ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-3066

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAUL DAVID HITE, **Defendant-Appellant.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF COLUMBIA AS AMICUS CURIAE IN SUPPORT OF APPELLANT PAUL DAVID HITE

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District Court
Cr. No. 12-65 (CKK)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the Federal Public Defender for the District of Columbia respectfully states as follows:

A. Parties and Amici:

This appeal arises from a criminal prosecution of Defendant-Appellant Paul David Hite by Plaintiff-Appellee the United States of America. No intervenors or amici appeared before the district court. On November 1, 2013, this Court granted Dr. Hite's unopposed motion to appoint the Federal Public Defender for the District of Columbia as amicus curiae in support of Dr. Hite.

B. Rulings Under Review:

References to the rulings at issue appear in the Brief of Defendant-Appellant.

C. Related Cases:

This case has been previously before this Court in the context of Appellant's application for release pending appeal (Case No. 13-3072). There are no other related cases.

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OTHER AUTHORITIES

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

On November 1, 2013, this Court granted the motion of Appellant Paul David Hite to appoint the Federal Public Defender for the District of Columbia as amicus curiae in support of Dr. Hite. Dr. Hite's motion indicated that the district court's jury instructions in this case raise issues common to criminal prosecutions brought in the United States District Court for the District of Columbia under 18 U.S.C. § 2422(b).

To comply with Circuit Rule 29, Amicus has endeavored to avoid repetition of the legal arguments made in the Brief of Defendant-Appellant. Nevertheless, Amicus supports the arguments made in Dr. Hite's opening brief, including those with respect to the district court's exclusion of Dr. Hite's proffered

psychiatric expert and its evidentiary ruling regarding the cross examination of Detective Palchak.

INTRODUCTION

This appeal involves the deeply flawed application of an important federal criminal statute — a statute the government in this District misuses both at trial and as leverage during plea negotiations. Contrary to the way in which the district court instructed the jury below, 18 U.S.C. § 2422(b) does not criminalize communications between two adults; it does not criminalize an intent to persuade anyone at a future face-to-face meeting; and it does not criminalize the defendant's intended persuasion of another adult (as opposed to a minor). Instead, as its plain language indicates, § 2422(b) criminalizes using the Internet or another facility of interstate commerce to "knowingly persuade[], induce[], entice[], or coerce[] any individual who has not attained the age of 18 years" to engage in unlawful sexual activity, or an attempt to do so.

The district court's § 2422(b) jury instruction — which permitted the jury to rest Dr. Hite's conviction on conduct § 2422(b) does not proscribe — was inconsistent with the statute's plain language, Congress's intent in enacting the statute, its severe penalty, and federal attempt jurisprudence. Amicus respectfully submits that Dr. Hite's convictions should be vacated.

BACKGROUND

Over the last several years, the number of federal prosecutions for alleged enticement (under 18 U.S.C. § 2422) and travel (under 18 U.S.C. § 2423) crimes have increased dramatically in this District. The principal technique the government has used to increase the number of prosecutions is a "reverse-sting" operation in which an undercover law enforcement officer goes on the Internet pretending to be an adult with sexual access to a minor. The minor is fictitious. Though the government could set up its sting operation differently — e.g., the law enforcement officer could pose as a child instead of an adult — it rarely, if ever, does so.

A. Prior Cases.

In November 2008, as a result of the sting operation described above, Brandon Laureys was arrested at an agreed-upon meeting place after communicating over the Internet with an undercover officer who claimed to have sexual access to his fictitious girlfriend's 9 year-old daughter. Laureys was prosecuted and convicted under 18 U.S.C. § 2422(b) after the district court instructed the jury that it must find the defendant guilty if he "intended to persuade an adult to cause a minor to engage in unlawful sexual activity."[1] (ADD:005

[1] Laureys was also convicted of violating § 2423(b), crossing state lines with the intent to engage in illicit sexual conduct. (continued...)

(emphasis added).)[2] Laureys' counsel did not object to the instruction at trial, nor did Laureys' appellate counsel challenge the instruction on appeal.

On August 19, 2011, a divided panel of this Court upheld Laureys' convictions, remanding only for an evidentiary hearing on whether counsel was ineffective for failing to call certain witnesses at trial, including Dr. Fred Berlin of Johns Hopkins University School of Medicine — the same psychiatric expert Dr. Hite engaged to testify at his trial. Though the issue was not raised by either trial or appellate counsel, Judge Brown dissented, addressing sua sponte the jury instruction that required 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" and emphasized that "[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." United States v. Laureys, 653 F.3d 27, 38 (D.C. Cir. 2011) (Brown, J., dissenting in part) (internal quotation marks omitted). Judge Brown found that the instruction constituted plain error, observing:

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[1](...continued)
United States v. Laureys, 653 F.3d 27, 29 (D.C. Cir. 2011).

[2] For ease of reference, "JA" refers to Joint Appendix; "ADD" refers to the Addendum to this brief.

> The district court instructed a jury to convict Brandon Laureys of attempted enticement of a child if the Government proved Laureys tried to persuade an adult to grant him access to a minor. . . . 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. . . . These jury instructions [thus] thwart the plain meaning of § 2422(b) by replacing the statutory object ("any individual who has not attained the age of 18 years") with its opposite ("an adult").

Id. at 37-38 (emphasis in original); see also id. at 39 ("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.").

In addressing whether the erroneous instruction was prejudicial, Judge Brown highlighted § 2422(b)'s requirement that the attempted persuasion occur via a facility of interstate commerce, stating:

> Had the jury been correctly instructed, it could not reasonably have found Laureys guilty under § 2422(b). Even if Laureys intended at some point in the future to entice the fictitious child herself, there is no evidence Laureys intended to use a facility of interstate commerce to do so. . . . And there is no evidence Laureys attempted to entice the fictitious girl through his online communications with [the adult].

Id. at 39 n.2. Thus, Judge Brown made clear that § 2422(b) does not criminalize an attempt at face-to-face persuasion.

The majority opinion "[d]id not attempt to defend the district court's statement of law on the merits" and did "no[t] dispute that — if it [was] erroneous — the district court's jury instruction was prejudicial." Id. at 39. Rather, "[t]he court disagree[d] only with [Judge Brown's] conclusion that any error was plain." Id. The Court noted that the district court's instruction "contradicted no precedents of this Court or the Supreme Court" and that Judge Brown's interpretation of § 2422(b) was not otherwise "well-established" throughout the circuits. Id. at 33.

Soon after Laureys was decided, Judge Boasberg of the district court dismissed a § 2422(b) charge upon the defendant's pretrial motion.[3] See United States v. Nitschke, 843 F. Supp. 2d 4 (D.D.C. 2011). In Nitschke, the court described the 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."[4] Id. at 5. The court answered that question in the

[3] The defendant's motion to dismiss was filed several months before Laureys was decided and independently raised several of the issues Judge Brown addressed in her Laureys dissent.

[4] Because the facts of the case did not require the court to reach the issue, the defendant assumed for the purposes of his motion that § 2422(b) could be violated through communications with an adult only.

negative. Like Judge Brown, Judge Boasberg rejected the notion that one could violate § 2422(b) through the attempted persuasion of an adult, with no communications directed to the minor. He explained: "[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." Id. at 12; see also id. at 12 ("The theory behind [the cases allowing indirect persuasion] is that the defendant's communications through the adult intermediary sought to cause the assent of the minor to defendant's proposals. The focus is on the intent of the defendant through his communications to influence the child's assent.").

In discussing both the intent and substantial step elements of a § 2422(b) attempt, Judge Boasberg recognized the significance of the statute's "facility of interstate commerce" requirement, stating:

> The intent to persuade . . . 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.

Id. at 11; see also id. at 15 ("To the extent the Government is arguing that a substantial step is achieved by arranging a face-to-face meeting for the purpose of subsequent persuasion, it is incorrect. Later face-to-face persuasion . . . is not criminalized under § 2422(b)."). Concluding that "no reasonable

juror could find that Defendant intended to cause the minor to assent" through his Internet communications with an adult, id. at 13, Judge Boasberg granted the defendant's motion to dismiss. The government did not appeal.

B. Dr. Hite's Case.

The parties submitted proposed jury instructions in Dr. Hite's case on January 4, 2013. Notwithstanding the fact that Judge Brown had already found the substantive § 2422(b) instruction from Laureys plainly erroneous, and despite Judge Boasberg's opinion addressing § 2422(b) in Nitschke, the government proposed the same § 2422(b) instruction used in Laureys, which (1) required a guilty verdict if, among other routes to conviction, the jury found that the defendant "intended to persuade an adult to cause a minor to engage in unlawful sexual activity" and (2) provided that "[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." (JA450-51.) The proposed instruction did not require that the defendant intended for the so-called "adult intermediary" to subsequently persuade, induce, entice, or coerce the minor.

The district court adopted the § 2422(b) jury instruction proposed by the government (and used in Laureys) nearly verbatim, but with one major substantive difference. The instruction in

Laureys had included the statement that "[t]he government must prove that the defendant used the Internet to commit the crime charged as I have instructed." (ADD:003 (emphasis added).) The government's proposed instruction also included this requirement.[5] (See Dkt. #45 at 13.) The district court, however, struck the proposed language sua sponte. (JA450.)

Under the district court's revised instruction, the jury was not required to find that Dr. Hite used the Internet or any other facility of interstate commerce to commit the crime charged, but only that Dr. Hite used it "in an attempt to persuade or induce or entice or coerce." (JA449.) Thus — and particularly given the district court's deletion of the requirement from the Laureys instruction (and the government's proposal) — the instruction here required a conviction if the jury found that Dr. Hite intended to entice a minor or an adult at a future face-to-face meeting, so long as he used a facility of interstate commerce to transmit "communications" at any point during the course of conduct.

[5] Dr. Hite's requested jury instructions also addressed this issue, including three alternative jury instructions that all emphasized the requirement that a § 2422(b) attempt occur via a facility of interstate commerce. (See Dkt. #45 at 18-34.)

ARGUMENT

I. SECTION 2422(b) DOES NOT CRIMINALIZE COMMUNICATIONS BETWEEN TWO ADULTS.

Section 2422(b) criminalizes a very particular harm. It forbids individuals from "using the mail or any facility or means of interstate or foreign commerce" to "persuade[], induce[], entice[], or coerce[] any individual who has not attained the age of 18 years" to engage in unlawful sexual conduct, or attempting to do so. The gravamen of the offense is the remote procurement of a minor's assent to criminal sexual behavior (through, e.g., grooming communications). As the Sixth Circuit has recognized, the statute is "designed to protect children from the act of solicitation itself[.]" United States v. Hughes, 632 F.3d 956, 961 (6th Cir. 2011).

This Court has yet to decide whether a defendant can violate § 2422(b) by communicating exclusively with an adult. Though the question is an open one in this Circuit, the text of the statute supports only one answer: Section 2422(b) requires that a defendant communicate, via a facility of interstate commerce, directly with someone he believes to be a minor.

"[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) states:

> 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 he 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.

The statute's plain language prohibits "persuad[ing], induc[ing], entic[ing], or coerc[ing] any individual who has not attained the age of 18 years," as well as attempts to do so, "using" a facility of interstate commerce. 18 U.S.C. § 2422(b) (emphasis added). 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,'" BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004), direct Internet/phone/mail communication with a minor is required.

The Eleventh Circuit — the first court of appeals to address this issue — held otherwise, however, in United States v. Murrell, 368 F.3d 1283 (11th Cir. 2004). With only cursory briefing on the "adult intermediary" issue, the Murrell court held that § 2422(b) can be violated through communications between two consenting adults.[6] In so holding, the Murrell court

[6] See Brief for Appellant at 9-14, Murrell, 368 F.3d 1283 (No. 03-12582), 2003 WL 23723973, at *17-23; Brief for Appellee at 17-23, Murrell, 368 F.3d 1283 (No. 03-12582), 2003 WL 23723974, at (continued...)

went well beyond the plain language of the statute, relying, inter alia, 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 other courts of appeals have relied on this same policy concern in upholding § 2422(b) convictions where the defendants' only communications were with other adults. See, e.g., United States v. Douglas, 626 F.3d 161, 164 (2d Cir. 2010) ("We agree with the Eleventh Circuit that the 'efficacy of § 2422(b) would be eviscerated if a defendant could circumvent the statute simply be employing an intermediary to carry out his intended objective'" (quoting Murrell, 368 F.3d at 1287)); United States v. Nestor, 574 F.3d 159, 162 (3d Cir. 2009) ("It would be wholly inconsistent with the purpose and policy of the statute to allow sexual predators to use adult intermediaries to shield themselves from prosecution."); United States v. Spurlock, 495 F.3d 1011, 1014 (8th Cir. 2007) ("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.").

Though the policy argument first set forth in Murrell is a superficially appealing one, it should be rejected for at least

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[6](...continued)
*9-14.

three reasons. First, it fails to account for the fact that federal criminal law already creates liability for defendants who would employ intermediaries to entice minors. Aiding and abetting and conspiracy liability attach, by act of Congress, to any "offense against the United States." 18 U.S.C. §§ 2, 371.[7] Congress enacted these statutes for precisely the reason identified in Murrell. Thus, there is no need to torture the statutory language to create liability where a defendant acts through another to accomplish criminal objectives — aiding and abetting and conspiracy liability exist for this very purpose.[8]

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[7] 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.

[8] It is, however, well-established that a defendant can neither conspire with nor aid and abet an undercover law enforcement officer. See, e.g., United States v. Iennaco, 893 F.2d 394, 397 n.3 (D.C. Cir. 1990) ("As a government agent, [the law enforcement officer] could not be a conspirator himself."); (continued...)

Second, as Judge Brown recognized in Laureys, prosecutors have numerous other statutes — even beyond 18 U.S.C. §§ 2 and 371 and numerous state-law crimes — with which to charge those who 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

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Kash v. United States, 112 F. 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."). This may very well be why courts have gone to such lengths to read these alternative theories of liability into § 2422(b) itself. Congress is 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 . . . ."). In fact, the D.C. Council enacted D.C. Code § 22-3010.02 — which criminalizes "arranging to engage in a sexual act or sexual contact" with a minor "if the arrangement is done by or with a law enforcement officer" — for precisely this reason. But even if Congress were not to act, the government could easily adjust its sting operation to have law enforcement officers pose as minors, instead of adults with access to minors.

> crimes, id. § 2422(a), transporting a minor for sex crimes, id. § 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. § 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. There is no need to stretch the language of § 2422(b) beyond its plain meaning to prosecute those who would attempt sexual contact with minors.

Finally — and 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 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) ("[I]f the language of a statute is clear, that language must be given effect — at least in the absence of a patent absurdity."). Because § 2422(b)'s statutory text is clear and unambiguous, its plain meaning must be given effect.[9] Any policy argument to the

[9] Even were the statutory language ambiguous, the rule of lenity would apply:

(continued...)

contrary 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)); United States v. McMinnis, 601 F.2d 1319 (5th Cir. 1979) ("Penal statutes must not be stretched to prosecute a defendant merely because what he has done is vile, or . . . a violation of state law that is likely to go unpunished by state authorities.").

The courts that have interpreted § 2422(b) to permit the use of an adult intermediary have done so in contravention of the

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(...continued)

> [W]hen 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).

plain language of the statute. Because those decisions are not binding on this Court, Amicus respectfully submits that the Court should adopt the reading most consistent with the statute's plain language and hold that § 2422(b) requires direct communication between the defendant and someone the defendant believes to be a minor.

II. SECTION 2422(b) DOES NOT CRIMINALIZE THE INTENT TO PERSUADE AT A FUTURE FACE-TO-FACE MEETING.

In legislating § 2422(b), Congress's primary goal was to make the Internet safer for minors. Section 2422(b) was enacted as part of the Telecommunications Act of 1996.[10] Pub. L. 104-105 § 508 (1996). The Committee Report accompanying the Senate Bill explained the motivation for this and other amendments related to "Communications Decency:"

> The information superhighway should be safe for families and children. The Committee has been troubled by an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography, engage children in inappropriate adult contact, terrorize computer network users through "electronic stalking" and seize personal information.

S. Rep. 104-23 § 401 at 59 (1995) (emphasis added). Two years later, in 1998, Congress amended the offense. See Pub. L. 105-314 § 102 (Oct. 30, 1998). In an accompanying House Report,

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[10] The 1996 version of the statute was essentially identical to the statute in its current form except for the fact that the statute contained no mandatory minimum term of imprisonment and a statutory maximum penalty of 10 years' imprisonment.

Congress made clear that the statute was intended for use against adults who use facilities of interstate commerce to contact children:

BACKGROUND AND NEED FOR THE LEGISLATION

> With the advent of ever-growing computer technology, law enforcement officials are discovering that criminals roam the Internet just as they roam the streets. While parents strive to warn their children about the dangers outside of the home, they are often unaware of the dangers within—on the World Wide Web. "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. 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 superhighway. Youths who have agreed to such meetings have been kidnapped, photographed for child pornography, raped, beaten, robbed, and worse.

H.R. Rep. No. 105-557 at 11-12, 1998 U.S.C.C.A.N. 678, 680 (1998) (emphasis added).

The Committee was quite specific about the reach of the offense: "It prohibits contacting a minor over the Internet for the purposes of engaging in sexual activity and punishes those who knowingly send obscenity to children." Id. at 12, 1998 U.S.C.C.A.N. at 681 (emphasis added). Thus, read properly, § 2422(b) "target[s] efforts to overbear the wills of children online." Laureys, 653 F.3d at 42 (Brown, J., dissenting); see also United States v. Begin, 696 F.3d 405, 413 (3d Cir. 2012)

("[T]he stiff penalties under § 2422(b) are intended to punish and deter predators who use the reach and anonymity of the internet to perpetrate crimes against children.").

The way in which Congress proscribed certain communications through § 2422(b) is similar to how it criminalized threats made against personal safety. The federal threats statute, 18 U.S.C. § 875, does not simply prohibit threats; instead, it prohibits "transmit[ting] in interstate or foreign commerce" ransom demands, or threats to commit bodily injury, kidnapping, or property damage. 18 U.S.C. § 875(a)-(d). Similarly, § 2422(b) does not criminalize all manner of persuasion, inducement, enticement, or coercion; it criminalizes the use of the mail or wires to send messages of persuasion, inducement, enticement, or coercion to minor. Just as "[t]he transmittal of a threat in interstate commerce" is an integral element of federal extortion, United States v. Korab, 893 F.2d 212, 213 (9th Cir. 1989), the transmission of a message of persuasion, inducement, enticement, or coercion to a minor or purported minor is an integral element of § 2422(b).[11] Thus, whereas "[t]elephone calls to organize an

[11] Accordingly, the reason a defendant in a § 2422(b) case is guilty of attempt instead of the completed crime is not because the defendant was planning to entice a minor, but did not yet have the chance to make the required illegal communication, as the jury instruction provided for here. Instead, it is because the defendant did attempt the enticement through an illegal communication over a facility of interstate commerce, but the attempt was not successful because (1) the minor was not real; or (continued...)

extortion do not satisfy the proof required of threatening calls," Korab, 893 F.2d at 215, telephone calls and Internet communications to arrange an illicit liaison do not satisfy the proof required of a communication that "persuades, induces, entices, or coerces and individual under the age of 18 years . . . or attempts to do so." 18 U.S.C. § 2422(b).

Thus, the future "in person enticement" theory of § 2422(b) liability is incorrect. Because the jury instruction used here required conviction if the jury found only that Dr. Hite attempted to arrange future face-to-face persuasion, it relieved the government of its burden of proving that Dr. Hite had actually attempted to persuade, induce, entice, or coerce a minor (or even an adult) to engage in sexual activity via a facility of interstate commerce. Instead, the jury was instructed that "[t]he government must only prove that the defendant believed that he was communicating with someone who could arrange for the

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[11](...continued)
(2) the minor was real but was not persuaded. See, e.g., Taylor, 640 F.3d at 257 ("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, 820 (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.").

child to engage in unlawful sexual activity." (JA450-51 (emphasis added); see also id. at 450 ("The government must only prove that the person the Defendant believed he would attempt to persuade, or induce, or entice or coerce to engage in sexual activity was a minor." (emphasis added)).) Section 2422(b) proscribes attempts to entice minors that occur via facilities of interstate commerce; not planning a future in-person meeting of a sexual nature.

Outside of the jury instruction, the district court's misunderstanding of 2422(b) may be best reflected in the alleged "substantial steps" it identified towards what it viewed as a § 2422(b) offense. In its Order denying Dr. Hite's motion for judgment of acquittal, the district court viewed a § 2422(b) "substantial step" as including most anything done in anticipation of a future in-person meeting. See United States v. Hite, 12-cr-65, 2013 WL 3092072, at *5 (D.D.C. June 20, 2013). The district court identified the following, inter alia, as potential substantial steps in this case: (1) "discuss[ions] of what days [Dr. Hite] would or would not be available to engage in sexual activity with the [minor] girl;" (2) "discuss[ions] of what sexual activity with the girl would be permitted;" (3) "discuss[ions of] where to park when he arrived in Washington, D.C., and what car he would drive"; (4) Dr. Hite's "indicat[ion] that he had a jar of peanut butter and jelly to use during sexual

activity with the [minor] boy;" (5) Dr. Hite's "search[] for directions to the Verizon Center in Washington, D.C.," which is where the undercover officer claimed to live; and (6) discussions of "whether the weather would be an issue when he drove to Washington, D.C." Id. All of the purported "substantial steps" the district court described are, at most, preparatory steps towards an in-person meeting of a sexual nature.[12] They are not steps in the online or telephonic persuasion or enticement of a minor.[13]

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[12] A closer examination of the cases the district court relied upon for the proposition that discussions of a future meeting could constitute substantial steps in a § 2422(b) attempt reveals that all but one are direct contact cases, i.e., the defendants were making arrangements with minors directly in the course of enticing the minors to participate in sexual activity. See Hite, 2013 WL 3092072, at *5 (citing United States v. Broussard, 669 F.3d 537, 550 (5th Cir. 2012); United States v. Goetzke, 494 F.3d 1231, 1237 (9th Cir. 2007); United States v. Gravenhorst, 190 F. App'x 1, 4 (1st Cir. 2006); United States v. Engle, 676 F.3d 405, 423 (4th Cir. 2012); United States v. Thomas, 410 F.3d 1235, 1246 (10th Cir. 2005)). The one exception is Nestor, 574 F.3d at 161, where the Third Circuit framed the substantial step inquiry as whether Nestor "took a substantial step toward" "meet[ing] and hav[ing] sex with a child." That is plainly wrong. See Hughes, 632 F.3d at 961 ("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 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").

[13] Even if the district court were correct that § 2422(b) proscribes attempts at future in-person enticements — which it does not — then the substantial steps identified in its Rule 29 Order were insufficient under the law of attempt. See United

(continued...)

III. SECTION 2422(b) CRIMINALIZES COMMUNICATIONS THAT ARE INTENDED TO PERSUADE, INDUCE, ENTICE, OR COERCE A MINOR TO ENGAGE IN SEXUAL ACTIVITY, NOT COMMUNICATIONS INTENDED TO PERSUADE AN ADULT.

Contrary to the jury instruction used in this case, § 2422(b) does not permit a conviction based on persuasion of another adult. Even assuming that § 2422(b) does not require direct communication with a minor, the statute nevertheless requires that the defendant attempt to persuade a minor, not an adult. See, e.g., United States v. Dwinells, 508 F.3d 63, 71 (1st Cir. 2007) (Section 2422(b) "criminalizes an intentional attempt to achieve a mental state — a minor's assent.").

Judge Brown's opinion in Laureys and Judge Boasberg's opinion in Nitschke (both discussed above) could not be more persuasive on this point. Dr. Hite also thoroughly addresses this issue at pages 20-23 of his brief. Amicus agrees with the

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[13](...continued)
States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007) ("[T]he mere intent to violate a federal statute is not punishable as an attempt unless it is also accompanied by significant conduct." (emphasis added)); United States v. Gladish, 536 F.3d 646, 647 (7th Cir. 2008) (reversing § 2422(b) conviction after finding that explicit sexual talk alone was not a "substantial step" towards commission of the crime). Cf. United States v. Buffington, 815 F.2d 1292, 1303 (9th Cir. 1987) (holding evidence of attempted bank robbery insufficient to constitute a substantial step because the defendants did not "take a single step towards the bank, they displayed no weapons and no indication that they were about to make an entry"). To hold anything less would abrogate the requirement of a substantial step, which is central to attempt jurisprudence. See Gladish, 536 F.3d at 647 ("Treating speech (even obscene speech) as the 'substantial step' would abolish any requirement of a substantial step.").

positions of Judge Brown, Judge Boasberg, and Dr. Hite that the object of a defendant's persuasion must be a minor.

IV. THE DISTRICT COURT'S INTERPRETATION OF § 2422(b) 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 would be inconsistent with 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 actually travels to meet a minor for actual sexual conduct is subject to no mandatory minimum penalty and a statutory maximum of 30 years. See 18 U.S.C. § 2423(b). The sentencing range under the United States Sentencing Guidelines, where the victim is between 12 and 16 years of age, with credit for acceptance of responsibility, is 37-46 months imprisonment. See U.S.S.G. § 2G1.3(a)(4).[14] 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.

[14] The Guidelines ranges set forth in this brief assume Criminal History Category I.

§ 2A3.2. It therefore makes little sense that § 2422(b) subjects someone like Dr. Hite who, with another adult, is alleged to have merely arranged to have sex with a minor — but not to have attempted to follow through with it — to a ten-year mandatory minimum penalty and a life maximum. Surely Congress did not intend such absurd results, and yet that is exactly what the district court's interpretation of § 2422(b) entails.

CONCLUSION

For the reasons stated above, as well as those set forth in the Brief for Defendant-Appellant, Amicus supports Dr. Hite's request that his convictions be vacated and that his case be remanded for further proceedings.

Respectfully Submitted,

/s/

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CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY** that the foregoing Brief of the Federal Public Defender for the District of Columbia as Amicus Curiae in Support of Appellant Paul David Hite does not exceed the number of words permitted by Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). Actual number of words: 6,168.

/s/
Jonathan S. Jeffress

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 13-3066

I **HEREBY CERTIFY** that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on November 12, 2013.

I certify that appellees in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/
Jonathan S. Jeffress

ADDENDUM

ADDENDUM

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	Criminal No. 09-106
	:	
v.	:	May 27, 2010
	:	
BRANDON LAUREYS,	:	
Defendant	:	9:57 a.m.

TRANSCRIPT OF TRIAL RECORD
JURY INSTRUCTIONS
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE,
and a jury

APPEARANCES:

For the United States:
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Official Court Reporter
Room 6511, U.S. Courthouse
Washington, D.C. 20001
(202) 354-3249

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

by Mr. Laureys and other facts and circumstances received in evidence which indicate his state of mind or his intent.

It is entirely up to you, however, to decide what facts to find from the evidence received during this trial. You should consider all the circumstances in evidence that you think are relevant in determining whether the government has proved beyond a reasonable doubt that Mr. Laureys acted with the necessary state of mind.

Now, Count One: The defendant is charged in Count One of the indictment with using a facility of interstate commerce to attempt to persuade, induce, entice, or coerce a minor to engage in an unlawful sexual act. I'll read that again: Using a facility of interstate commerce to attempt to persuade, induce, entice, or coerce a minor to engage in an unlawful sexual act.

In order for the defendant to be found guilty of Count One, the charge of attempted coercion and enticement, the United States must prove each of the following four elements beyond a reasonable doubt: One, that the defendant used a facility or means of interstate commerce in an attempt to persuade or induce or entice an individual under the age of 18 to engage in sexual activity. So it's use of a means of interstate commerce.

Number two, that the defendant believed that such individual was less than 18 years of age; three, that if the

sexual activity had occurred, the defendant could have been charged with a criminal offense under the District of Columbia law; and fourth, that the defendant acted knowingly and willfully.

The Internet is a facility or means of interstate commerce. Using a facility or means of interstate commerce means employing or using any method of communication between one state and another. A telephone is considered a facility or means of interstate commerce, whether it is used in the traditional manner or used in conjunction with a computer and modem.

In addition, the Internet is considered a facility or means of interstate commerce. As long as the electronic or oral communications travel between one state and another, there has been a use of a facility or a means of interstate commerce. The government must prove that the defendant used the Internet to commit the crime charged, as I have instructed.

With respect to the second element, that he attempted to persuade or induce or entice or coerce a person who the defendant believed to be under the age of 18 to engage in sexual activity, I instruct you that the person with whom the defendant communicated need not be an actual minor for the defendant to be guilty of the charge. I instruct you that it is not a defense to Count One that the minor child did not in fact exist. The government must only prove that the person the defendant

believed he would attempt to persuade, to induce, or entice or coerce to engage in sexual activity was a minor.

And it is not a defense to Count One that the defendant did not directly communicate with the fictitious minor child. Direct communication with a child is unnecessary. Here it is alleged that the defendant communicated with an adult intermediary who claimed to have access to a fictitious child. The 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.

Now, you will have noticed that the actual charge here is attempt to persuade or coerce, and I will now instruct you on what is required for an attempt. In order to prove the defendant attempted to persuade, induce, entice, or coerce an individual under the age of 18 to engage in sexual activity, the government must prove the following two elements beyond a reasonable doubt:

First, that the defendant intended to persuade, induce, entice, or coerce an individual under the age of 18 to engage in unlawful sexual activity; and second, that the defendant took some action which was a substantial step toward the commission of the crime.

For the first requirement, the government must prove only that the defendant intended to - I've got to use this whole phrase every time - persuade, induce, entice, or coerce a minor

to engage in illegal sexual activity, or intended to persuade an adult to cause a minor to engage in unlawful sexual activity. The government does not need to prove that the government intended to commit the underlying sexual act.

In determining whether the defendant's actions amounted to a substantial step toward the commission of the crime, it is necessary to distinguish between mere preparation on the one hand and the actual doing of the crime on the other. Mere preparation, which may consist of merely planning the offense, or of devising, obtaining, or arranging a means for its commission, is not an attempt, although some preparations may amount to an attempt.

The act of a person who intends to commit a crime will constitute an attempt where the acts themselves indicate an intent to willfully commit the crime, and the acts are a substantial step in a course of conduct planned to culminate in the commission of the crime.

The government does not need to prove that the defendant actually persuaded, induced, coerced, or enticed an individual under the age of 18 to engage in sexual activity; the ability to successfully complete the sexual act is immaterial. It is not a defense to the charge that as a result of circumstances unknown to the defendant, he was unable to complete the intended sexual act or acts.

With respect to the third element of the offense, that

the sexual activity violated District of Columbia law, I instruct you as a matter of law that under Title 22 of District of Columbia Code Section 3008, it is a crime for any person who is at least four years older than a child to engage in a sexual act with that child, or to cause a child to engage in a sexual act with any person who is at least four years older than that child.

Now, that's a mouthful on Count One. You'll have it to study. I think it may become clearer if you read through it a couple more times.

Count two: Travel with intent to engage in illicit sexual conduct. The defendant is charged in Count Two of the indictment with traveling in interstate commerce for the purpose of engaging in illicit sexual conduct. In order for the defendant to be found guilty on Count Two, the United States must prove each of the following elements beyond a reasonable doubt:

First, that the defendant traveled in interstate commerce. A person travels in interstate commerce when he travels from one state to another state. For purposes of this offense, the District of Columbia is considered a state. Not for other purposes, but for this purpose it's a state.

And second, that the defendant's purpose in traveling in interstate commerce was to engage in illicit sexual conduct. Illicit sexual conduct means a sexual act, as defined for you in

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

18 U.S.C.A. § 2

§ 2. Principals

Currentness

(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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.)

Notes of Decisions (1263)

18 U.S.C.A. § 2, 18 USCA § 2
Current through P.L. 113-36 approved 9-18-13

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 19. Conspiracy (Refs & Annos)

18 U.S.C.A. § 371

§ 371. Conspiracy to commit offense or to defraud United States

Currentness

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.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 701; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147.)

Notes of Decisions (8954)

18 U.S.C.A. § 371, 18 USCA § 371
Current through P.L. 113-36 approved 9-18-13

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 41. Extortion and Threats (Refs & Annos)

18 U.S.C.A. § 875

§ 875. Interstate communications

Currentness

(a) Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 741; Nov. 10, 1986, Pub.L. 99-646, § 63, 100 Stat. 3614; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(G), (H), (K), 108 Stat. 2147.)

Notes of Decisions (126)

18 U.S.C.A. § 875, 18 USCA § 875
Current through P.L. 113-36 approved 9-18-13

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 109A. Sexual Abuse (Refs & Annos)

18 U.S.C.A. § 2241

§ 2241. Aggravated sexual abuse

Effective: December 26, 2007
Currentness

(a) By force or threat.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act--

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly--

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children.--Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12

years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement.--In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

CREDIT(S)

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3620; amended Pub.L. 103-322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 7(b)], Sept. 30, 1996, 110 Stat. 3009-31; Pub.L. 105-314, Title III, § 301(a), Oct. 30, 1998, 112 Stat. 2978; Pub.L. 109-162, Title XI, § 1177(a)(1), (2), Jan. 5, 2006, 119 Stat. 3125; Pub.L. 109-248, Title II, §§ 206(a)(1), 207(2), July 27, 2006, 120 Stat. 613, 615; Pub.L. 110-161, Div. E, Title V, § 554, Dec. 26, 2007, 121 Stat. 2082.)

Notes of Decisions (164)

18 U.S.C.A. § 2241, 18 USCA § 2241
Current through P.L. 113-36 approved 9-18-13

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 109A. Sexual Abuse (Refs & Annos)

18 U.S.C.A. § 2242

§ 2242. Sexual abuse

Effective: December 26, 2007
Currentness

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly--

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is--

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

CREDIT(S)

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3621; amended Pub.L. 103-322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150; Pub.L. 109-162, Title XI, § 1177(a)(3), Jan. 5, 2006, 119 Stat. 3125; Pub.L. 109-248, Title II, §§ 205, 207(2), July 27, 2006, 120 Stat. 613, 615; Pub.L. 110-161, Div. E, Title V, § 554, Dec. 26, 2007, 121 Stat. 2082.)

Notes of Decisions (38)

18 U.S.C.A. § 2242, 18 USCA § 2242
Current through P.L. 113-36 approved 9-18-13

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 109A. Sexual Abuse (Refs & Annos)

18 U.S.C.A. § 2243

§ 2243. Sexual abuse of a minor or ward

Effective: December 26, 2007
Currentness

(a) Of a minor.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who--

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is--

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) Defenses.--(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement.--In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

CREDIT(S)

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3621; amended Pub.L. 101-647, Title III, § 322, Nov. 29, 1990, 104 Stat. 4818; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 7(c)], Sept. 30, 1996, 110 Stat. 3009-31; Pub.L. 105-314, Title III, § 301(b), Oct. 30, 1998, 112 Stat. 2978; Pub.L. 109-162, Title XI, § 1177(a)(4), (b)(1), Jan. 5, 2006, 119 Stat. 3125; Pub.L. 109-248, Title II, § 207, July 27, 2006, 120 Stat. 615; Pub.L. 110-161, Div. E, Title V, § 554, Dec. 26, 2007, 121 Stat. 2082.)

Notes of Decisions (36)

18 U.S.C.A. § 2243, 18 USCA § 2243
Current through P.L. 113-36 approved 9-18-13

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 109A. Sexual Abuse (Refs & Annos)

18 U.S.C.A. § 2244

§ 2244. Abusive sexual contact

Effective: December 26, 2007
Currentness

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate--

(1) subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(5) subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

(b) In other circumstances.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

(c) Offenses involving young children.--If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

CREDIT(S)

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3622; amended Pub.L. 100-690, Title VII, § 7058(a), Nov. 18, 1988, 102 Stat. 4403; Pub.L. 103-322, Title XXXIII, § 330016(1)(K), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 105-314, Title III, § 302, Oct. 30, 1998., 112 Stat. 2979; Pub.L. 109-162, Title XI, § 1177(a)(5), (b)(2), Jan. 5, 2006, 119 Stat. 3125; Pub.L. 109-248, Title II, §§ 206(a)(2), 207(2), July 27, 2006, 120 Stat. 613, 615; Pub.L. 110-161, Div. E, Title V, § 554, Dec. 26, 2007, 121 Stat. 2082.)

Notes of Decisions (48)

18 U.S.C.A. § 2244, 18 USCA § 2244
Current through P.L. 113-36 approved 9-18-13

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes (Refs & Annos)

18 U.S.C.A. § 2421

§ 2421. Transportation generally

Effective: October 30, 1998
Currentness

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual 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 10 years, or both.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 812; May 24, 1949, c. 139, § 47, 63 Stat. 96; Nov. 7, 1986, Pub.L. 99-628, § 5(b)(1), 100 Stat. 3511; Pub.L. 105-314, Title I, § 106, Oct. 30, 1998, 112 Stat. 2977.)

Notes of Decisions (965)

18 U.S.C.A. § 2421, 18 USCA § 2421
Current through P.L. 113-36 approved 9-18-13

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes (Refs & Annos)

18 U.S.C.A. § 2422

§ 2422. Coercion and enticement

Effective: July 27, 2006
Currentness

(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.

(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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 812; Nov. 7, 1986, Pub.L. 99-628, § 5(b)(1), 100 Stat. 3511; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7070, 102 Stat. 4405; Feb. 8, 1996, Pub.L. 104-104, Title V, § 508, 110 Stat. 137; Oct. 30, 1998, Pub.L. 105-314, Title I, § 102, 112 Stat. 2975; Apr. 30, 2003, Pub.L. 108-21, Title I, § 103(a)(2)(A), (B), (b)(2)(A), 117 Stat. 652, 653; July 27, 2006, Pub.L. 109-248, Title II, § 203, 120 Stat. 613.)

Notes of Decisions (302)

18 U.S.C.A. § 2422, 18 USCA § 2422
Current through P.L. 113-36 approved 9-18-13

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes (Refs & Annos)

18 U.S.C.A. § 2423

§ 2423. Transportation of minors

Effective: March 7, 2013
Currentness

(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.

(c) Engaging in illicit sexual conduct in foreign places.--Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(d) Ancillary offenses.--Whoever, 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 shall be fined under this title, 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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 812; Feb. 6, 1978, Pub.L. 95-225, § 3(a), 92 Stat. 8; Nov. 7, 1986, Pub.L. 99-628, § 5(b)(1), 100 Stat. 3511; Sept. 13, 1994, Pub.L. 103-322, Title XVI, § 160001(g), 108 Stat. 2037; Dec. 23, 1995, Pub.L. 104-71, § 5, 109 Stat. 774; Oct. 11, 1996, Pub.L. 104-294, Title VI, §§ 601(b)(4), 604(b)(33), 110 Stat. 3499, 3508; Oct. 30, 1998, Pub.L. 105-314, Title I, § 103, 112 Stat. 2976; Nov. 2, 2002, Pub.L. 107-273, Div. B, Title IV, § 4002(c)(1), 116 Stat. 1808; Apr. 30, 2003, Pub.L. 108-21, Title I, §§ 103(a)(2)(C), (b)(2)(B), 105, 117 Stat. 652, 653, 654; July 27, 2006, Pub.L. 109-248, Title II, § 204, 120 Stat. 613; Pub.L. 113-4, Title XII, § 1211(b), Mar. 7, 2013, 127 Stat. 142.)

Notes of Decisions (167)

18 U.S.C.A. § 2423, 18 USCA § 2423
Current through P.L. 113-36 approved 9-18-13

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes (Refs & Annos)

18 U.S.C.A. § 2425

§ 2425. Use of interstate facilities to transmit information about a minor

Effective: October 30, 1998
Currentness

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 initiates the transmission of the name, address, telephone number, social security number, or electronic mail address of another individual, knowing that such other individual has not attained the age of 16 years, with the intent to entice, encourage, offer, or solicit any person to engage 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, imprisoned not more than 5 years, or both.

CREDIT(S)

(Added Pub.L. 105-314, Title I, § 101(a), Oct. 30, 1998., 112 Stat. 2975.)

Notes of Decisions (7)

18 U.S.C.A. § 2425, 18 USCA § 2425
Current through P.L. 113-36 approved 9-18-13

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West's District of Columbia Code Annotated 2001 Edition
Division IV. Criminal Law and Procedure and Prisoners.
Title 22. Criminal Offenses and Penalties. (Refs & Annos)
Subtitle I. Criminal Offenses.
Chapter 30. Sexual Abuse.
Subchapter II. Sex Offenses.

DC ST § 22-3010.02

§ 22-3010.02. Arranging for a sexual contact with a real or fictitious child.

Effective: June 11, 2013
Currentness

(a) It is unlawful for a person to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger than the person. For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.

(b) A person who violates subsection (a) of this section shall be imprisoned for not more than 5 years, fined not more than the amount set forth in § 22-3571.01, or both.

Credits
(May 23, 1995, D.C. Law 10-257, § 209b, as added June 3, 2011, D.C. Law 18-377, § 11(a), 58 DCR 1174; June 11, 2013, D.C. Law 19-317, § 232(n), 60 DCR 2064.)

DC CODE § 22-3010.02
Current through July 29, 2013

End of Document

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part A. Offenses Against the Person
3. Criminal Sexual Abuse and Offenses Related to Registration as a Sex Offender (Refs & Annos)

USSG, § 2A3.2, 18 U.S.C.A.

§ 2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

Currentness

(a) Base Offense Level: 18

(b) Specific Offense Characteristics:

(1) If the minor was in the custody, care, or supervisory control of the defendant, increase by 4 levels.

(2) If (A) subsection (b)(1) does not apply; and (B)(i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct, increase by 4 levels.

(3) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct, increase by 2 levels.

(c) Cross Reference:

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. 2241 or 2242), apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the "consent" of the victim.

<[Commentary to Guideline is located in Historical Note field. The following credit reflects amendments to both Guideline and Commentary.]>

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1991; November 1, 1992; November 1, 1993; November 1, 1995; November 1, 2000; November 1, 2001; November 1, 2004; November 1, 2009; November 1, 2010.)

COMMENTARY

<**Statutory Provision:** 18 U.S.C. 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).>
<**Application Notes:**>

<1. Definitions.--For purposes of this guideline:>

<"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).>

<"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).>

<"Minor" means (A) an individual who had not attained the age of 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.>

<"Participant" has the meaning given that term in Application Note 1 of § 3B1.1 (Aggravating Role).>

<"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).>

<2. Custody, Care, or Supervisory Control Enhancement.-->

<(A) In General.--Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.>

<(B) Inapplicability of Chapter Three Adjustment.--If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<3. Application of Subsection (b)(2).-->

<(A) Misrepresentation of Identity.--The enhancement in subsection (b)(2)(B)(i) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Subsection (b)(2)(B)(i) is intended to apply only to misrepresentations made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(B)(i) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.>

<The misrepresentation to which the enhancement in subsection (b)(2)(B)(i) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.>

<(B) Undue Influence.--In determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.>

<However, subsection (b)(2)(B)(ii) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.>

<In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B)(ii) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.>

<**4. Application of Subsection (b)(3).**--Subsection (b)(3) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with the minor or with a person who exercises custody, care, or supervisory control of the minor.>

<**5. Cross Reference.**--Subsection (c)(1) provides a cross reference to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. 2241 or 2242. For example, the cross reference to 2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. 2242(1)).>

<**6. Upward Departure Consideration.**--There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.>

<**Background:** This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. 2243(a) that would be lawful but for the age of the minor, it also applies to cases, prosecuted under 18 U.S.C. 2243(a), in which a participant took active measure(s) to unduly influence the minor to engage in prohibited sexual conduct and, thus, the voluntariness of the minor's behavior was compromised. A four-level enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the minor and the defendant, as specified in 18 U.S.C. 2243(a). A four-level enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the minor had not attained the age of 12 years, § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the "consent" of the minor.>

Notes of Decisions (17)

Federal Sentencing Guidelines, § 2A3.2, 18 U.S.C.A., FSG § 2A3.2
As amended to 10-7-13

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United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part G. Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity (Refs & Annos)
1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct (Refs & Annos)

USSG, § 2G1.3, 18 U.S.C.A.

§ 2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

Currentness

(a) Base Offense Level:

(1) 34, if the defendant was convicted under 18 U.S.C. 1591(b)(1);

(2) 30, if the defendant was convicted under 18 U.S.C. 1591(b)(2);

(3) 28, if the defendant was convicted under 18 U.S.C. 2422(b) or 2423(a); or

(4) 24, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.

(3) 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.

(4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.".

(5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.

(c) Cross References

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

(2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the "consent" of the minor.

(d) Special Instruction

(1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

CREDIT(S)

(Effective November 1, 2004; amended effective November 1, 2007; November 1, 2009.)

COMMENTARY

<**Statutory Provisions:** 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425.>

<**Application Notes:**>

<**1. Definitions.**--For purposes of this guideline:>

<"Commercial sex act" has the meaning given that term in 18 U.S.C. § 1591(e)(3).>

<"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).>

<"Illicit sexual conduct" has the meaning given that term in 18 U.S.C. § 2423(f).>

<"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).>

<"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.>

<"Participant" has the meaning given that term in Application Note 1 of the Commentary to § 3B1.1 (Aggravating Role).>

<"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).>

<"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).>

<"Sexual contact" has the meaning given that term in 18 U.S.C. § 2246(3).>

<2. Application of Subsection (b)(1).-->

<(A) Custody, Care, or Supervisory Control.--Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.>

<(B) Inapplicability of Chapter Three Adjustment.--If the enhancement under subsection (b)(1) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<3. Application of Subsection (b)(2).-->

<(A) Misrepresentation of Participant's Identity.--The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.>

<The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.>

<(B) Undue Influence.--In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness

of the minor's behavior. The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.>

<However, subsection (b)(2)(B) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.>

<In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.>

<**4. Application of Subsection (b)(3).**--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.>

<5. Application of Subsection (c).-->

<**(A) Application of Subsection (c)(1).**--The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), "sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).>

<**(B) Application of Subsection (c)(3).**--For purposes of subsection (c)(3):>

<**(i)** Conduct described in 18 U.S.C. § 2241(a) or (b) is: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.>

<**(ii)** Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).>

<**(iii)**Conduct described in 18 U.S.C. § 2242 is: (I) threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) victimizing a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.>

<**6. Application of Subsection (d)(1).**--For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a

commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.>

<7. **Upward Departure Provision.**--If the offense involved more than ten minors, an upward departure may be warranted.>

Notes of Decisions (20)

Federal Sentencing Guidelines, § 2G1.3, 18 U.S.C.A., FSG § 2G1.3
As amended to 10-7-13

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