence, it would be a directed verdict at the end, and I don’t know why I have to sit through two or three weeks while you put on what we know the evidence will be. There doesn’t seem to be a dispute of the facts in this case. It’s an unusual criminal case in that sense.” *Id.* at 468 n.1. Echoing the district court’s sentiments and relying, *inter alia*, on the Supreme Court’s decision in *Covington*, the Sixth Circuit affirmed, noting that, because “the operative facts . . . were undisputed[. . .] a two or three week trial of the substantive criminal charges would not have assisted the district court or this court in deciding the legal issues” raised by the defendant’s pretrial motion to dismiss.” *Id.* at 467; see also *United States v. Jensen*, 93 F.3d 667 (9th Cir. 1996) (Fletcher, J. concurring) (where issue presented is legal and underlying facts are not in dispute, merits of motion to dismiss should be reached; “[o]therwise, the same issue with the same evidence will be raised at trial, the defendant will again move to dismiss . . . , the district court will again rule on the motion, and the issue will be back before this court”); *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976) (upholding district court’s pretrial dismissal of indictment because “[t]he facts surrounding the alleged offense were virtually undisputed and trial of the substantive charges would not substantially assist the Court in deciding the legal issue raised by the motion to dismiss the indictment”).

**b. 404(b) - Child Pornography.**

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<sup>16</sup>(...continued)

*Yakou* court did note, however, that “[o]nly the Eleventh Circuit has held that even where there are undisputed facts a district court may not engage in a pretrial determination of the sufficiency of the evidence.” 428 F.3d at 247 (also noting that “there was no indication” in the Eleventh Circuit opinion “that the government failed to object in the district court”).

**i. Try to Keep It Out under Rule 403.**

Rule 403 “does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party’s case. The rule protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis.” *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981). The Advisory Committee Notes to Rule 403 explain that a decision on an “improper basis” is “commonly, though not necessarily, an emotional one.” Fed. R. Evid. 403, Advisory Committee Notes. It is difficult to imagine evidence more likely to produce an “emotional reaction” among jurors than child pornography. *See generally United States v. Koebele*, No. CR 07-2015-MWB, 2008 WL 63293, \*3 (N.D. Iowa Jan. 3, 2008) (excluding defendant’s references during post-arrest interview to possibility of child pornography on his computer, though no child porn was found).

**ii. If You Cannot Keep It Out, Argue the Lack of Correlation Between Possessors of Child Pornography and Contact Offenders.**

To the extent child pornography is admitted, you should admit and argue the evidence we usually use at CP sentencings to show that someone who merely possesses child pornography is not significantly more likely to try to engage in a “hands on” contact offense. As Hernandez of Bourke and Hernandez has himself warned:

Some individuals have misused the results of Hernandez (2000) and Bourke and Hernandez (2009) to fuel the argument that the majority of CP [child pornography] offenders are indeed contact sexual offenders and, therefore, dangerous predators. This is simply not supported by the scientific evidence. . . . The incidence of contact sexual crimes among child pornography offenders, as we reported in our studies, is important and worthy of considerable empirical examination. However, it is not a conclusive finding that can be generalized to all CP offenders notwithstanding, some individuals in law enforcement are tempted to rely on a biased interpretation of our study (i.e., to prove that the majority of CP offenders are child molesters).

Use an expert to get this evidence admitted. *See* discussion, *infra* at Part II.A.7.

**6. Potential Defenses.**

**a. Fantasy.**

Particularly where there is no travel, you should consider the defense of role play/fantasy, employing an expert witness to explain how commonplace such relationships are in this day and age on this internet. *See* discussion *infra* at Part II.A.7. Notably, in *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), the court held that even extremely sexual communications with a purported minor—without more—did not constitute a substantial step under § 2422(b). *Id.* at 649. In doing so, *Gladish* recognized that a defendant “may have thought (this is common in Internet relationships) that they were both enacting a fantasy.” *Id.* at 650.

#### **b. Entrapment.**

ICAC Task Force members can be extremely aggressive in pursuit of “internet sex predators.” Thus, where there is no evidence of a predisposition to commit this crime (e.g., prior sex offenses, child pornography, or other chats with/about sex with children), consider a defense of entrapment. The law in this area as applied to § 2422 and § 2423 prosecutions is fairly harsh, however, so try to structure any entrapment pleadings using some of the better entrapment language from outside this particular context.

### **7. Expert Testimony.**

We have found that there are three areas of expert psychiatric testimony that are extremely helpful in § 2422 (and § 2423) prosecutions: (1) general testimony with respect to psychiatric conditions and patterns of behavior clinically associated with sexual attraction to children; (2) applied/diagnostic testimony; and (3) testimony with respect to sexual fantasy, particularly with respect to the Internet. Below is a discussion of these areas of testimony, how/why they are useful, and the case law that supports their admission:

#### **a. Testimony with Respect to Psychiatric Conditions and Patterns of Behavior Clinically Associated with Sexual Attraction to Children.**

Expert testimony with respect to the psychiatric conditions (as defined by the Diagnostic and Statistical Manual of Mental Disorders) and patterns of behavior clinically associated with sexual attraction to children is often critical in prosecutions under § 2422 (and § 2423). Educating the jury about the established patterns of behavior that individuals who are sexually attracted to children typically engage is key to any defense, as it will allow you to juxtapose your client’s history and behavior with those of a textbook pedophile (assuming the comparison is favorable!). *Cf. United States v. Curtin*, 588 F.3d 993, 997 (9th Cir. 2009) (quoting with approval district court statement that “it has been the experience of this Court that virtually all of the Defendants who have been convicted in this Court of crimes similar to those with which the Defendant is charged [18 U.S.C. §§ 2423(b), 2422(b)], utilize the same basic approach as employed by Defendant in this case”). These patterns include, but are not limited to, viewing and collecting child pornography used for sexual arousal and gratification; corresponding and/or meeting with other adults to share child pornography; purchasing access to paid websites or other

commercial sources of child pornography; engaging in sexual or otherwise inappropriate communications about children with other adults, whether in person, on the phone, or over the internet; engaging in sexual or otherwise inappropriate communications with children, whether in person, on the phone, or over the internet; seeking out the company of children because of sexual desire; gravitating to employment, activities, and/or relationships that provide access or proximity to children; and efforts to “groom” children for sexual activity through a variety of means including promises and gifts. Such behaviors have been studied at length, and they are certainly not in dispute, as the government itself routinely relies on them in order to establish probable cause for its search warrants in similar cases. *See, e.g., United States v. Rabe*, 848 F.2d 994, 995-96 (9th Cir. 1988) (upholding validity of search warrant against staleness challenge where affidavit “contained expert opinions on the behavior of pedophiles and the manner and means by which child pornography is commercially distributed,” including government expert’s opinions that “pedophilia is a life-long condition” and “[a] pedophile maintains a collection of child pornography gathered over many years and does not destroy or discard his materials”); *United States v. Atkins*, 169 Fed. App’x 961, 966 (6th Cir. 2006) (search warrant valid, as evidence supporting warrant “suggest[ed] that [the defendant] exhibited many of the characteristics of preferential child sex offenders described in [law enforcement agent’s] affidavit: he is sexually attracted to children; his sexual behavior toward children is repetitive and predatory; he devoted time, money, and energy toward sexual contact with children (and perhaps child pornography via the internet); and he possessed toys, which can be considered ‘child erotica’”). In addition to providing information that is beyond the ken of the average juror, the such testimony would also act as the necessary foundation for an expert’s specific opinions with respect to the defendant, further discussed below.

There is a long line of cases holding that this precise testimony is admissible. One such case is from the D.C. Circuit. In *United States v. Long*, 328 F.3d 655, 665 (D.C. Cir. 2003), the court reviewed the district court’s decision to admit the testimony of FBI Agent Kenneth Lanning, who the court had qualified “as an expert concerning sexual exploitation of children, including the typology, identification, characteristics and strategies of a sexual offender, particularly preferential sex offenders, and the characteristics and behavior of child victims of sexual abuse.” (internal quotation marks omitted). In forming its conclusion that Mr. Lanning’s testimony was admissible, the court focused on the helpfulness of such information to a jury, noting that “experts may testify regarding modus operandi of a certain category of criminals where those criminals’ behavior is not ordinarily familiar to the average layperson, as in the case of the modus operandi of persons involved in illegal drug trafficking or prostitution.” *Id.* at 666 (citing cases); *see also id.* at 667 (noting again that “this court has generally permitted expert testimony regarding the modus operandi of a certain type of criminal offender” and discussing circuit precedent).

As part of its analysis, the court addressed, in detail, the Seventh Circuit’s decision in *United States v. Romero*, 189 F.3d 576 (7th Cir. 1999), and the Eleventh Circuit’s decision in *United States v. Cross*, 928 F.2d 1030 (11th Cir. 1999), both of which involved an unsuccessful challenge to Mr. Lanning’s expert testimony with respect to the characteristic patterns of child

sex offenders. See *Romero*, 189 F.3d at 584-85 (holding that expert testimony regarding the modus operandi of child molesters was admissible and “helpful to the jury in understanding how child molesters operate — something with which most jurors would have little experience” and commenting that “the defense[’s] claim that the district court erred in finding that Lanning’s testimony in general would be reliable and helpful to the jury is baseless” (emphasis added)); *Cross*, 928 F.2d at 1049-1051 (holding that admission of expert testimony describing the “characteristic behaviors of pedophiles” was proper and critical to the issue of whether defendant intended to produce child pornography). Agreeing with the courts’ analyses in *Romero* and *Cross*, the D.C. Circuit upheld the district court’s admission of Mr. Lanning’s expert testimony.

Since *Long*, *Romero*, and *Cross*, the Third Circuit has approved of Mr. Lanning’s testimony regarding the patterns of behavior exhibited by child sex offenders. See *United States v. Hayward*, 359 F.3d 631 (3d Cir. 2004) (holding that Lanning’s expert testimony regarding “general profile” and “pattern of activity” of child molesters was admissible). And the Fifth and Tenth Circuits have also sanctioned the testimony of similar government experts with respect to the characteristics of child sex offenders. See *United States v. Hitt*, 473 F.3d 146, 158-59 (5th Cir. 2006) (admission of expert testimony regarding the modus operandi of child molesters, including grooming, was not an abuse of discretion); *United States v. Batton*, 602 F.3d 1191, 1200-01 (10th Cir. 2010) (due to his “long clinical career in treating both and by virtue of his research in this area,” government psychiatric expert could offer testimony with respect to the characteristics of sex offenders and their victims, as “[t]his specialized information may very well be beyond the knowledge of many jurors”).

Thus, numerous courts have heard objections to this type of testimony — though they are usually made by the defendant — and rejected them. The fact that the proffered testimony here tends to disprove the government’s case, instead of proving it, does not make the testimony any less relevant or any less admissible. In fact, it is even more important for us, since an accused’s constitutional right to present a defense is at stake. Cf. *Washington v. Texas*, 388 U.S. 14, 19 (1967) (“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”); *id.* at 22 (“[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court.” (internal quotation marks omitted)). It cannot be that the government is permitted to introduce such evidence when it benefits the prosecution, but a defendant is not equally within his rights to rely on such evidence when it supports his innocence. With the approval of numerous circuit courts, the government has been permitted to use as a sword the very same testimony the defense would seek to employ as a shield. We can think of no principled basis for distinguishing the relevant authority in this area, and thus encourage you to proffer this type of expert testimony in those cases with no or little

404(b) evidence of pedophilic conduct.

Finally, should the government challenge the admission of such testimony on *Daubert* grounds, you should definitely make the point that a medical psychiatrist's qualifications (especially those that specialize in sexual behavior) for testifying in this area are superior to those of a government agent, such as Mr. Lanning. See *United States v. Raymond*, 700 F. Supp. 2d 142, 152 (D. Me. 2010) (rejecting Lanning as expert because, inter alia, court was unable to determine "whether Lanning's opinions are generally accepted in the community of psychologists and behavioral scientists for predicting illicit intent or victim truthfulness, and . . . whether Lanning's professional field reaches reliable results beyond suggesting useful leads for law enforcement investigation"). A psychiatrist's extensive medical, clinical, and academic background serves only to reinforce the reliability of this type of testimony, which has already been held to be admissible by the vast majority of courts to have addressed this issue.

**b. Applied Psychiatric and Behavior Science Testimony: Clinical Diagnoses.**

Of course, any general discussion of the psychiatric conditions and patterns of behavior clinically associated with sexual attraction to children — while relevant and admissible on its own, as established above — would be even more helpful to a jury if a connection to the individual defendant's psychiatry and conduct is made (unless, of course, the expert concludes that your client is in fact a dangerous pedophile). Thus, the second area of expert testimony we recommend that you proffer is the expert's opinions, within a reasonable degree of medical certainty, that (1) the defendant does not meet the accepted diagnostic criteria (set forth in the *Diagnostic and Statistical Manual of Mental Disorders*) for any of the psychiatric conditions that are either directly or indirectly associated with sexual attraction to children (primarily pedophilia) or that may predispose an individual to want to engage in sexual activity with a child; and (2) the defendant does not display the patterns of behavior clinically associated with sexual attraction to children.

Generally, the government will object to this type of testimony on two grounds. The government will assert that either (1) the testimony is too relevant, such that it allegedly "embraces an ultimate issue"; and/or (2) the testimony is not relevant enough, as it does not make it any less likely that the defendant committed the crime charged. How the same testimony can be of such non-existent probative value yet still be dispositive of the ultimate issue is difficult to comprehend.<sup>17</sup> Nevertheless, you will likely need to address each of these arguments, as we do,

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<sup>17</sup> Cf. *United States v. Davenport*, 149 Fed. App'x 536, 537-38) (7th Cir. 2005) ("Davenport's lead argument is that the judge should not have permitted Kenneth Lanning to testify as an expert about how pedophiles use the Internet to exploit children — first because what he said was obvious, and second because the testimony usurped the jurors' role and 'intimidated' them into returning a verdict of guilty. These contentions are inconsistent — if the  
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in turn, below:

**i. Objection: Too Relevant!**

First, the text of and Advisory Committee notes to Federal Rule of Evidence 704 make clear that any “ultimate issue” argument is a non-starter. Rule 704 actually permits testimony embracing the ultimate issue (“specifically abolish[ing]” that rule,” Fed. R. Crim. P. 704 advisory committee’s note), limiting this permission only with respect to experts testifying regarding the mental state or condition of a defendant in a criminal case. Specifically, Rule 704 provides that no such expert “may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto.” Fed. R. Crim. P. 704(b). This Rule is generally implicated in cases — unlike the ones we are discussing here — in which a defendant is presenting an insanity or diminished capacity defense. The Advisory Committee notes evidence this, as they include only one example of the Rule’s effect in practice: “Thus, the question, ‘Did T have capacity to make a will?’ would be excluded, while the question, ‘Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?’ would be allowed.” Fed. R. Crim. P. 704 advisory committee’s notes.

Your psychiatrist’s opinion testimony with respect to the defendant will not, you should argue, even approach the kind prohibited by Rule 704, especially the behavioral science testimony, which does not go directly to the defendant’s “mental state or condition.” As the government will undoubtedly seek to point out at trial, your expert’s opinions do not *prove* that the defendant did not have, on the day in question, the intent with which he is charged. Your expert’s opinions should merely be that (1) there is no psychiatric explanation for why the defendant would have been seeking sex with a minor on the date in question; and (2) there is no evidence (or there is insignificant evidence) that the defendant exhibits the patterns of behavior clinically associated with sexual attraction to children. Thus, your expert’s opinions will not embrace the ultimate issue, as he or she will offer no testimony as to whether the defendant did or did not have the intent to commit the crime with which he is charged. Rule 704 does not prohibit a party from introducing *any* evidence that is relevant to an element of the crime charged — that would be preposterous. Rule 704 merely prohibits an expert from testifying that a defendant did or did not have the mental state or condition necessary for conviction.

The Seventh Circuit’s opinion in *Untied States v. Gladish*, 536 F.3d 646 (7th 2008), is highly instructive in this regard — though it certainly is an outlier and, in our experience, few courts are willing to parse Rule 704 as thinly as Judge Posner. In *Gladish*, the court reviewed an 18 U.S.C. § 2422(b) prosecution in which the district court had prevented the defendant’s

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<sup>17</sup>(...continued)

jurors already knew what Lanning related, how can his testimony have affected, let alone dominated and controlled, their deliberations? — but both can be wrong, and they are.”)

psychologist to testify at trial about the defendant's use of the Internet for sexual gratification. *Id.* at 650. Writing for the court, Judge Posner concluded that Rule 704 would not have been violated by the expert's proffered opinion testimony, reasoning: "[A]s the rule itself states, the expert is permitted to 'testify . . . with respect to the mental state or condition' of the defendant. The psychologist could not have been permitted to testify that the defendant did not intend to have sex with [the minor], but he could have testified that it was unlikely, given the defendant's psychology, that he would act on his intent." *Id.* This reasoning mimics the Advisory Committee notes example cited above. In any event, because *Gladish* is an outlier, we use it to juxtapose our proffered opinions, as they are a step removed from the opinions the Seventh Circuit found admissible in *Gladish*. This way, you can say to the court: "Hey, we're not even asking you to go as far as *Gladish*; but in light of (or in comparison to) that case our proffered testimony is *obviously* admissible."

The district court's opinion in *United States v. Robinson*, 94 F. Supp. 2d 751 (W.D. La. 2000), is also instructive. In *Robinson*, the defendant was charged with engaging in sexual acts or causing sexual contact to occur with two females under the age of twelve. *Id.* at 752. The defendant sought to introduce expert testimony that he did not have a sexual interest in young girls. *Id.* The government challenged this testimony, contending that it violated Rule 704(b). *Id.* at 754. The district court rejected the government's argument and permitted the expert's testimony. In reaching this conclusion, the court looked to the elements of the offense charged:

[T]he ultimate issue the United States must prove to convict [the defendant] is whether he knowingly engaged in sexual acts or caused sexual contact with a person under 12 years of age. The requisite mental element is knowingly engaging in the conduct alleged. Whether Robinson was or was not a sexual deviant or had a sexual preference for minors is not a necessary element of the offense. Since [the expert] will only testify that [the defendant] did not have a sexual interest in young females, such testimony does not address the ultimate issue to be decided by the trier [of] fact. If [the expert] testified that [the defendant] personally could not have committed the crimes charged because he was not a sexual deviant, then his testimony would likely violate Rule 704(b).

*Id.* at 755; see also *United States v. Hofus*, 598 F.3d 1171, 1180 (9th Cir. 2010) (permitting expert testimony in § 2422(b) prosecution that defendant "lacked the characteristics of a hebophile" in 2422(b) prosecution where targeted minor was 14 year-old girl). We encourage you to cite *Gladish* and *Robinson* when the government makes its inevitable Rule 704 objection.

## ii. **Objection: Not Relevant Enough!**

As to any objection that your proffered expert's opinions are not relevant *enough*, obviously you can point out the logical inconsistency in making this argument along with one

under Rule 704. The government is likely to assert that “whether or not” an individual meets the diagnostic criteria of the psychiatric conditions associated with sexual attraction to children *or* displays the patterns of behavior clinically associated with sexual attraction to children does not necessarily make it less likely that such individual is sexually attracted to children, intended to entice a minor, or would travel with the intent of having sex with a minor. This claim does not pass the straight-face test; and it is obviously one that goes to weight, not admissibility. Further, it is directly at odds with the justifications that government agents swear to — upon penalty of perjury — when they seek to obtain additional evidence in child sex offender cases via court-authorized search warrants.

While your expert’s opinions will not purport to be dispositive of the element of intent, they will certainly be both “pertinent” and “relevant” to the defense, making it less probable that the defendant actually intended to have sex with a minor on the charged date, and more probable that there is another explanation for the defendant’s behavior.<sup>18</sup> This is all that is required under the Federal Rules. *See* Fed. R. Crim. P. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more *probable* or less *probable* than it would be without the evidence.” (emphasis added)); *see also* Fed. R. Crim. P. 404 (permitting “evidence of a *pertinent* trait of character” if offered by an accused (emphasis added)). “[I]t is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence. . . . [V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003) (citations omitted); *see also United States v. Bennett*, 161 F.3d 171, 185 (3d Cir. 1998) (“[E]xpert testimony is admissible if it merely supports an inference or conclusion that the defendant did or did not have the requisite mens rea[.]”).

A psychiatric expert’s opinion testimony is important evidence that will tend to establish a § 2422(b) defendant’s innocence, but will not be dispositive of whether he intended to commit the crime with which he is charged. As such, the testimony is neither too relevant nor not relevant enough. In the words of an age-old fable, the breadth of this type of testimony is “just right.” John Hasall, *The Story of the Three Bears*, in *Old Nursery Stories and Rhymes* (1904).

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<sup>18</sup> Here we recognize that we are speaking in terms of an “intent to have sex” vs. an “intent to persuade.” Recognizing that the intent to have sex is not the operative intent under § 2422(b), it is still nonetheless relevant — as it is, at the very least, less likely that a defendant would intend to persuade a minor to do something that the defendant never intended to follow through with. *See Hofius*, 598 F.3d at 1180 (Noonan, J., dissenting) (in § 2422(b) prosecution, excluded evidence regarding defendant’s intent to have sex with minor was “highly relevant”; “[i]f the defendant did not intend to have intercourse with the minor, he was unlikely to be attempting to persuade her to have intercourse”). The intent to have sex is the operative intent in § 2423 cases, however, so it should be even easier in traveler cases to establish the relevance of this type of testimony.

**Practice Tip:** If the government seeks to introduce 404(b) evidence — especially if it is exclusively in the form of child pornography — and at the same time opposes your expert, definitely point out the hypocrisy in taking such a position. If the possession of child pornography is relevant evidence of intent, the fact that your client does *not* display other common patterns of behavior is equally so.

**c. Testimony re: Internet Fantasy.**

Finally, and bordering on most importantly, you should seek to have your expert testify with respect to the role of the Internet as it relates to sexual behavior. Though there is fairly good case law on the issue, in our experience, courts appear to be the most wary of this category of testimony, perhaps because it is not as tightly moored to “science.” Because this area is a little tricky, you should definitely down-play the breadth of this type of testimony. We have proffered our psychiatric expert to explain “simply” that the Internet has provided individuals with an avenue to engage in fantasy and pretense not necessarily linked to reality. Courts have permitted such limited testimony, which — while it may seem obvious to us — is extremely important for jurors to hear, especially from the mouth of an expert (though we are certain that any credible undercover law enforcement officer would admit to most of this type of testimony on cross-examination). Dr. Fred Berlin, Associate Professor and the Director of the Sexual Behaviors Consultation Unit at the Johns Hopkins University Hospital, has been great in this area. He has two particularly powerful stories, one of which is about a man who was chatting on-line about how he was keeping his girlfriend’s son locked in a cage in his basement. Law enforcement intercepted his communications and obtained a search warrant for the man’s house. Upon execution, law enforcement found that the man had no girlfriend, no cage, and no basement; the entire story was just a sick fantasy. This type of testimony is critical in order for a fantasy defense to have any degree of credibility. We encourage you to fight hard in this area.

**Practice Tip:** Remember, while we may be conditioned at this point to accept Internet fantasy and role-play as an extremely pervasive reality, there are many jurors who are not. Don’t underestimate the effect expert testimony can have in this area, even though it borders on common sense.

Here is the case law that should help you out:

In *United States v. Curtin*, 588 F.3d 993 (9th Cir. 2009), the Ninth Circuit reviewed a district court’s exercise of discretion in an 18 U.S.C. § 2423(b) prosecution. In *Curtin*, the district court permitted a licensed marriage and family therapist to testify about “fantasies and sexual behavior,” as the subject relates to the Internet. *Id.* at 997. The district court allowed the expert “to explain to the jury Internet ‘role playing fantasy’ and to state that such an aberration does exist.” *Id.* “Assuming that some jurors may not be as well read as others,” the court found

that testimony concerning “the role of fantasies in sexual behavior and [the fact that] many people fantasize about things they would never do in actuality” would be helpful to the jury. *Id.* The court concluded that the defendant’s expert was qualified to offer such testimony, as she was licensed therapist who had extensive experience with sex offenders. *Id.* The Ninth Circuit found no error in the district court’s reasoning.<sup>19</sup> *Id.* at 998; *see also Hofus*, 598 F.3d at 1180 (finding no error in district court’s decision to permit expert to testify “extensively about the large number of people who engage in sexual texting or chat rooms for pure fantasy,” which enabled defense attorney to argue in closing that defendant “was one of those people, that it was just fantasy, and that in [defendant’s] mind there was no real intent, that it as all divorced from reality”); *United States v. Grauer*, No. 3:10-cr-49, 2011 WL 3702658, at \*6 (S.D. Iowa Aug. 8, 2011) (noting, in 18 U.S.C. § 2422(b) prosecution, that defendant’s expert had been permitted to “testify that the chat-logs were consistent with Internet fantasy role-play”).

In *United States v. Joseph*, 542 F.3d 13 (2d Cir. 2008), the Second Circuit reviewed an 18 U.S.C. § 2422(b) conviction, ultimately remanding the case for a new trial based on an erroneous jury instruction. Though the issue was no longer dispositive of the defendant’s appeal, the court addressed the defendant’s claim that the district court had abused its discretion in precluding the defendant’s expert witness, an Associate Professor of Clinical Sexuality at the Institute of Advanced Human Sexuality in San Francisco, from testifying about “role-playing in the context of sexually explicit conversations on the Internet.”<sup>20</sup> *Id.* at 21. Because the issue would likely recur on remand, the appellate court explicitly “urge[d] the District Court to give a more thorough consideration to the defendant’s claim to present [the expert’s] testimony, in the event it is offered at retrial.” *Id.* In support of this suggestion, the court underwent a lengthy analysis. Citing the D.C. Circuit’s opinion in *United States v. Long*, 328 F.3d 655, 668 (D.C. Cir. 2003), for the proposition that “expert testimony need not be based on statistical analysis in order to be probative,” the court found that “[p]eer review, publication, potential error rate, etc. . . . are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.” *Joseph*, 542 F.3d at 21 (quoting *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (ellipses in *Joseph*)). The court concluded that “[i]n such cases, the place to quibble with an expert’s academic training is on cross-examination and goes to his testimony’s weight not its admissibility.” *Id.* at 21-22 (internal quotation marks and alterations admitted).

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<sup>19</sup> The district court did exclude the therapist’s testimony with respect to an unpublished and un-peer reviewed survey she conducted with her associates. Due to, *inter alia*, the survey’s sample size, time frame, and limited geographic representation, the court found it to be unreliable; though it could be used as rebuttal evidence. *Curtin*, 588 F.3d at 997. The Ninth Circuit held that this was not an abuse of discretion. *Id.* at 998. No similar survey is at issue in this case.

<sup>20</sup> The defendant’s proffered expert “had testified previously on the subject in federal court,” *Joseph*, 542 F.3d at 21, and the court specifically cited a federal district court case in which the expert testified and the defendant was acquitted, *id.* at 21 n.8.

As to whether the testimony would be helpful to the jury, the *Joseph* court viewed the proffered testimony as “significant.” *Id.* at 22 n.10. The court reasoned:

Although some jurors may have familiarity with Internet messaging, it is unlikely that the average juror is familiar with the role-playing activity that Dr. Herriot was prepared to explain in the specific context of sexually oriented conversation in cyberspace. Many prospective jurors at Joseph’s trial acknowledged that they had never visited a chat-room, and professed no understanding of what occurs there. Obviously a jury would not have to accept Joseph’s claim that he planned only to meet “Julie” to learn who she was and that he lacked any intention to engage in sexual conduct with her, but the frequent occurrence of such “de-mask[ing]” of chat-room participants might provide support for his defense.

*Id.* at 22. The court went on to cite several examples of appellate courts upholding the admission of expert testimony to explain conduct not normally familiar to most jurors. *Id.* (listing cases). In conclusion, the court made clear that “when the Government implores a jury to find the defendant and his explanation not credible, we think the presentation of that explanation from a qualified expert would be significant, especially where the explanation is not one with which jurors are likely to have familiarity.” *Id.* at 22 n.10. The *Joseph* court’s reasoning is as pertinent to Dr. Berlin’s other proffered areas of testimony as it is to this one.

Finally, in *United States v. Laureys*, 653 F.3d 27 (D.C. Cir. 2011), the D.C. Circuit indirectly addressed this issue in a § 2423(b) appeal involving an allegation of ineffective assistance of defense counsel. On appeal, the defendant argued that his counsel was ineffective for failing to call at trial a psychiatric expert (Dr. Berlin), who would have discussed his diagnosis that the defendant suffered from paraphilia<sup>21</sup> and testified with respect to Internet sexual fantasy. The majority opinion found the defendant’s claim to be colorable and thus remanded the case for an evidentiary hearing in the district court. *Id.* at 33-34. The D.C. Circuit did *not* determine or even imply that such testimony would have been inadmissible in any event. Of course, if the proffered testimony was not admissible, there would have been no need for a remand on the ineffectiveness issue.

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<sup>21</sup> Paraphilia involves “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one’s partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months . . . [and that] cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *Laureys*, 653 F.3d at 36 (internal quotation marks omitted; alterations in *Laureys*).

**Practice Tip:** If the court gets hung up on the “Internet” aspect of the sexual fantasy/role playing testimony, broaden your proffer to capture sexual fantasy and role playing in general. Any psychiatric expert who specializes in sexual behavior is surely qualified to testify that sexual fantasies and/or role-plays are disconnected from reality and involves only thoughts or words used for sexual arousal. Your expert can explain that sexual arousal based on “taboo” thoughts or talk between consenting adults is far afield from an actual desire to engage in the behavior fantasized about. To illustrate this, have him or her discuss the literature/studies examining women who find the idea of forced sex or rape to be arousing in the context of fantasy role-play with a consenting partner. Of course, such women in no way desire to be forcibly raped in reality. The studies in this area may lead a court to view such testimony as more “scientific” than a general discussion of sexual behavior and the Internet. Further, because an examination of what thoughts and/or fantasies sexually arouse an individual is an inextricable part of a sexual behavioral scientist’s assessment of any patient, his or her testimony with respect to the defendant in this regard would be separate and apart from proposed testimony regarding sexual behavior and the Internet

**d. Is a *Daubert* Hearing Really Necessary?**

**Practice Tip:** Resist a *Daubert* hearing if you can, as it will give the government more than one bite at your expert (like the one we get at preliminary and/or suppression hearings) and function essentially as a civil deposition.

As evidenced by the above, the majority of issues that the government can raise in opposition to your expert are legal issues that have already been addressed by numerous courts and resolved as matters of law. Under such circumstances, a *Daubert* hearing is neither necessary nor required. It is well-established that “[w]hen a district court is satisfied with an expert’s education, training, and experience, and the expert’s testimony is reasonably based on that education, training, and experience, the court does not abuse its discretion by admitting the testimony without a preliminary [*Daubert*] hearing.” *United States v. Kenyon*, 481 F.3d 1054, 1061 (8th Cir. 2007); *see also United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir. 2004) (“[A] district court would not abuse its discretion by limiting, in a proper case, the scope of a *Daubert* hearing to novel challenges . . . or even dispensing with the hearing altogether if no novel challenge were raised.”); *United States v. Clarke*, 767 F. Supp. 2d 12, 73 (D.D.C. 2011) (Bates, J.) (accord).

Once you find an expert whose qualifications are beyond challenge, the bases of that expert’s testimony should not be much of an issue. His or her diagnosis will inevitably be based on the *Diagnostic and Statistical Manual of Mental Disorders* — the standard classification of

mental disorders used by mental health professionals throughout the United States; and, as discussed above, the patterns of behavior clinically associated with sexual attraction to children about which an expert would testify are the very same behaviors routinely cited by law enforcement to obtain search warrants in child sex offense cases. To the extent the government disagrees with your expert's testimony and/or ultimate conclusions or believes that his or her methodology is subject to attack, the appropriate place to raise such issues is at trial during cross-examination. See *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002) ("Rule 705, together with Rule 703, places the burden of exploring facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination."); *Walker v. Gordon*, 46 Fed. App'x 691, 695-96 (3d Cir. 2002) (admitting party's psychiatric expert, reasoning that: "An expert is . . . permitted to base his opinion on a particular version of disputed facts and the weight to be accorded to that opinion is for the jury. It is also . . . a proper subject for cross-examination."); see also *Quiet Tech.*, 326 F.3d at 1341 ("[I]t is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence. . . . [V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." (citations omitted)).

Simply put, a *Daubert* hearing is not a vehicle for a criminal expert deposition or an opportunity to take a practice shot at one of opposition's trial witnesses. Any desire to conduct a dress rehearsal of your expert's testimony — in light of its clearly established relevance and reliability — is not a sufficient justification for such a hearing, which would require a significant expenditure of judicial resources.

#### **8. Helpful Secondary Source Material.**

- Andriy Pazuniak, *A Better Way to Stop Online Predators: Encouraging a More Appealing Approach to § 2422(b)*, 40 Seton Hall L. Rev. 691 (2010).
- Korey J. Christensen, *Reforming Attempt Liability Under 18 U.S.C. § 2422(b): An Insubstantial Step Back from United States v. Rothenberg*, 61 Duke L. Rev. 693 (2011).

**B. Enticing a Minor to Travel: 18 U.S.C. § 2422(a).**

**§ 2422 (a). Coercion and enticement (Travel)**

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

**1. Legislative History.**

According to § 2422’s legislative history, its first version was based on 18 U.S.C. § 399 (1940), the precursor of which was § 3 of the Mann Act. The first version of § 2422 prohibited “knowingly persuad[ing], induc[ing], entic[ing], or coer[cing] any woman or girl to go from one place to another in interstate or foreign commerce . . . for the purpose of prostitution or debauchery, or for any other immoral purpose.” Congress significantly revised the Mann Act in 1986 in an attempt to modernize the text of the statute. Similar to the revisions that it made to other sections of the Mann Act, Congress made § 2422 gender neutral and eliminated the outdated “debauchery” and “immoral purpose” language. The focus of § 2422, however, remained (and still remains) on whether an individual persuaded another individual to travel across state lines to engage in an illegal sexual activity.

**2. Section 2422(a) as a Compromise.**

Because § 2422(a) has no mandatory minimum sentence, it is generally the compromise statute the government offers in enticement cases for the purpose of plea negotiations. Often this is welcome compromise, but if the communications in your case do not truly constitute persuasion, inducement, enticement, or coercion, you may be able to negotiate the plea down to a more applicable (and less harsh) state offense.

### III. The Travel Statute: 18 U.S.C. § 2423.

The alleged traveler cases are prosecuted under §§ 2423(a) or 2423(b). Section 2423(a) criminalizes the transportation of a minor in interstate or foreign commerce “with the intent that the minor engage in prostitution, or in any sexual activity for which the person could be prosecuted for a criminal offense.” 18 U.S.C. § 2423(a). It mirrors § 2421, the original Mann Act, as amended in minor respects, but imposes more severe penalties. While § 2423(a) carries a mandatory minimum sentence of 10 years and a statutory maximum of life, this statute is not charged in cases resulting from an ICAC reverse-sting operation, as, *inter alia*, it requires the existence of an actual child.

Section 2423(b) criminalizes traveling in interstate or foreign commerce “for the purpose of engaging in illicit sexual conduct with another person.” 18 U.S.C. § 2423(b). There is no mandatory minimum sentence and the statutory maximum is 30 years. The Sentencing Guidelines range for a first-time offender is 37-46 months.

#### A. Statutory Construction (§ 2423(b)): “For the Purpose Of . . . .”

As far as statutory construction is concerned, the main issue you will need to litigate is the jury instruction that addresses the “for the purpose of engaging in any illicit sexual conduct with another person” aspect of § 2423(b). In this regard, we refer you to Judge Posner’s opinion in *United States v. McGuire*, 627 F.3d 622 (7th Cir. 2010) (discussing evolution of “dominant purpose instruction”), and Judge Sanchez’s opinion in *United States v. Schneider*, 817 F. Supp. 2d 586 (E.D. Pa. 2011) (citing *McGuire* favorably and discussing “transporting with intent” law as it applies to round-trip travel). These cases (and the cases they cite) chronicle the evolution of the “dominant purpose” language that snuck into Mann Act jurisprudence as a result of the Supreme Court’s dicta in *Mortensen v. United States*, 322 U.S. 369, 374 (1944). Despite the statutory text, which clearly states that “the” purpose for travel must be illicit sex, every court to have addressed the issue (to our knowledge) has held that illicit sex need not be the sole purpose for the defendant’s travel, but instead must be “a dominant purpose, as opposed to an incidental one.” *McGuire*, 627 F.3d at 625 (quoting *United States v. Vang*, 128 F.3d 1065, 1068 (7th Cir. 1997)). Though courts have either replaced or further explained the word “dominant” with the words “compelling and efficient,” “significant,” “predominat[ing],” and “motivating.” See *McGuire*, 627 F.3d at 625 (citing cases); *United States v. Snow*, 507 F.2d 22, 24 & n.9 (7th Cir. 1974) (Stevens, J.) (citing cases), no court has held that § 2423(b) does not apply altogether to a defendant who travels with dual purposes.

In *McGuire*, Judge Posner suggested a new approach: dropping the “dominant” purpose notion all together and replacing it with a “but-for” causation test, asking “whether, had a sex motive not been present, the trip would not have taken place or would have differed substantially.” 627 F.3d at 625; see also *Schneider*, 817 F. Supp. 2d at 595 (adopting Judge Posner’s formulation). If your court does not accept this formulation, or if in your judgment this formulation does not benefit your case, the collection of cases cited in *McGuire* should, at the

very least, help you cobble together an instruction that other courts have approved and that gives the most meaning to the “for the purpose of” language in § 2423(b).

**§ 2423. Transportation of minors**

(a) Transportation with intent to engage in criminal sexual activity.--A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

(b) Travel with intent to engage in illicit sexual conduct.--A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

\* \* \*

(e) Attempt and conspiracy.--Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

(f) Definition.--As used in this section, the term “illicit sexual conduct” means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

(g) Defense.--In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2), it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years.

**B. Potential Defenses.**

Like with § 2422(b) cases, fantasy/role-play and entrapment are the two most common and/or likely defenses. In a § 2423 case involving an adult intermediary (i.e., where the

only person the defendant communicates with before traveling is an adult), the fantasy defense is especially strong (unless the adult is the parent of the minor and is contacted by the defendant specifically to “rent-out” his or her children as in *United States v. Berk*, 652 F.3d 132 (1st Cir. 2011). But if, as in our District, law enforcement officers troll the Internet posing as “pervy” adults who almost immediately invite anyone who contacts them to join a pre-arranged sexual encounter between that adult and a minor, fantasy is definitely a plausible defense — especially if the UC is particularly aggressive and your client’s communications can be construed as merely going along with the UC’s fantasy. This defense was successful (in that it hung the jury) in a recent case in our District : *United States v. Beauchamp*, No. 11-cr-310 (D.D.C.).

### **C. Expert Testimony.**

Expert testimony that your client does not meet the accepted diagnostic criteria for any of the psychiatric conditions that are either directly or indirectly associated with sexual attraction to children (primarily pedophilia) or that may predispose an individual to want to engage in sexual activity with a child (discussed *supra* at Part II.A.7.b.) is even more relevant in § 2423 cases, as the intent to have sex is an element of the offense. To the extent the government will be able to cite cases where courts prohibited a defense expert from testifying that the defendant is not a “pedophile,” those cases will be easily distinguishable, in that many of them involve the possession or distribution of child pornography, *see, e.g., United States v. Pires*, 642 F.3d 1 (1st Cir. 2011); *United States v. Wallenfang*, 568 F.3d 649 (8th Cir. 2009); or other crimes that do not require as an element of the offense an intent to engage in sexual relations with a minor, *see, e.g., United States v. Godwin*, 399 F. App’x 484, 488 (11th Cir. 2010) (§ 2422(b) case); *United States v. Hofus*, 598 F.3d 1171, 1180 (9th Cir. 2010) (prohibiting expert opinion that defendant was unlikely to have actually engaged in sex with minor because intent to have sex is not an element of § 2422(b)); *see also United States v. Powers*, 59 F.3d 1460, 1471-73 (4th Cir. 1995) (prosecution for aggravated sexual abuse of a minor, under 18 U.S.C. § 2241(c), in which defendant was convicted of repeatedly raping his daughter; affirming district court exclusion of expert testimony regarding pedophilia because the case involved parent/child incest, and expert could not establish a sufficient connection between incest abusers and fixated pedophiles). Be mindful that the remaining cases will generally involve a pretrial agreement by the government not to have its proffered expert — most commonly Mr. Lanning (who is former FBI agent, not a psychiatrist, and thus not qualified to make such a diagnosis) — testify that the particular defendant was in fact a pedophile. Thus, in § 2423 cases especially, you should be able to distinguish most of the bad case law the government will cite on its behalf.