No. _____

In the Supreme Court of the United States

RICHARD RUTGERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit, affirming Petitioner's conviction under 18 U.S.C. § 2422(b), which prohibits "persuad[ing], induc[ing], entic[ing], or coerc[ing]" a minor to assent to engage in sexual conduct, concluded that Petitioner violated the statute by texting his acceptance of a solicitation of prostitution by an undercover police officer who pretended to be under the age of 18, after drawing Petitioner's interest by advertising adult escort services on the internet using photographs of an adult woman to depict her appearance.

The questions presented are:

1. Does a defendant "induce" the assent of another person, within the meaning of 18 U.S.C. § 2422, where the defendant accepts the request of the other person, who has already assented to the course of conduct prior to and independent of any action by the defendant?

2. Did the court of appeals correctly apply the harmless error doctrine to the exclusion of evidence of a government investigation showing Petitioner's lack of interest in sex involving any underage person prior to contact with the government, where Petitioner's lack of predisposition was essential to his entrapment defense?

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceeding other than those listed in the style of the case.

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The decision of the Eleventh Circuit, reported at *United States v. Rutgerson*, 822 F.3d 1231 (11th Cir. 2016), is contained in the Appendix (1a).

STATEMENT OF JURISDICTION

The Eleventh Circuit affirmed the conviction and sentence on May 12, 2016 and denied rehearing on September 13, 2016 (App. 47a).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following Constitutional and other provisions:

U.S. Const. amend. V (due process clause)

No person shall be ... deprived of life, liberty, or property, without due process of law ... .

18 U.S.C. § 2422

(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.

Federal Rule of Criminal Procedure 52(a)

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

INTRODUCTION

Using a combination internet clickbait[1] and undercover jailbait, the government repeatedly engaged Petitioner in electronic messaging to convince him to accept an offer of prostitution services from a person whose photographs depicted an adult woman, but who claimed in a text message to be underage.

The investigative tactic employed poses two problems: (1) unlike ordinary prostitution or drug-sale stings, 18 U.S.C. § 2422 requires more than customer acceptance of an offer repeatedly and persistently

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[1] According to Wikipedia, clickbait exploits the "curiosity gap," providing just enough information to make readers curious, but not enough to satisfy their curiosity without clicking through to the linked content.

conveyed by an undercover officer; and (2) the high-pressure, manipulative messaging by the undercover officer made entrapment an issue, requiring that Petitioner be given a fair opportunity to dispute his predisposition.

STATEMENT OF THE CASE

Petitioner was charged in the Southern District of Florida, with one count of enticement of a minor to engage in illegal sexual activity in violation of 18 U.S.C. § 2422(b). He proceeded to a jury trial, and was convicted and sentenced to the statute's 10-year mandatory minimum term of imprisonment.

This was an undercover sting operation in which an agent used photographs of an adult woman to entice men to respond to an adult escort services advertisement on backpage.com, a site known for prostitution solicitation. There was no evidence that Petitioner initially contemplated that in answering the adult advertisement, he would be contacting an underage prostitute, but, after three days of messaging initiated and repeatedly reinitiated by the undercover officer, Petitioner accepted the financial terms the undercover officer set.

Petitioner's entrapment defense included that in the three days of messaging, the undercover agent used direct and subliminal techniques to motivate Petitioner to express his consent to a prostitution date. The undercover agent's inducement techniques included continually restarting the messaging

whenever Petitioner appeared to stop communicating and conveying to Petitioner that the prostitute: had the physical appearance of an attractive adult woman; was intelligent and mentally-agile with no sign of immature thinking or ideation; found Petitioner to be likable and entertaining, with a good sense of humor; had to refuse Petitioner's request that they just meet socially without any sexual activity, even if he paid for such a meeting, and would never meet with Petitioner unless he made a prostitution date; needed to produce revenue as a prostitute; was being pressured by her manager to do more business and needed Petitioner's business; eventually felt she had wasted so much time messaging with Petitioner that she was in trouble with her manager, and thus scolded Petitioner for failing to make a prostitution date; and would stop messaging Petitioner if he refused to make a date.

The undercover agent adopted the personality of a clever, mature person and used text-message-style abbreviations in soliciting Petitioner. Converting the abbreviations into words shows that Petitioner received these messages (in addition to sexual banter):

> I'm on backpage.com, what do you think I'm looking for?
>
> Are you good with a young playmate or no?
>
> I can't just hang out for a few hours to get to know you. But I know, and you know, that backpage.com isn't for hanging out for a few hours to get to know each other, and I probably

> won't have a few hours straight anyway. You're funny though. I like you.
>
> My friend is sort of in charge and she won't let me just hang out with someone; just know that's how she is. That breaks her rules, I think.
>
> What time do you want to come see me? I'm booking up the day.
>
> Are you going to come see me when you're done working or are you just going to text all day?
>
> I have another appointment with another customer and want to know if you are really going to show up.
>
> My friend says you're playing games and I'm not even going to see you at all. Are you coming or not?
>
> My friend is right. I wasted too much time texting with you. Bring money and stop playing games.

Given the government's efforts to induce Petitioner to commit an offense, the trial court instructed the jury on the entrapment defense. But the trial court erroneously excluded Petitioner's best biographical evidence of a lack of predisposition, that the government's lead agent had conducted an "extensive investigation" and found no indication that Petitioner had ever visited websites dedicated to sex with minors.

On appeal, the Eleventh Circuit rejected

Petitioner's claim that he had not violated the statute, and concluded, as a categorical rule: "Where an underage prostitute holds herself out as willing to engage in sex for money, the offer to pay that money qualifies as sufficient inducement under § 2422(b)." App. 2a ("On appeal, Rutgerson challenges the sufficiency of the evidence supporting his conviction, arguing that he could not have persuaded, induced, enticed, or coerced a minor into engaging in prostitution when the minor has held herself out as a prostitute before he made contact with her. We disagree."). The Eleventh Circuit explained:

> [Petitioner']s claim that he believed [the prostitute] would agree to have sex with anyone who paid her price essentially gives away the argument. It (correctly) assumes that her agreement to have sex was dependent on the payment of money. As we have already observed, offering or agreeing to pay money in exchange for engaging in various sex acts qualifies as inducement within the meaning of the statute; it was the necessary element that would cause [the prostitute] to agree to have sex with [Petitioner].

App. 18a.

The Eleventh Circuit also determined that although the district court erred in excluding defense evidence that the lead agent conducted an "extensive investigation" of Petitioner and found no indication that Petitioner, a 38-year-old military veteran, had

ever visited any websites dedicated to sex with minors, the error was harmless because of "overwhelm[ing]" and "powerful" evidence of predisposition drawn from Petitioner's continuing to exchange text messages after the undercover agent claimed to be underage. App. 34a-35a (describing Petitioner's messages as reflecting active pursuit of a sexual encounter, despite the three days of messaging needed to induce Petitioner to make a date and the frustration expressed by the "prostitute" regarding Petitioner's delays and excuses; noting also that Petitioner was able to offer evidence that he had no child pornography on his phone).

REASONS FOR GRANTING THE WRIT

I. The Court should resolve the split in the circuits on whether, in order to violate 18 U.S.C. § 2422(b), a defendant must engage in conduct that is luring or coercive in nature, so as to affect the willingness or disposition of the minor to engage in sexual activity.

The courts of appeals are divided on the reach of 18 U.S.C. § 2422(b). Several Circuits have sought to limit the scope of the statutory terms, *persuade*, *entice*, *induce* and *coerce*, to their plain meaning of obtaining the assent of another person by means of reason, luring, trickery, incitement, or threat, or by engaging another person, such as a parental figure, to do so. *See United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) ("Congress made a clear choice to criminalize persuasion and attempt to persuade, not the

performance of sexual acts themselves); *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.").

In *United States v. Hite*, 769 F.3d 1154, 1166 (D.C. Cir. 2014), the District of Columbia Circuit explained that "the preeminent characteristic of the conduct prohibited under § 2422(b) is transforming or overcoming the minor's will, whether through 'inducement,' 'persuasion,' 'enticement,' or 'coercion.'" The court rejected the watered-down "cause" standard proposed by the government (and adopted in Petitioner's case by the Eleventh Circuit). "Although the word 'cause' is contained within some definitions of 'induce,' cause encompasses more conduct; simply 'to cause' sexual activity with a minor does not necessarily require any effort to transform or overcome the will of the minor." *Id.* at 1166-67 (reversing based on cause standard's inclusion in jury instructions). *See United States v. Zagorski*, 807 F.3d 291, 293 (D.C. Cir. 2015) (recognizing *Hite*'s insistence that there be evidence that the defendant sought to "transform or overcome the will of a minor"); *see also United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) (noting that § 2422(b) "'criminalizes an intentional attempt to achieve a mental state—a minor's assent—regardless of the accused's intentions [concerning] the actual consummation of sexual activities with the minor'") (quoting *United States v. Berk*, 652 F.3d 132, 140 (1st Cir. 2011)); *United States v. Douglas*, 626 F.3d 161, 164 (2d Cir. 2010) ("[T]he statute criminalizes

obtaining or attempting to obtain a minor's assent to unlawful sexual activity.); *United States v. Nestor*, 574 F.3d 159, 162 n. 4 (3d Cir. 2009) (defining the term "persuade" to mean, "(1) to move by argument, entreaty, or expostulation to a belief, course of action; (2) to plead with."); *United States v. Thomas*, 410 F.3d 1235, 1244 (10th Cir. 2005) ("Section 2422(b) requires only that the defendant intend to entice a minor, not that the defendant intend to commit the underlying sexual act."); *see also United States v. Nitschke*, 843 F. Supp. 2d 4, 14 (D.D.C. 2011) ("The Court agrees that Defendant's communications demonstrate a 'willingness and desire to meet,' but, once again, a willingness and desire to have sex does not demonstrate an intent to persuade a minor via the internet."; granting defendant's motion to dismiss).

The Eleventh Circuit, however, held that the term "induce" means "to cause," thereby rendering the terms "persuade, entice, or coerce" superfluous. *See* App. 15a (citing *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004)); *see also United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010) ("the government must prove that the defendant took a substantial step toward causing assent").[2]

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[2] One circuit judge has explained at length the flaws in the Eleventh Circuit's expansive reading of "induce." *See United States v. Laureys*, 653 F.3d 27, 41–42 (D.C. Cir. 2011) (Brown, J., dissenting) ("In § 2422(b), the verb 'induce' has a person as its object ... . But 'induce' only means 'cause' when its object is inanimate. *See* Oxford English Dictionary Online, 'induce,' def. 4(a) (listing

Even the Eleventh Circuit's minority view of causation analysis would not place Petitioner's conduct within the statute's scope in other circuits or under this Court's precedents. *See Burrage v. United States*, 134 S.Ct. 881, 888 (2014) (addressing causation in the sense of a necessary factor in bringing about a result).

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examples), http://www.oed. com/view/Entry/94758 (last visited August 9, 2011). ... By contrast, when 'induce' is used with a personal object, it has the first meaning. *See id.* def. 1 ('To lead (a person), by persuasion or some influence or motive that acts upon the will, to (into, unto) some action, condition, belief, etc.; to lead on, move, influence, prevail upon (any one) to do something.'). ... Second, the word 'induce,' in its first definition, is not 'essentially synonymous with the word 'persuade,' as the *Murrell* court said it was. 368 F.3d at 1287. The word 'persuade' suggests the use of reason, but the word 'induce,' though it can bear that meaning, may signify any force, such as trickery, that acts upon the will. ... Moreover, Congress often uses multiple words with overlapping meaning to capture a broad swath of conduct. ... *Cf. Moskal v. United States*, 498 U.S. 103, 120–21 ... (1990) (Scalia, J., dissenting) ... . Third, the statutory history of § 2422(b) confirms that 'induce' does not mean simply 'cause,' but involves an act directed at bending the will of another person—here, a minor. The modern enticement statute traces its origin to the Mann Act of 1910, which used 'induce' and 'cause' in the same sentence. ... *See Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) ('The canon of statutory construction noscitur a sociis, i.e., a word is known by the company it keeps[,] is often wisely applied where a word is capable of many meanings in order to avoid giving unintended breadth to the Acts of Congress.' (quotation marks omitted)); ... .").

In the context of persistent solicitation by a prostitute, there is nothing about the mere fact of the customer's stating assent to pay the quoted price that alters the level of willingness already expressed by the prostitute. The messaging and banter with a prostitute is by its very nature mere talk or prologue; the prostitute, like any commercial vendor, wants money on the table (coin of the realm), not mere talk about payment. The prostitute, as scripted in Petitioner's case, could not be "induced" by anything other than compensation as the undercover agent made clear in demanding of Petitioner: Bring money and stop playing games.[3]

As with the causation issue in *Burrage*—in which the Court rejected the government's argument that the sale of a drug caused a customer's death, when other drugs taken by the victim had already set him on the path to his demise, 134 S.Ct. at 888—so too here, the prostitute had set the price, so that only payment, not talk of payment, could induce assent to sexual activity.

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[3] Analogously, when a bricks-and-mortar vendor responds to customers' questions or invites their business, the customer's mere expression of willingness to pay the price set by the vendor remains mere talk, absent an actual transaction, and does not change the vendor's pre-announced willingness to sell at that price. The scripted prostitute was already prostituting (according to the jury instructions) before Petitioner spoke sexually at all. Her assent to sex at her quoted rates was an assumed fact in all of her messaging with Petitioner.

Because the focus of the statute is on the words of enticement and their capacity to stimulate sexual activity, allowing that focus to be blurred by equating enticement with announcing capitulation to a price setting is inconsistent with governing principles of statutory construction. The Court recently reaffirmed "the presumption 'that statutory language is not superfluous.'" *McDonnell v. United States*, 136 S.Ct. 2355, 2369 (2016) (citing *Arlington v. School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299 n.1 (2006)). As in *McDonnell*, "[t]here is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales ... . It is instead with the broader legal implications of the Government's boundless interpretation of the ... statute." *Id.*, 136 S.Ct. at 2375 (interpreting the term "official act" in 18 U.S.C. § 201(a)(3) in a way that avoids vagueness concerns and requires more than an action taken by an official); *id.* at 2373 ("where a more limited interpretation of 'official act' is supported by both text and precedent, we decline to 'construe the statute in a manner that leaves its outer boundaries ambiguous") (citing *McNally v. United States*, 483 U.S. 350, 360 (1987)).

The Court explored a similar issue of the scope of criminal responsibility of the consumer in a commercial transaction in *Abuelhawa v. United States*, 129 S.Ct. 2102 (2009), where the defendant made six telephone calls in connection with purchases of small quantities of cocaine and was subsequently charged with six counts of violating 21 U.S.C. § 843,

which makes it a felony "to use any communication facility in committing or in causing or facilitating" certain felonies prohibited by the statute. 21 U.S.C. § 843(b). The Court unanimously rejected the government's argument that by using the telephone in advance of his purchases, the defendant "caused or facilitated" the dealer's drug "distributions." While acknowledging that phone calls could be described as "facilitating" drug distribution since they "'undoubtedly made ... distribution easier,'" the Court explained that statutes "are not read as a collection of isolated phrases." 129 S.Ct. at 2105 (citing *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993)). "A buyer does not just make a sale easier; he makes the sale possible. No buyer, no sale; the buyer's part is already implied by the term 'sale,' and the word 'facilitate' adds nothing. We would not say that the borrower facilitates the bank loan." *Id.* at 2105. *See also Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013)(rejecting government's "shifting and imprecise characterization" of the concept of a property right taken by extortion); *Yates v. United States*, 135 S.Ct. 1074, 1081-82 (2015) (plurality opinion) ("Whether a statutory term is unambiguous ... does not turn solely on dictionary definitions of its component words. Rather, the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.") (citation and alteration

marks omitted).

The rule of lenity applies in Petitioner's case because of the distinction between predatory behavior and simple improper sexual conduct. In a one-on-one sexual context, every action taken by each party can be viewed as in some way offering an encouragement to the other. "Every idea is an incitement." *Dennis v. United States*, 341 U.S. 494, 545–46 (1951) (internal citation omitted). But the willingness of the prostitute to work at the price level the prostitute sets does not naturally change merely based on the idea that some customers will accept and some will refuse that price. Thus, as the Second Circuit has held, absent enticement that alters the assent of the minor, there is no inducement within the statutory meaning. *See United States v. Gagliardi*, 506 F.3d 140, 147–48 (2d Cir. 2007) ("The words 'attempt,' 'persuade,' 'induce,' 'entice,' or 'coerce' ... are words of common usage that have plain and ordinary meanings. ... Although, as Gagliardi argues, there may be some uncertainty as to the precise demarcation between 'persuading,' which is criminalized, and 'asking,' *which is not*, this uncertainty is not cause for constitutional concern because the statute's terms are sufficiently definite that ordinary people using common sense could grasp the nature of the prohibited conduct.") (emphasis added).

Congress could have chosen to criminalize any commerce-affecting interaction with a minor relating to engaging in unlawful sex, but it did not do so, and

instead Congress used limiting language of persuasion, enticement, inducement, and coercion. And particularly, because there is no end to the causation analysis if we abandon the normal distinction between seller and buyer, the resulting ambiguity should, under the rule of lenity, call for a narrower reading of the scope of the statute. *See Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time honored interpretive guideline when the congressional purpose is unclear."); *accord United States v. Bass*, 404 U.S. 336, 347-48 (1971).

The scope of the statute is also informed by the traditional meaning of the Mann Act, 18 U.S.C. § 2422(a), which has long used the same terms of inducement at issue in § 2422(b). Because § 2422(b) uses the same terms as the more well established Mann Act, § 2422(a) (applicable to anyone who "knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce" to engage in unlawful sexual activity), cases applying the Mann Act offer guidance on causation by those means. In *United States v. Williams*, 291 F.3d 1180 (9th Cir. 2002), the Ninth Circuit recognized the distinction between conduct that is transactional and conduct that convinces someone to engage in illegal conduct. *See id.* at 1187 ("[C]onvincing someone to transport himself or herself across state lines for the purpose of prostitution completes the crime under § 2422(a). That persuasion is distinct from the actual

transportation. ... Transporting a minor with the intent that the minor engage in prostitution is not the same as persuading, enticing, inducing, or coercing someone to travel in interstate commerce to engage in prostitution."); *see also United States v. Zitlalpopoca-Hernandez*, 495 Fed.Appx. 833, 836 (9th Cir. 2012) ("Under 18 U.S.C § 2422(a) (2006), a defendant is guilty if he 'knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce ... to engage in prostitution.' The evidence at trial demonstrated that it was Florencia who persuaded Zitlalpopoca to bring her to the United States, not the other way around. "); *United States v. Rashkovski*, 301 F.3d 1133, 1135 (9th Cir.2002) (sufficient evidence supported § 2422(a) conviction where defendant traveled to Russia, held recruiting meetings to promote prostitution in the United States, and arranged and paid for Russian women to travel to the United States to work as prostitutes).

Similarly, the Second Circuit's analysis of inducement in this context shows the unwarranted overexpansiveness of the Eleventh Circuit interpretation. *United States v. Joseph*, 542 F.3d 13, 25 (2d Cir. 2008) ("Even the definition of 'induce' outside of the context of aiding and abetting is more than simply a request for the results of the criminal conduct. ... In this case, the district court's interpretation of inducement for aiding and abetting is more similar to the conduct of a customer of a drug trafficker, prostitute or other illegal product or

service."; citing *United States v. Southard*, 700 F.2d 1, 20 (1st Cir. 1983) (customer of prostitute not liable for aiding and abetting prostitution)); *see Rashkovski*, 301 F.3d at 1136–37 (holding that under the Mann Act, "induce" is "to move by persuasion or influence"; and "entice" is "to attract artfully or adroitly or by arousing hope or desire"). As the Second Circuit explained in *Joseph*, 542 F.3d at 24, the "[k]ey to the analysis in *Rashkovski* is that the women had taken no prior action toward travel. Only when Rashkovski made the offer and took steps toward the travel arrangements did the women take any action."

Unlike an ordinary prostitution sting used for rounding up "johns" or customers who respond to solicitations, a sting for violators of 18 U.S.C. § 2422(b) is insufficient where it rests solely on a purported underage prostitute's solicitation and a customer's expression of acceptance of the prostitute's offer.

Petitioner's case does not involve conduct inherently marked as predatory in nature: the lure was adult escort services; the photographs of the "prostitute" showed an adult woman's features; the "prostitute" engaged in mature commercial discussions; Petitioner's attempt to redirect the discussion to non-sexual behavior or to end the communications was thwarted by the undercover officer; and after three days of messaging, repeatedly reinitiated by the officer, the "prostitute" was scolding and belittling Petitioner for failing to agree to a date.

Because Petitioner did not otherwise entice or

persuade the prostitute, the Eleventh Circuit focused on the singular fact of Petitioner's statement that he would pay the fee demanded and the court characterized that expression of acceptance of the solicitation as *causing* the prostitute's assent to engage in prostitution. Both logically and as a matter of plain meaning, the Eleventh Circuit's expansion of the statute to reach a wider range of conduct than it has been previously found to encompass is unwarranted. Because there is no basis for application of the statute to a defendant whose actions do not increase the level of assent by the prostitute, the Court should address and resolve the conflict and hold that the causative component of the statute is not automatically applicable to a commercial sex customer.

II. The Court should grant certiorari to clarify the elements of the entrapment defense and the requisite predisposition analysis in the context of internet or other virtual communication offenses, where the court of appeals ruled that excluding evidence of Petitioner's lack of any interest in sexual activity with minors prior to the government's inducements was harmless because Petitioner's messaging with an agent who pretended to be an underage prostitute showed Petitioner's predisposition to eventually accept the offer of sex.

To determine a defendant's predisposition to

commit an offense, there must first be an understanding of the elements of the offense. Contrary to the Eleventh Circuit, Petitioner was not shown conclusively to be predisposed to cause a minor to assent to illegal sexual activity simply because Petitioner evinced interest in a Lolita figure who pursued and enticed him in a sting operation (particularly where that interest in the three days of messaging was limited to anonymous banter).[4] Nor did the fact that Petitioner had no interest child pornography establish his lack of predisposition as to the luring offense. Instead, Petitioner should have been permitted to show that the government's "extensive investigation" found he had never used the internet to even visit a website dealing with underage sexual contact or activity. The Eleventh Circuit's application of the harmless error doctrine to foreclose a fair trial on the predisposition issue warrants the Court's review.

Entrapment is an affirmative defense. It has two related elements: (1) the government's inducement of the crime and (2) the defendant's lack of predisposition to commit the crime. *Mathews v. United States*, 485

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[4] In *United States v. Joseph*, 542 F.3d 13, 21 (2d Cir. 2008) , the Second Circuit addressed proposed expert testimony about "role-playing in the context of sexually explicit conversations on the Internet" - in particular, the "distinct culture of the Internet in which one can become a 'fantasy character[ ]' " and "the realities and motivations of online role-playing via chatrooms and email."

U.S. 58, 63 (1988). It is based on the notion that law-enforcement officers may not originate a criminal plan, "implant in an innocent person's mind the disposition to commit a criminal act," and then induce its commission. *Jacobson v. United States*, 503 U.S. 540, 548 (1992).

The government, to overcome an entrapment defense to a charge of internet luring under 18 U.S.C. § 2422(b), must show Petitioner's predisposition to attempt to lure the minor to assent to having sex, rather than merely to engage in internet sexual communications.[5]

The entrapment analysis used by the Eleventh Circuit unduly constricted the entrapment defense (by holding that Petitioner's banter with the agent—as opposed to any ready agreement to commit the offense—was enough to show predisposition so clearly that exculpatory evidence could be excluded). Where the use of internet-based communications are at issue, the Court should clarify that the predisposition

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[5] Petitioner's entrapment issue also pertains to the use of images of an adult's body to incite his interest. The tactic of using an image of a mature woman to interest someone having sex with an underage prostitute is inherently problematic—a mixed message sent to manipulate Petitioner. *Cf. United States v. Cote*, 504 F.3d 682, 683 (7th Cir. 2007) (government provided a photo of a young girl, not an adult, to entice defendant).

standard cannot be subsumed by assumptions that the attitudes expressed in the anonymous environment of internet and related communications can be presumed to be true to such an extent that a defendant is barred from demonstrating by his life history that such comments do not reflect any pre-existing willingness to commit an offense. *See United States v. Gladish*, 536 F.3d 646, 649–50 (7th Cir. 2008) (conviction reversed where evidence showed defendant used internet enticement language for the purpose of fantasy, with no intent that it would result in actual sexual activity; "He may have thought (this is common in Internet relationships) that they were both enacting a fantasy."). That the government was left only with the talk and the three days that it took the defendant to show up, and only after being chastised and humbled by the police officer for failing to bring money and stop playing games, shows that a juror could readily have been moved to doubt by the complete absence of any interest in sex with minors (an impression the jury did not receive merely with evidence that the defendant had no child pornography, a separate type of offense). *See United States v. McGill*, 754 F.3d 452, 458 (7th Cir. 2014) (holding that even as to various forms of child pornography offenses, predisposition issue must be carefully focused on the relevant aspect of the offense; "The government's other premise, that McGill's possession of child pornography is evidence of a predisposition to distribute, proves too much. Possession and distribution are very different crimes;

the government's long history of prosecuting drug offenses surely makes this evident ... . The government is not free to induce more-serious crimes simply because the target already committed a lesser crime.").

Thus, the entrapment doctrine needs further clarification in a clickbait era, where the pervasive nature of internet-based solicitations and the role-playing potential in largely-anonymous electronic responses and chatter distinguish such verbal conduct from traditional discussions of a criminal proposal in the real world, for which the predisposition standard was crafted. The mere fact of eventual communication of acceptance of a teased, apparently-criminal offer in the context of internet or text message banter cannot foreclose jury consideration of the behavior of the defendant in the real world in order to understand whether what transpired over three days of persistent undercover messaging was a better indicator of willingness to ultimately express consent to the minor's solicitation than other factors in the defendant's life. Notably, internet banter may be less probative of predisposition because in the virtual, digital world there are no likely consequences to teasing an acceptance to the offeror (who might not real either—thus making the whole interaction theoretical and tentative at best).

Unlike real interactions where backtracking from a conveyed acceptance or expression of interest can

have repercussions and where the acceptance itself has greater (even semi-contractual) significance, a virtual, anonymous "yes" via electronic communication may say very little about the defendant's predisposition regarding or even belief in the reality of the offer; so, in Petitioner's case, the exclusion of evidence that Petitioner had no prior interest in what was being teased becomes even more essential than in a real-life interaction case in which ready acceptance may tend to show predisposition.

The Eleventh Circuit also failed to distinguish sexual attraction from willingness to actually agree to engage in illicit sexual activity. A comment made about the sexual allure of another person does not necessarily mean the commenter is willing to have any form of relations, much less illegal relations, with such person. The Eleventh Circuit's focus on the content of the undercover interaction as overshadowing all other evidence thus does not comport with the special distinction applicable to issue of sexual desire.

Notably, this was not a case where Petitioner was offered an "out," a ready means to let the offer pass. Instead, the agent was persistent and diligent in stirring Petitioner's interest. Petitioner even advised that he desired a non-sexual interaction, but was entirely rebuffed by the undercover agent who insisted that prostitution was the only interaction available; thus, the messaging showed investigative persistence in the face of Petitioner's effort to propose legal

conduct.

This unlike offering involvement in a drug deal, where there is no natural impulse toward selling drugs, so that readily saying yes to a supplier's offer implies predisposition to violate trafficking laws—instead, here there is a natural sexual impulse that, as long as it does not cross legal lines, is not necessarily even unwholesome, and, at least in theory, could even lead to marriage, depending on age limits of given states. *See*, *e.g.*, Fla. Stat. § 741.0405; N.Y. Dom. Rel. Law § 15-a; Ala. Code § 30-1-4; N.H. Rev. Stat. Ann. § 457:4. Lusting on the internet within the bounds of the law does not show a predisposition to violate § 2422(b).

The court of appeals concluded that there was substantially similar evidence introduced to the effect that the defendant had no child pornography on his phone and that his own private investigator confirmed he had apparently not search for child pornography. App. 33a–33b. But this was not a child pornography case. The court of appeals notes that Petitioner had searched for "young" prostitutes, App. 34a, but that was all the more reason to let the jury know that unlike virtually all other reported cases of internet luring, Petitioner had never once gone to a site associated with children and had stuck exclusively with adult sites. In that context, searching for young women makes much more sense for a man in his 30's and could mean women relatively close in age to

himself. It is the one-sided and misleading nature of the evidence of interest in young (adult) women that magnified the need for the jury to know the truth—that there was not a shred of evidence that this man had ever been interested in minors until he stumbled upon the photographs of a 34-year-old woman appended to the undercover solicitation.

Where the right to present a defense is at stake, mere sufficiency of the other evidence does not say what the jury would do if it had the full picture. The defense focus on the police investigation as undermining the reliability of the prosecution's theory of the case is often the best defense. *See Kyles v. Whitley*, 514 U.S. 419, 446, 115 S. Ct. 1555, 1571-72 (1995) ("the defense could have examined the police to good effect on their knowledge of [favorable evidence] and so have attacked the reliability of the investigation"). The credibility and significance of testimony by the undercover agent that he sought to find any evidence of preexisting interest in minors and found none is rendered greater by the ambiguity of much of the evidence, which must be looked at not in the light most favorable to the government but the light of its potential effect on a jury as the Court explained in *Kyles* in the analogous context of suppression of favorable evidence of an investigation that, if revealed, would support the trial defense.

The Court should grant certiorari to review the appropriate analysis of predisposition in the context of

government internet-communication stings.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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December 2016

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-15536.

D.C. Docket No. 0:14-cr-60083-DPG-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD RUTGERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida.

May 12, 2016.

Before MARCUS, JORDAN and BLACK, Circuit Judges.

MARCUS, Circuit Judge:

Defendant Richard Rutgerson, using an internet site frequented by prostitutes and their clients, responded to a posting by Amberly, who described herself as a "sweet petite young lady." Amberly answered Rutgerson's message, offering in veiled terms to have sex with him for money and revealing that she was 15

years old. Undeterred as long as they were discreet, Rutgerson proceeded to arrange a meeting with Amberly where he expected to pay her for sex. Upon arriving at the hotel designated for their rendezvous, Rutgerson was surprised to learn that Amberly was not a 15-year-old prostitute, but rather a creation of the Fort Lauderdale Police Department, whose officers arrested him. Rutgerson was charged and convicted of attempting to persuade, induce, entice, or coerce a minor into engaging in prostitution or unlawful sex, in violation of 18 U.S.C. § 2422(b).

On appeal, Rutgerson challenges the sufficiency of the evidence supporting his conviction, arguing that he could not have persuaded, induced, enticed, or coerced a minor into engaging in prostitution when the minor has held herself out as a prostitute before he made contact with her. We disagree. Where an underage prostitute holds herself out as willing to engage in sex for money, the offer to pay that money qualifies as sufficient inducement under § 2422(b). We also conclude that Rutgerson is not entitled to relief based on the district court's refusal to deliver a confusing and erroneous jury instruction requested by Rutgerson or in its exclusion of particular evidence. Accordingly, we affirm.

I.

On April 24, 2014, a grand jury sitting in the United States District Court for the Southern District of Florida indicted Rutgerson with one count of:

> using any facility and means of interstate commerce, [to] knowingly attempt to persuade, induce, entice, and coerce an individual who had not attained the age of eighteen years, to engage in prostitution or any sexual activity for which a person can be charged with a criminal offense, in violation of Title 18, United States Code, Section 2422(b).

Rutgerson's case proceeded to a jury trial on August 25, 2014.

At trial, the government first called Detective Robert Mauro, who was part of the Fort Lauderdale Internet Crimes Against Children task force. Detective Mauro testified that Rutgerson replied to an ad that he and Detective Jennifer Montgomery posted on backpage.com as part of an operation that targeted child predators on the Internet.

The ad was posted on January 23, 2014, and was titled:

> ♥♥♥ SwEEt Petite yOung Lady . . . ♥♥♥ Come See Me!! ♥ AMBERLY ♥ Ft Laud♥ -99.

The ad included photos of a woman's stomach and legs and read this way:

> Hi, I'm Amberly . . . pics are 100% real ((promise)). . . . New 2 BP and hOping tO like it here ♥
>
> i'm 5'2, 103 lbs, grEEn EyeS with a swEEt bAby dOLL sMile ♥

> i PreFer mature upScale GENTLEmen who like the cOmpany of a petite yOung lady and Enjoy bEing paMpered & spOiled. If this sounds like you, hit me Up!
>
> i'm juSt an email or pHonE cALL aWay!! Come see MEEEE! ! ! ♥♥♥
>
> ♥
>
> Gmail me @cutieamberly99 for my #
>
> Poster's age: 99

Mauro testified that he had been trained how to sound like a child online, using typos, spelling errors, slang, and words that adults typically do not use as much as children. He explained that the heart symbols and the spelling that alternated between capital and lowercase letters were indicative of how a teenager texted and communicated on the internet. The words "petite" and "young" indicated that the poster was under 18. Maura testified that, through his training and experience, he knew that the number 99, in the underage prostitution world, is code for a child, so the 99 in the ad was a "big hint" that the person posting the ad was underage. The woman in the pictures was actually Detective Montgomery, taken when she was 34 years old.

On January 22, 2014, Richard Rutgerson responded to the e-mail address listed in the ad. Mauro, playing the role of Amberly, replied. Their conversation continued via email and text message for the next two

days, culminating in a meeting for sex and Rutgerson's arrest at a La Quinta Inn in Plantation, Florida.

The government introduced a composite exhibit of the e-mail exchange between Rutgerson and Amberly. The conversation began:

> **Rutgerson:** Hi babe.
>
> Can you tell me more about you?
>
> **Amberly:** im available tomorrw . . . im new on here and fyi im young. bp [backpage.com] shut down my ad twice thats why I cant put a phone # now cuz they kno its me. what are u lookn for
>
> **Rutgerson:** I'm looking for a playmate.
>
> What are you looking for?
>
> **Amberly:** im on bp . . . wat do you think lol are you good with a young playmate or no
>
> **Rutgerson:** How young are you?
>
> Where will you be available?
>
> **Amberly:** im 15 bu ppl say i look older. im clean and descreet. im gonna be near ft laud airport
>
> **Rutgerson:** Can you send me more pictures?
>
> Ya. I'm fine. So long as we're discrete.
>
> What do you like to do? What are your rules?

In subsequent emails, Rutgerson again asked Amberly what she liked to do and what her "rules" were. She responded that her rules were that he could not "tattle" about her age, pee on her, or do anything that hurt. Amberly asked what he wanted to do, and Rutgerson replied that he was looking on Backpage, so "what do you think[?]" Rutgerson asked how Amberly could get a hotel room and whether she was working with someone else. She told him that she was working with a 17-year-old friend named Nicki who was in charge and set the rules.

Rutgerson asked how much it would cost to meet with her, and she told him it depended on what he wanted. He asked, whether she was available for GFE, PFE, or other extras. Mauro testified that, in the prostitution world, "GFE" meant "girlfriend experience," meaning that it involved a sexual encounter and included something more romantic like cuddling or hand holding. "PSE" means "porn star experience," which means "straight sex, a little more of the hardcore sex, nothing like the girlfriend experience." "Extras" referred to different fetishes. Rutgerson also asked, "Do you masterbate? Do you cum easy? Do you like to be eaten out?"

After those e-mail communications, Rutgerson texted Amberly's phone. The government then introduced a series of text messages between Rutgerson and Amberly, which started near midnight on January 22 and continued into the early morning hours of January 23. Rutgerson asked, "So how much?" and, "How much to meet?" Amberly responded:

> **Amberly:** depends wat u want. i told u. i dont meet to hang out n i kno thats not wat ur gonna pay for
>
> **Rutgerson:** GFE?
>
> **Amberly:** an hour gfe i can do for $175 extras depends wat extras u want

Rutgerson proposed various "extras" in which he was interested. Amberly said she was fine with whatever he wanted, except for "Greek," which Mauro explained meant anal sex. The conversation continued:

> **Rutgerson:** Ok. $?
>
> **Amberly:** i like condoms but maybe i can make exception for an hour?!?! $200
>
> . . .
>
> **Rutgerson:** Ok. Can we do it more than once?
>
> **Amberly:** whatevr u wanna squeeze into the hr is fine
>
> **Rutgerson:** How about 2 hours for 300

Rutgerson also asked Amberly if she enjoyed receiving oral sex, saying, "I want you to cum too;-)."

During the conversation, Amberly pressed Rutgerson to get out of work and come see her. She said that she was leaving that night so he had to hurry. He told her that he would not be able to meet her that night and that she should go ahead and take another date. Amberly then said that she would be staying in town

for a little while longer. He responded that he wanted the first date she had on Friday or Saturday night, so he could get her "fresh." He asked if he could have sex without a condom and whether she was on birth control. Amberly responded, "y . . . u wanna cum inside me? thats more $ but u kno that."

Rutgerson attempted to get Amberly to come from Fort Lauderdale to meet him in Miami. He offered to pick her up or to get a hotel room in Miami. She refused, explaining that she was 15 and could not drive. On January 24, 2014, Rutgerson texted that he had gotten off work early and offered to drive the hour to Fort Lauderdale if Amberly was still available. She gave him the address of a La Quinta Inn in Plantation, told him to hurry, and advised him to "bring $ n stop playin games." He told her that he was on his way. Rutgerson sent Amberly a series of text messages from the car as he drove to Fort Lauderdale and showed no reluctance to have sex with a 15-year-old in those text messages.

Mauro and other officers arrested Rutgerson when he arrived at the hotel in Fort Lauderdale. Mauro interviewed Rutgerson after explaining his *Miranda* rights. The recording of that interview was introduced and played before the jury. In the interview, Mauro asked Rutgerson if he thought he was going to have a sexual encounter with a 15-year-old. Rutgerson replied that he did not know what was going to happen until he got there and that he "was just coming to hang out," but that "nine times out of ten that's what happens." Rutgerson further admitted that he believed Amberly

was 15 years old when he was texting and e-mailing her.

The interview also contained the following exchange, which was read to the jury by the prosecutor and Detective Mauro:

> **Det. Montgomery:** Do you think she was lying about her age, did you suspect she was, or did you think she sounded like she might be telling the truth?
>
> **Rutgerson:** I think it could have gone either way. I think I couldn't honestly believe someone that young was doing that, so either there was someone forcing her to do that and I thought – I hope – I hope I would have seen the distress when I . . . met her.

He also said that he had "no bad intentions" and that he would have liked to believe that he would have done "nothing indecent" if he felt that she was underage.

On cross-examination, Mauro testified that he could not remember any time when he had seen a minor posting with an age other than 99. Rutgerson also introduced a number of Backpage ads with posters that claimed they were adults but that contained heart symbols, upper- and lowercase letters, and words like "petite," "young," and "sweet." Mauro agreed that he had investigated Rutgerson "very thoroughly" and that he had never learned that Rutgerson had any of the training that enabled Mauro to identify the number 99, hearts, or capital letters as being indicia of a minor posting.

The government next called Detective Nicholas Masters. Masters testified about the sting operation and Rutgerson's arrest. He stated that, when Rutgerson was arrested, he found $400 and two condoms in Rutgerson's front pocket, as well as a large amount of cash in Rutgerson's wallet and other pockets. He added that he searched Rutgerson's car where he discovered an iPhone and more condoms. The government also called Special Agent Daniel Johns, who worked with the Federal Bureau of Investigation and was the liaison with the Internet Crimes Against Children task force at the Broward Sherriff's Office. Johns testified that no specific sex acts were mentioned before Rutgerson asked about whether "GFE," "PSE," or "extras" were available. Amberly indicated that she was underage many times, having made references to her age and to her inability to drive or rent a hotel room. Rutgerson emailed, called, or text messaged her 114 times in total.

Johns also testified that he had searched the internet history on Rutgerson's phone. His web history contained hundreds of searches on Backpage and other sites involving escorts or prostitution. Johns said that Rutgerson searched for pornography on his iPhone, but discovered only commercially available adult pornography, not child pornography. Indeed, Johns did not find any child pornography on Rutgerson's iPhone.

The government rested at the close of Detective Johns's testimony. Rutgerson then moved the court for a judgment of acquittal, pursuant to Federal Rule of

Criminal Procedure 29, on three grounds. First, he argued that the government had not carried its burden of proof in two ways. He claimed that the evidence was insufficient to allow the jury to find beyond a reasonable doubt that Rutgerson had any "intent to influence the will of" Amberly. The government had presented only a solicitation case, he argued, and solicitation has not been criminalized by 18 U.S.C. § 2422(b). Second, Rutgerson insisted that the government had not presented any evidence to rebut his entrapment defense by showing that he was predisposed to engage in sex with a minor. He maintained that "[t]his statute is a child predator statute," not a soliciting statute. The government's broad definition of "persuade, induce, entice or coerce" had effectively moved a "purely local crime[] . . . into the realm of Federal court," rendering it unconstitutional in violation of "principles of federalism." Finally, Rutgerson said that, even if his other arguments failed, to the extent that the statute's terms were ambiguous, the rule of lenity demanded that the district court adopt a narrower interpretation of the phrase "persuades, induces, entices, or coerces." The district judge denied the Rule 29 motion in its entirety.

Rutgerson called two witnesses on his behalf. The first, Timothy Jones, testified that Rutgerson left work at around 5:00 p.m. on January 23. Rutgerson argued that this established that his work had not prevented him from seeing Amberly that day, as his text messages to her had indicated. The other witness was Valerie Rivera, a licensed private investigator. She had Googled the many websites and names that came up

in Rutgerson's iPhone history. Through her, Rutgerson entered into evidence images of the websites that the detectives had uncovered in his iPhone history.

After the close of his case, Rutgerson renewed his Rule 29 motion for a judgment of acquittal. The district court again denied the motion because "there [was] sufficient evidence to proceed."

The court instructed the jury regarding the elements of attempting to entice, persuade, or induce a minor to engage in prostitution or unlawful sexual activity. It also provided an entrapment instruction.

In closing argument, Rutgerson made two basic points. First, he attempted to convince the jury that the government had not proven beyond a reasonable doubt that he believed Amberly was a minor. He noted that the pictures on her profile appeared to be of an older woman, and that he had expressed doubt that a fifteen-year-old could rent a hotel room. Second, he argued that the evidence all pointed to Amberly having persuaded him to meet for sex, that she made her agreement to have sex clear from the outset, and thus that there was no evidence that he intended to persuade her to have sex.

On August 28, 2014, the jury found Rutgerson guilty of having violated 18 U.S.C. § 2422(b). And on December 5, 2014, the court sentenced him to the mandatory minimum prison term of 10 years.

This timely appeal followed.

II.

Rutgerson first argues that the evidence was insufficient to support his conviction under § 2422(b), or that he was predisposed to violate the statute. We review the sufficiency of the evidence *de novo*. *United States v. Ramirez*, 426 F.3d 1344, 1351 (11th Cir. 2005). We are required to affirm Rutgerson's conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hunt*, 187 F.3d 1269, 1270 (11th Cir. 1999) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Thus, we view "all the evidence in the light most favorable to the government and draw[] all reasonable inferences and credibility choices in favor of the jury's verdict." *United States v. Boffil-Rivera*, 607 F.3d 736, 740 (11th Cir. 2010) (quoting *United States v. Taylor*, 480 F.3d 1025, 1026 (11th Cir. 2007)). Because Rutgerson was charged with attempt, sufficient evidence would support his conviction if a reasonable jury could have found beyond a reasonable doubt that he "(1) had the specific intent or mens rea to commit the underlying charged crimes, and (2) took actions that constituted a substantial step toward the commission of [each] crime." *United States v. Lee*, 603 F.3d 904, 913-14 (11th Cir. 2010) (quoting *United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007)).

Based on our review of the evidence adduced at trial, we are satisfied that a reasonable jury could have found that Rutgerson attempted to induce Amberly to have sex with him, as proscribed by § 2422(b). The evidence established that he energetically pursued

Amberly over three days in an attempt to induce her to agree on a price, terms, time, and location for a sexual encounter. Moreover, a reasonable jury could also have found (as it obviously did) that Rutgerson was predisposed to commit the charged crime and thus had not been entrapped. He readily committed the crime and expressed no hesitation about having sex with Amberly when she informed him that she was only 15 years old.

A.

Rutgerson was convicted of attempting to violate 18 U.S.C. § 2422(b). The statute provides:

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

18 U.S.C. § 2422(b). Thus, the government had to prove that (1) Rutgerson "acted with the specific intent to persuade, induce, entice or coerce [Amberly] to engage in criminal sexual activity," and (2) "took a substantial step toward the commission of the underlying crime[]." *Yost*, 479 F.3d at 819. "The underlying criminal conduct that Congress expressly proscribed in

passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself." *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004).

We have held that the terms persuade, induce, and entice in § 2422(b) should be given their ordinary meaning. *United States v. Panfil*, 338 F.3d 1299, 1301 (11th Cir. 2003). That is precisely what the district court did here. The judge instructed the jury:

> As used in this instruction, persuade means to win over, by an appeal to one's reason and feelings, into doing or believing something.
>
> Induce means to stimulate the occurrence of or to cause.
>
> Entice means to lure or attract by arousing hope or desire.

These definitions are in line with the ordinary meaning of those terms. Indeed, the definition of "induce" exactly matches the definition we endorsed in *Murrell*, 368 F.3d at 1287. Similarly, the definitions of "persuade" and "entice" match their ordinary meanings. *See* "Persuade," *Merriam-Webster Unabridged Dictionary* (3d ed. 2015) ("[W]in over by an appeal to one's reason and feelings (as into doing or believing something)"); "Entice," *Merriam-Webster Unabridged Dictionary* (3d ed. 2015) ("[T]o draw on by arousing hope or desire"). With these definitions in mind, there was more than enough evidence to support the jury's

finding that Rutgerson was guilty of attempting to persuade, induce, or entice Amberly to engage in prostitution with him.

First, it is undisputed that Rutgerson initiated contact with Amberly after seeing her ad and indicated that he was looking for a "playmate." More importantly, the jury reasonably could have concluded that Rutgerson offered to pay a sum of money to Amberly in order to induce her to agree to have sex with him. By definition, this constitutes a violation of § 2422(b). So far as Rutgerson knew, Amberly would not agree to have sex with him without receiving payment. Thus, his offer of money was a clear attempt to persuade, induce, or entice her into having sex with him. A reasonable jury could easily have found Rutgerson guilty of violating § 2422(b) based on this fact alone.

Moreover, contrary to the defendant's argument, this was not simply a "market transaction" whereby Rutgerson passively accepted an offer posed by Amberly. Passing over whether this argument would even constitute a defense, it is plainly not supported by the facts here. Instead, the evidence showed that Rutgerson engaged in active negotiations as to price and the particular sexual activities in which he wished to engage. Amberly told Rutgerson she could do "an hour gfe [] for $175." Rutgerson responded by suggesting various extras, including oral sex, using his fingers to penetrate her, and not wearing a condom. She replied that the price would be $200 for an hour with his extras. Rutgerson asked whether it would be possible to do

two hours for $300. This continued negotiation undoubtedly forms part of Rutgerson's efforts to persuade, induce, or entice Amberly to have sex with him. Indeed, there is not the slightest suggestion in this record that Amberly held herself out as being willing to engage in sex acts with Rutgerson in the absence of being induced by the offer to pay her a substantial sum of money.

Nor was the offer of money the only means by which Rutgerson attempted to persuade, induce, or entice Amberly. He also engaged in explicit sexual dialogue, including telling Amberly that he "want[ed] her to cum too," and repeatedly asked what sex acts she would assent to and what she enjoyed. A reasonable jury could interpret this dialogue as suggesting that Rutgerson was trying to persuade Amberly that she would enjoy having sex with him, thus further enticing her into agreeing to have sex with him.

To the extent that Rutgerson suggests that an underage prostitute who holds herself out for sex cannot be induced within the meaning of § 2422(b) as a matter of law, he is mistaken. According to Rutgerson, the "question is not whether Rutgerson believed that Amberly would have had sex *with him* in the absence of payment," but rather whether he believed she "was prepared to have sex with *anybody* who paid her price – i.e., that this was the business she chose – such that no external inducement, enticement, or persuasion was necessary." This flouts the plain meaning of § 2422(b). The statute criminalizes attempting to *induce* a minor to "engage in prostitution or any sexual

activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2422(b). Each time Amberly, a fifteen-year-old, assented to have sex with an adult in exchange for money, she was engaging in "prostitution" or sexual activity that "can be charged with a criminal offense." That many individuals might have sought to induce or entice the same underage prostitute to engage in sex for money – even if each one was successful – does not immunize Rutgerson from prosecution under § 2422(b). The essential point is that Rutgerson attempted to persuade or induce Amberly to engage in sex with him by offering to pay her money (and a substantial amount at that) for her services. Rutgerson's claim that he believed Amberly would agree to have sex with anyone who paid her price essentially gives away the argument. It (correctly) assumes that her agreement to have sex was dependent on the payment of money. As we have already observed, offering or agreeing to pay money in exchange for engaging in various sex acts qualifies as inducement within the meaning of the statute; it was the necessary element that would cause Amberly to agree to have sex with Rutgerson.

B.

Rutgerson also argues that even if the evidence was sufficient to establish a violation of § 2422(b), he should not have been convicted because he was entrapped into committing the crime as a matter of law. Entrapment is an affirmative defense that requires (1) government inducement of the crime, and (2) lack of

predisposition on the part of the defendant to commit the crime before the inducement. *United States v. Orisnord*, 483 F.3d 1169, 1178 (11th Cir. 2007); *United States v. Ryan*, 289 F.3d 1339, 1343 (11th Cir. 2002). The defendant bears the initial burden of production as to the government inducement and he may meet this burden by producing any evidence that is sufficient to raise a jury question that the government "created a substantial risk that the offense would be committed by a person other than one ready to commit it." *Ryan*, 289 F.3d at 1343-44 (quoting *United States v. Brown*, 43 F.3d 618, 623 (11th Cir. 1995)). "The defendant may make such a showing by demonstrating that he had not favorably received the government plan, and the government had had to 'push it' on him, or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate." *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985) (citations omitted).

Since entrapment is generally a jury question,[1] entrapment as a matter of law is a sufficiency-of-the-evidence inquiry that we review *de novo*, viewing all facts

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[1] The district court delivered the following instruction regarding entrapment:

> Entrapment occurs when law enforcement officers or others, under their direction, persuade a Defendant to commit a crime that the Defendant had no previous intent to commit.
>
> The Defendant has claimed to be a victim of entrapment regarding the charged offense.
>
> The law forbids convicting an entrapped defendant, but there is no entrapment, when a defendant is willing to

and making all inferences in favor of the government. *United States v. King*, 73 F.3d 1564, 1568 (11th Cir. 1996). Where, as here, the jury has rejected an entrapment defense and government inducement is not at issue, "our review is limited to deciding whether the evidence was sufficient for a reasonable jury to conclude [beyond a reasonable doubt] that the defendant was predisposed to take part in the illicit transaction." *Brown*, 43 F.3d at 622.

Predisposition is a fact-intensive and subjective inquiry, requiring the jury to consider the defendant's readiness and willingness to engage in the charged crime absent any contact with the government's agents. *Brown*, 43 F.3d at 624; *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992) (holding that once government inducement is shown, "the prosecution

---

> break the law and the Government merely provides what appears to be a favorable opportunity for the Defendant to commit a crime.
>
> For example, it is not entrapment for a Government agent to pretend to be someone else and after, directly or through another person, to engage in an unlawful transaction.
>
> So a Defendant is not a victim of entrapment, if you find beyond a reasonable doubt that the Government only offered the Defendant an opportunity to commit a crime the Defendant was already willing to commit.
>
> But if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty.

must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."). We have rejected creating a "fixed list of factors" for evaluating an entrapment defense, but we have posited "several guiding principles":

> Predisposition may be demonstrated simply by a defendant's ready commission of the charged crime. A predisposition finding is also supported by evidence that the defendant was given opportunities to back out of illegal transactions but failed to do so. Post-crime statements will support a jury's rejection of an entrapment defense. Existence of prior related offenses is relevant, but not dispositive. Evidence of legal activity combined with evidence of certain non-criminal tendencies, standing alone, cannot support a conviction. Finally, the fact-intensive nature of the entrapment defense often makes jury consideration of demeanor and credibility evidence a pivotal factor.

Brown, 43 F.3d at 625 (citations omitted).

Viewing the evidence in the light most favorable to the government, a variety of factors support a finding that Rutgerson was not entrapped as a matter of law. In the first place, Rutgerson made the initial contact with Amberly and, after she said that she was 15, Rutgerson readily proceeded to attempt to arrange a sexual encounter with her. She repeatedly asked if he was okay with her tender age, and he replied that he was okay as long as they were discreet. Rutgerson

never once said that he did not want to have sex with a 15-year-old (even as he was repeatedly advised of Amberly's age), and, as we have outlined the facts, persistently pursued Amberly over three days in an attempt to agree on a price, rules, time, and location for a sexual encounter.

Second, Rutgerson did not back out of his meeting with Amberly and never expressed any hesitation about having sex with a minor, although he repeatedly had the opportunity. Indeed, he drove from Miami to Fort Lauderdale for the purpose of paying her for sex. He repeatedly rescheduled his date with her after his work kept interfering. And in spite of the expressed concerns that Amberly was not real or was part of a sting operation, Rutgerson continued to pursue a sexual encounter with her. *Cf. Lee*, 603 F.3d at 915 (concern that online person defendant intends to have sex with is part of a sting operation supports a relevant inference of guilt because "a relationship with . . . an adult[] would not have concerned law enforcement"). In the third place, his post-arrest statements were quite damning: he stated that he believed he was texting and e-mailing a 15-year-old, and that while he was not sure what was going to happen when he got there, "nine times out of ten" a sexual encounter happens. Fourth, and finally, although there was no evidence of prior related offenses, the government introduced evidence that, before reaching out to Amberly, Rutgerson had accessed numerous ads for "young" prostitutes online. Plainly, Rutgerson was familiar with the website he used to locate Amberly's ad. While there was no

evidence that the other prostitutes Rutgerson contacted were under 18, his search history suggests that he was predisposed to attempt to entice young women into having sex.

The long and short of it is that the government agents "simply provided [Rutgerson] with the opportunity to commit a crime" by posting the backpage ads, and his "ready commission of the criminal act amply demonstrate[d] [his] predisposition." *See Jacobson*, 503 U.S. at 550. The evidence supports the jury's verdict.

III.

Rutgerson argues next that the district court erred by refusing to give a proposed theory of the defense instruction to the jury. We review a refusal to give a requested jury instruction for abuse of discretion. *United States v. Duperval*, 777 F.3d 1324, 1331 (11th Cir. 2015). A trial court enjoys broad discretion to formulate jury instructions provided those instructions are correct statements of the law. *United States v. Merrill*, 513 F.3d 1293, 1305 (11th Cir. 2008). A refusal to incorporate a requested instruction will be reversed only if "(1) the requested instruction was substantively correct, (2) the court's charge to the jury did not cover the gist of the instruction, and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense." *United States v. Culver*, 598 F.3d 740, 751 (11th Cir. 2010) (quoting *United States v. Klopf*, 423 F.3d 1228, 1241 (11th Cir. 2005)). An instruction that tracks the statute's text

will almost always convey the statute's requirements. *United States v. Hurn*, 368 F.3d 1359, 1362 (11th Cir. 2004). "Under our deferential standard of review, we reverse only if 'we are left with a substantial and [in]eradicable doubt as to whether the jury was properly guided in its deliberations.'" *United States v. Browne*, 505 F.3d 1229, 1276 (11th Cir. 2007) (quoting *United States v. Eckhardt*, 466 F.3d 938, 948 (11th Cir. 2006)); *accord McCormick v. Aderholt*, 293 F.3d 1254, 1260 (11th Cir. 2002).

Rutgerson proposed the following jury instruction:

> It is a theory of defense that Mr. Rutgerson did not violate the statute he is charged with because he did not persuade, induce, entice, or coerce a person who he believed was under 18 to engage in prostitution or unlawful sexual activity, or attempt to do so.
>
> To prove Mr. Rutgerson guilty of Count 1, the government must prove beyond a reasonable doubt that Mr. Rutgerson intended to persuade, induce, entice, or coerce Detective Montgomery and that he believed her to be under 18 years old, not that he acted with the intent to engage in sexual activity with her.
>
> If you believe that Detective Montgomery presented as [a] 15-year old who was ready and willing to engage in sexual activity with Mr. Rutgerson, but that Mr. Rutgerson did not persuade, induce, entice, or coerce Detective Montgomery to do so, then you must find Mr. Rutgerson not guilty. Under these circumstances, you must find Mr. Rutgerson not

> guilty even if you believe that he intended to engage in sexual activity with Detective Montgomery and that he believed she was under 18 years old.
>
> On the other hand, if you believe that the evidence establishes beyond a reasonable doubt that Mr. Rutgerson did persuade, induce, entice, or coerce Detective Montgomery to engage in unlawful sexual activity, and that he believed she was under 18 years old, you should find him guilty.

The district court determined that the proposed instruction was a substantive instruction, not a theory of the defense instruction, and declined to give it. The court initially agreed, however, to give the first paragraph of the instruction in a slightly modified form. But in response to a government objection, the court declined to give even the modified version. The district court observed that, while Rutgerson had not been charged with statutory rape, a minor could not consent in any event, so the instruction was not appropriate.

The district court ultimately gave the jury an instruction that largely tracked the statutory language of § 2422(b).[2] The court further instructed the jury that

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[2] The district court's instruction to the jury read as follows:

> It is a federal crime for anyone using any facility or means of interstate or foreign commerce including transmissions by computer on the internet, to persuade, induce, entice, or coerce anyone under 18 years old to engage in prostitution or any sexual activity for which any person could be charged with a criminal offense.

Rutgerson could be found guilty of using a computer to entice a minor to engage in unlawful sexual activity only if the government proved beyond a reasonable doubt, along with the other elements, that Rutgerson

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> The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:
>
> > One, the Defendant knowingly persuaded, induced, enticed or coerced Amber Lee to engage in prostitution or unlawful sexual activity, as charged;
> >
> > two, the Defendant used a computer or telephone to do so;
> >
> > Three, when the Defendant did these acts, he believed Amber Lee was less than 18 years old; and
> >
> > four, one or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the law of Florida.
>
> So the Government must prove that one or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the laws of Florida.
>
> As a matter of law, the following acts are crimes under Florida law: Sexual activity with a person under the age of 18.
>
> As used in this instruction, persuade means to win over by an appeal to one's reason and feelings, into doing or believing something.
>
> Induce means to stimulate the occurrence of or to cause.
>
> Entice means to lure or attract by arousing hope or desire.
>
> As used in this instruction, the term prostitution means engaging in or agreeing or offering to engage in any lewd act, with or for another person, in exchange for money or other consideration.

"knowingly persuaded, induced, enticed or coerced [Amberly] to engage in prostitution or unlawful sexual activity as charged." It also explained what it means to attempt to violate the statute.

As an initial matter, we agree with the district court that Rutgerson's proposed instruction was a substantive instruction on the statute, not a theory of the defense. The proposed instruction did not simply seek to describe what the defense was arguing, but rather sought to define the law by which the jury was to decide the case. But the district court already outlined – and ultimately delivered to the jury – a wholly appropriate instruction on the substantive law governing the case. The instruction actually given to the jury tracked the statutory text, appropriately and correctly conveying the law to the jury. *See Hurn*, 368 F.3d at 1362. Because the proposed instruction was actually substantive, the gist of what Rutgerson proposed had already been covered. Indeed, offering a second substantive instruction covering the same ground was unnecessary and would likely have proven confusing.

That confusion would likely have been compounded because Rutgerson's proposed instruction was substantively incorrect. The proposed instruction informed the jurors that they could find Rutgerson guilty if they believed "that the evidence establishes beyond a reasonable doubt that Mr. Rutgerson did persuade, induce, entice, or coerce Detective Montgomery to engage in unlawful sexual activity, and that he believed she was under 18 years old." Likewise, the instruction directed jurors to find Rutgerson not guilty if

they concluded that Amberly "presented as [a] 15-year old who was ready and willing to engage in sexual activity with Mr. Rutgerson, but that Mr. Rutgerson did not persuade, induce, entice, or coerce" her to do so. One flaw in these instructions is that they failed to convey to the jury that Rutgerson was charged with an *attempted* violation of § 2422(b). The proposed instructions appear to suggest that Rutgerson must have actually been successful in persuading Amberly to have sex with him before he could be found guilty. Contrary to the language in the proposed instruction, Rutgerson still could have been found guilty for attempting to violate § 2422(b) had he tried unsuccessfully to entice Amberly into engaging in sex. Because the proposed instruction does not admit of this possibility, it was not substantively correct. Moreover, whether Amberly was "ready and willing" to engage in sexual activity with Rutgerson misses the essential statutory requirement – whether Rutgerson attempted to *induce* Amberly by offering her a substantial sum of money to do so. The district court did not abuse its considerable discretion in declining to deliver the proposed instruction to the jury.

In any event, Rutgerson's ability to present an effective defense was not impaired by the court's failure to give the proffered instruction for two other reasons. First, the instruction given by the trial court accurately conveyed the substantive law and the core of his defense theory. Moreover, Rutgerson's counsel was permitted to argue his theory of defense extensively in closing argument. Thus, for example, counsel argued:

> This case is not about whether Mr. Rutgerson was going to go hire the services of a prostitute. Of course, of course he was going up there to have sex with a prostitute. He had condoms in his pocket, he had money to pay.
>
> . . . .
>
> You are to determine from the evidence in this case whether the Defendant is guilty or not guilty of that specific crime. Not was he going to engage in prostitution; absolutely not, that's not what you are here to determine. You are here to determine who Mr. Rutgerson believed, who the Government has proved, beyond a reasonable doubt, and whether they have done that, he believed he was going to see, and *whether he induced, coerced, enticed or persuaded that person to do it.*

Rutgerson also robustly argued that the evidence established that Detective Montgomery was posing "as a prostitute, who is ready, willing and able to engage in sex." But, he said, there was "no evidence – nobody came up on the stand and told you . . . this is where Mr. Rutgerson was really trying to persuade and entice and coerce this person into performing sexual acts, because they can't." His defense was not impaired because the district court declined to present his proposed instruction.

IV.

Finally, Rutgerson claims that the district court abused its discretion by refusing to let Detective

Mauro testify that, after extensive investigation, he had not found any indication that Rutgerson had ever visited any websites dedicated to sex with minors. He argues that this evidence would have been significant to show that Rutgerson lacked knowledge that various traits in Amberly's initial ad indicated she was underage and also undermined the argument that he was predisposed to commit the crime. Although we think that the district court erred in excluding this evidence, the error was harmless and does not entitle Rutgerson to relief from his conviction.

We review a district court's evidentiary rulings for abuse of discretion. *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir. 2002). "[E]videntiary and other nonconstitutional errors do not constitute grounds for reversal unless there is a reasonable likelihood that they affected the defendant's substantial rights; where an error had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict, reversal is not warranted." *United States v. Arbolaez*, 450 F.3d 1283, 1290 (11th Cir. 2006) (quoting *United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1990)).

The general rule precluding introduction of character evidence to show a person's predisposition to commit (or not commit) a crime is clear. Fed. R. Evid. 404(a)(1) expressly provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." As such, the

government generally cannot introduce evidence attempting to show that a defendant was predisposed to commit a crime, *see United States v. Brannan*, 562 F.3d 1300, 1308 (11th Cir. 2009), nor can a defendant present evidence of generally good conduct in an attempt to negate the government's showing of criminal intent, *United States v. Ellisor*, 522 F.3d 1255, 1270-71 (11th Cir. 2008). But, "[w]hen a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may . . . be proved by relevant specific instances of the person's conduct." *See* Fed. R. Evid. 405(b). Thus, for instance, when a defendant raises an entrapment defense, the government is permitted to introduce specific instances of conduct designed to show that the defendant was predisposed to commit the crime of which he was accused. *Brannan*, 562 F.3d at 1308.

We are presented in this case with a slightly different question: whether a defendant who has raised an entrapment defense may present evidence of specific conduct to show a *lack* of predisposition to commit the charged crime. We believe that the best answer to this question would be to allow a defendant claiming entrapment to present evidence which meaningfully bears upon his lack of predisposition to commit the crime with which he is charged. Although we have not previously had the opportunity to decide this issue, the Ninth Circuit's decision in *United States v. Thomas*, 134 F.3d 975 (9th Cir. 1998), offers some guidance. There, the defendant sought to present evidence that he had no prior arrests or criminal record of any kind

to show that he was not predisposed to engage in a large-scale drug trafficking scheme and had fallen victim to government entrapment. *Id.* at 979. The Ninth Circuit noted that a defendant's character is an essential element of an entrapment defense because the government must prove that he was predisposed to commit the crime. *Id.* at 980. Where the defendant's predisposition to commit the crime is at issue, the lack of previous related bad acts by the defendant is relevant. *Id.* at 979. Moreover, the Ninth Circuit determined that it was important to allow the defendant a fair opportunity to present evidence to counter the effect of the government's presentation suggesting that he had a predisposition to commit the crime. *Id.* at 980.

Similarly, in this case, Rutgerson sought to present evidence that the police had not found any evidence that he had visited sites dedicated to sex with minors in order to show that he was not predisposed to seeking out minors to have sex with him. This was intended to help rebut any testimony showing that he was predisposed toward attempting to induce an underage prostitute to have sex with him. Most notable among that evidence, perhaps, was evidence that he had searched for and viewed the ads of multiple "young" prostitutes online and had contacted those prostitutes. Since Rutgerson's predisposition to commit the charged crime was an essential element at issue after he raised a claim of entrapment, the district court should have allowed him to present evidence tending to rebut the government's evidential foundation that he was predisposed to violate § 2422(b). To

that end, highlighting the lack of evidence that Rutgerson had visited any websites dedicated to sex with minors would have been relevant.

But the mere citation of error does not entitle Rutgerson to relief because the error plainly was harmless. We are satisfied after carefully reviewing this record that the error did not have a substantial effect on the outcome of the case, and more than sufficient evidence supported the jury's verdict. *See Arbolaez*, 450 F.3d at 1290. First, and most important, essentially the same body of evidence that Rutgerson sought to adduce through Detective Mauro was elicited from another witness. Detective Johns testified that he searched the internet history on Rutgerson's phone. On cross-examination, Johns admitted that, in filling out a warrant to search Rutgerson's phone, he had sworn that if Rutgerson were a child predator, he would possess child pornography on his phone. However, he stated that the forensic search of Rutgerson's phone revealed no child pornography or access to the kinds of internet sites where people discussed gathering, collecting, and obtaining child pornography. Rutgerson emphasized this testimony during closing arguments, observing for the jury that there was no evidence that he had ever visited a child pornography website or attempted to have sex with an underage person. Moreover, Detective Mauro testified that he was not suggesting that Rutgerson had any knowledge that an age listing of 99; the erratic use of capital and lowercase letters; or, finally, the use of the phrase "sweet, young, and petite"

in Amberly's ad would signify that she was underage.[3] Finally, Rutgerson was permitted to present the testimony of private investigator Valerie Rivera and, through her, enter into evidence images of the websites that the police had uncovered in his iPhone history. Those images further bolstered Rutgerson's claim that he never accessed child pornography.

Moreover, whatever benefit Rutgerson may have received from Detective Mauro's testimony would have been overwhelmed by the evidential foundation that Rutgerson was predisposed to commit the crime. In addition to evidence establishing his many searches for "young" prostitutes, Rutgerson expressed no hesitation whatsoever upon learning that Amberly was underage. His only concern on that front appeared to be that they be discreet. Far from hesitating after learning Amberly's tender age, Rutgerson actively pursued a sexual encounter with her across several days, and exhaustively negotiated the price, terms, and conditions for various sexual activities. The evidence that he was disallowed from eliciting from Detective Mauro would not

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[3] The examination went this way:

Q: Just so we are all clear about your testimony, you told this jury that this, the 99, the capitals and lowercases, the use of sweet, young, petite, based on your training and experience, was to signify a minor. Do you recall that testimony?

A: Yes, sir.

Q: You are not suggesting that Mr. Rutgerson had any knowledge that it would have signified a minor to him, are you?

A: No.

have overcome the powerful evidence that he was, in fact, predisposed to commit the crime with which he was charged. The district court's error in prohibiting the evidence was harmless.

AFFIRMED.

UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: **14-CR-60083-GAYLES**
RICHARD RUTGERSON	USM Number: **05163-104**
	Counsel For Defendant: **Marshall D. Louis**
	Counsel For The United States: **M. Catherine Koontz, AUSA**
	Court Reporter: **Patricia Diaz**

The defendant was found guilty on count 1 of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	**NATURE OF OFFENSE**	**OFFENSE ENDED**	**COUNT**
18 U.S.C. 2242(b)	Using a computer in an attempt to entice a child to engage in sexual activity	04/28/2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
12/4/2014

/s/ Darrin P. Gayles
Darrin P. Gayles
United States District Judge

Date: December 4, 2014

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **120 months**.

The court makes the following recommendations to the Bureau of Prisons:

Defendant be placed at a facility as close to South Florida as possible.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of

release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

Adam Walsh Act Search Condition – The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any

internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Mental Health Treatment – The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. The evaluation shall take place prior to the defendant's release to determine risk of recidivism.

No Contact with Minors – The defendant shall have no personal, mail, telephone, or computer contact with children/minors under the age of 18 or with the victim.

No Contact with Minors in Employment – The defendant shall not be employed in a job requiring contact with children under the age of 18 or with the victim.

No Involvement in Youth Organizations – The defendant shall not be involved in any children's or youth organization.

No Unsupervised Contact with Minors – The defendant shall have no unsupervised, personal, mail, telephone, or computer contact with children/minors under the age of 18, including in a familial relationship.

Permissible Search – The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Restricted from Possession of Sexual Materials – The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors engaged in sexually explicit conduct.

Sex Offender Registration – The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Sex Offender Treatment – The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	**TOTAL AMOUNT**	**JOINT AND SEVERAL AMOUNT**

The defendant shall forfeit the defendant's interest in the following property to the United States:

Property listed on the Preliminary Order of Forfeiture entered on the Court Docket as entry 57.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15536-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD RUTGERSON,

Defendant-Appellant,

Appeal from the United States District Court
for the Southern District of Florida

(Filed Sep. 13, 2016)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, JORDAN and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE