No.

In The
Supreme Court of the United States

DENNIS WILKERSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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December 11, 2017

QUESTIONS PRESENTED

1. Whether a criminal defendant may be convicted for a violation of 18 U.S.C. § 2422(b) where there is no evidence of any communications, either directly or indirectly through an adult intermediary, that establish a defendant's intent to entice a fictitious minor by means of interstate commerce?

2. Whether a criminal defendant may be convicted for a violation of 18 U.S.C. § 2422(b) where there is no evidence of a substantial step toward causing a minor's assent to engage in sexual activity using interstate communications and where Defendant took no such substantial step?

3. Whether a Federal District Court may disregard controlling state law on the elements of a state crime and find that the defendant's actions constituted a state criminal offense where the evidence establishes otherwise?

4. Whether the application of two-level and a five-level sentencing enhancement under Sentencing Guidelines §§ 3D1.4 and 4B1.5(b) is authorized where there is insufficient evidence to establish that a defendant "engaged in a pattern of activity involving prohibited sexual conduct" and where the offense for which the defendant was convicted is not a covered offense under the enhancement and therefore is inapplicable?

PARTIES TO THE PROCEEDING

The original parties to this case were the United States of America against Dennis Wilkerson. Rule 14.1(b) of the Supreme Court Rules.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dennis Wilkerson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on July 13, 2017**.**

DECISIONS BELOW

The July 13, 2017 opinion of the United States Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, is not published, and is reprinted in the separate Appendix to this Petition, page App. 1.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit to be reviewed was entered July 13, 2017. The mandate issued August 15, 2017. The instant Petition is filed within the extension of time issued by Justice Clarence Thomas. Sup. Ct. R. 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED[1]

18 U.S.C. § 1114
18 U.S.C. § 2422(b)
18 U.S.C. § 2426(b)(1)(A)
18 U.S.C. § 3742(a)
28 U.S.C. § 1291
Fla. Stat. § 800.04
Fla. Stat. § 847.0135
U.S.S.G. § 4B1.5(b)

STATEMENT OF THE CASE

Wilkerson was indicted by a federal Grand Jury on November 25, 2014, and charged with attempt to persuade, induce, and entice a person believed by the defendant to be younger than 18 years old, through an adult intermediary, to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), based upon communications alleged to have taken place between October 22, 2014, and October 27, 2014 (Count One). APP 34-37. Wilkerson pleaded not guilty at arraignment December 4, 2014.

The Government filed a Superseding Indictment on January 28, 2015, adding a second count of attempt to persuade, induce, and entice a person believed by the defendant to be younger than 18 years old, through an adult intermediary, to engage

[1] Aforementioned provisions are reproduced in the appendix.

in sexual activity, in violation of 18 U.S.C. § 2422(b), based upon communications between July 14, 2014, and July 16, 2014 (Superseding Count One). The original Count One in the indictment was re-cast as Superseding Indictment Count Two. APP 38-41.

Trial before a jury was held from April 13, 2015, through April 15, 2015. The jury found Wilkerson guilty on both counts on April 15, 2015. Wilkerson was sentenced to a term of 210 months in custody followed by eight (8) years of supervised release on each count, the sentences running concurrently. APP 24-33.

Wilkerson timely perfected a direct appeal to the United States Court of Appeals for the Eleventh Circuit. Wilkerson raised the following issues:

> (1) Whether the evidence was insufficient to sustain Appellant's conviction under 18 U.S.C. §2422(b) where there were no communications that established Appellant's intent to entice a fictitious minor, either directly or indirectly through an adult intermediary, using a means of interstate commerce.
>
> (2) Whether the evidence was insufficient to sustain Appellant's conviction where attempted online enticement under 18 U.S.C. §2422(b) requires a substantial step toward

> causing a minor's assent to engage in sexual activity using interstate communications and where Appellant took no such substantial step.
>
> (3) Whether the District Court erred by applying a two-level and a five-level sentencing enhancement under U.S. Sentencing Guidelines Manual §3D1.4 and 4B1.5(b) where there was insufficient evidence to sustain a conviction on Count One or that Appellant "engaged in a pattern of activity involving prohibited sexual conduct" and where the offense for which Appellant was convicted is not a covered offense under the enhancement and therefore is inapplicable.

Wilkerson responded to two online solicitations from an undercover Government agent posing as the father of a twelve-year-old daughter he was pimping out online. Wilkerson never communicated directly or indirectly with the fictitious minor.

Wilkerson first responded to the fake father's solicitation to pimp out his fictitious daughter on July 14, 2014. The conversation focuses on agreeing to a price for oral sex but no deal is ever reached and no meeting ever takes place. All communication ceased on July 18, 2014.

The same fake father posted a second solicitation on October 22, 2014, again, pimping out, presumably, the same fictitious daughter. Wilkerson responded to the online solicitation again, inquiring for a price for oral sex. The initial conversation ends abruptly and five days later, Wilkerson emails the fake father asking if he and his fictitious daughter are still in town. The conversation immediately returns to negotiating a price for oral sex and then to the details about meeting to facilitate the introduction of Wilkerson to the fictitious daughter. Wilkerson was subsequently arrested when found at the arranged meeting spot.

In the instant case, Special Agent John McElyea stated on July 14, 2014, he posted an advertisement titled, "Dad and daughter, Altamonte Springs, MW4M." Special Agent McElyea said he received approximately 30 to 35 responses to the ad including a response from someone he later identified as Wilkerson. APP 49. Special Agent McElyea said Wilkerson responded, "I'm interested in finding out more about what you're offering. I'm 35 YO MWM." App. 50. Special Agent McElyea said he began communicating with Wilkerson via Gmail and responded, "Dude just to let you know, I'm 50. Not into dudes. My daughter, 12, she's into dudes. We're both into roses." There was no actual minor involved.

Special Agent McElyea said the reason he responded as he did was to "put an act of prostitution out there" but also to let the person to whom he was responding know three things: he was not interested in participating in any sex, his daughter was 12 years old and that "we" planned on getting paid. *See* App. 44. According to Special Agent McElyea, Appellant responded by saying the 12-year-old "daughter" was "way too young." APP 56. Special Agent McElyea responded, "Dude, that's cool. All is consensual, nothing is forced." *See* App. 45.

The following day, July 15, 2014, Special Agent McElyea, posing as the fake "father," contacted Wilkerson and told him he and his daughter were "back from Buena Vista" and had "stayed the night at a hotel." *See* App. 47. Wilkerson said he was "free to meet" if available. Special Agent McElyea responded by noting "that's a good possibility" and restated that Wilkerson could receive oral sex for $40 and that if he wanted "more" they could negotiate a "better price." No meeting was ever agreed upon.

On October 22, 2014, Special Agent McElyea, as part of Task Force activity, posted another Craigslist advertisement, mirroring the one he posted back in July. The advertisement read, "dad and daughter looking to make some roses. No task is too big. Just ask and we'll let you know if we can comply." *See* App. 49. He received about 30-35 responses for this ad. *See* App. 49.

Agent McElyea said Wilkerson was one of those answering the ad and responded, "how about a BJ?" *See* App. 50. Agent McElyea, posing as the fake "dad" of his fake "daughter," responded, "I'm a 50-year-old dad. My daughter is 12. She's into dudes. I'm not. The roses are dependent on what you wanna do." App. 51-52. Wilkerson responded, "I'm just looking for a BJ. Where are you staying?" App. 52. Special Agent McElyea, posing as the fake "dad," responded, "dude, that would be 50 roses, the roses up front, we're in Kissimmee." Wilkerson responded that he agreed and asked if the fake "dad" was available to meet following day.

Special Agent McElyea, posing as the fake "dad," responded and Wilkerson then explained, "couldn't meet last week but free today." App. 54. Special Agent McElyea repeated the offer of "50 roses for a BJ from my daughter" and Wilkerson answered, "exactly." *Id.* The conversation then moved to discussing a location to meet. *Id.*

Special Agent McElyea identified the fake "dad" as "Bob" but Wilkerson did not provide any description. Wilkerson then contacted "Bob" and said he was running late and then changed the time for the meeting. "Bob" said he would be in a red Pontiac G6. Wilkerson asked, "How do I know you aren't with law enforcement? This is sketchy shit.". "Bob" answers, "no shit. We're cool. We're not fucking cops. That's why we aren't meeting at the house," and then asked if

Wilkerson was a cop and because Wilkerson had not arrived at the meeting location yet, if he should stay or leave. *Id.*

Wilkerson arrived at the location. before police arrived. App. 57-58. Wilkerson never parked directly next to the undercover vehicle. *Id*. Wilkerson then pulled out and appeared to drive by "window to window" with the undercover car. App. 55. Wilkerson never stopped and as soon as the car pulled past the undercover car, Special Agent McElyea said the take down team went into action and stopped him. *Id.*, at 88. He said there was no pursuit and when the police activated their lights, Wilkerson stopped. App. 58-59. Wilkerson was ordered from his vehicle at gun point and pressed to his knees.

At trial, the Government entered into evidence communication between Wilkerson and Special Agent McElyea. These communications, along with Wilkerson being spotted at the arranged meeting place constituted the Government's case in chief.

Upon the Government resting its case-in-chief, the Defense moved for a Judgment of Acquittal, specifically incorporating the arguments made in the Defense motion, pre-trial, to dismiss the case. App. 68-67. Counsel made three specific arguments in support of its motion for acquittal: (1) the Government failed to put forth evidence Wilkerson "did utilize a means or

facility of interstate commerce" (App. 64); (2) the evidence failed to establish that there was "a knowing attempt to persuade, induce, or entice someone Wilkerson believed to be a minor to engage in sexual activity which could be charged as a criminal offense in the State of Florida" (*see* App. 66); (3) there was insufficient evidence to prove an attempt to persuade, entice, or induce on the part of Wilkerson (App. 66-67).

Wilkerson argued the sole tie to federal jurisdiction was Wilkerson's use of his cell phone. Wilkerson analogized that if the instant case was a drug case, where a cell phone is used to call to buy or sell drugs, that use, in and of itself, would not trigger federal jurisdiction and would require something more. App. 65. Recognizing the factual difference at issue, counsel nonetheless argued the analogy remains the same particularly in the "digital era that we live in." He argued the cell phone use was contained specifically within one state "and in this particular case within a tri-county area" and thus did not give rise to a federal issue. *Id.*

Wilkerson argued the solicitation was made by the Government when Special Agent McElyea posted the advertisement on Craigslist. App. 68. He said the advertisement is "*per se*" a solicitation and is not "an invitation to be solicited." *Id.* "To suggest that someone responding to an advertisement is thereby inducing the salesperson by offering to purchase what is being offered is absurd." *Id.* Importantly, Wilkerson argued, to accept that position is contrary to the

common definition of the words and would require redefining them. *Id.*

Wilkerson also argued it was the Government that responded to his initial response to the advertisement with a price for oral sex and that the suggestion of price did not come from Wilkerson. App. 68. Further, Wilkerson did not increase the price "as a means of inducing, enticing, or persuading the fake "dad" or fake "daughter" to "do something more than had already been previously been offered without his involvement." *Id.* Finally, counsel argued there was no evidence of any gifts or promises or requests made to do anything more than what was already offered by the Government. *Id.*

The Government argued this case "falls squarely within the Eleventh Circuit definition of inducement." App. 69-70. According to the Government, when Wilkerson engaged in communications with the fake "dad" to set up a meeting and arrange a price to receive oral sex from the fake "daughter" Wilkerson was "actually inducing, stimulating the occurrence, of that meeting." *Id.*

The District Court denied the motion. App. 59-60. The District Court reasoned that Wilkerson's argument about a lack of persuasion, inducement, or enticement was foreclosed by Eleventh Circuit case law. *Id.* Wilkerson did not testify and the Defense presented no evidence before resting its case. App. 71-72,

On October 14, 2015, Wilkerson was sentenced a term of two hundred and ten (210) months in custody followed by eight years of supervised release on each count, the sentences running concurrently. App. 59-60.

On May 20, 2016, prior to the Government's Answer being filed in the appeal, Wilkerson filed a Petition for *En Banc* Hearing. Wilkerson argued there was a conflict with the United States Court of Appeals for the Eleventh Circuit's holdings in *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004) and *United States v. Lee*, 603 F.3d 904 (11th Cir. 2010) as to what, exactly, was the standard against which District Courts in Eleventh Circuit should evaluate sufficiency challenges in prosecutions under 18 U.S.C. § 2422(b). *Id*. The United States Court of Appeals for the Eleventh Circuit denied the petition on July 7, 2017.

The decision of the United States Court of Appeals for the Eleventh Circuit issued a written opinion affirming the conviction and sentence on July 13, 2017 and the mandate issued August 15, 2017.

This timely Petition follows.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Section 2422(b), 18 United States Code, states as follows:

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

The Statute also criminalizes "attempt to do so." Thus, to sustain a conviction for violating §2422(b) under its attempt clause, the government must prove Appellant: (1) "had the specific intent or mens rea to commit the underlying charged crime, and (2) took actions that constituted a "substantial step toward the commission of the crime." *See United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010); *United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007); *Braxton v. United States*, 500 U.S. 344, 349 (1991) (stating that "[f]or

Braxton to be guilty of an attempted killing under 18 U.S.C. §1114, he must have taken a substantial step towards that crime, and must also have had the requisite mens rea"); *United States v. Monholland*, 607 F.2d 1311, 1318 (10th Cir. 1979) ("the cases universally hold that mere intention to commit a specified crime does not amount to an attempt. It is essential that the defendant, with the intent of committing the particular crime, do some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in the commission of the particular crime."); *United States v. Bailey*, 228 F.3d 637, 640 (6th Cir. 2000) (The defendant's alleged substantial step towards the commission of the offense "must be necessary to the consummation of the crime and be of such a nature that the reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.")

Each of the significant cases to address the issue of the necessary proof to sustain a conviction under 18 U.S.C. § 2422(b) required the Government to prove two elements: (1) the defendant had a specific intent to use a means of interstate commerce to induce a minor to engage in sexual activity and (2) that the defendant took a substantial step toward the commission of the crime. The Eleventh Circuit has stated that a defendant does not have to communicate directly with the minor child, which recognizes the well-worn use by law enforcement of an undercover

officer posing as a minor or as an adult eager to prostitute a minor child for a price, what is clear is that the adult intermediary must be used as a vehicle through which a defendant attempted to obtain the child's assent through persuasive communication directed toward the minor.

In *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004), the Eleventh Circuit first examined the question of whether a defendant who arranges to have sex with a minor through communications with an adult intermediary violates 2422(b). In *Murrell*, the defendant, who accepted plea in his case, entered a "family love" chat room on AOL and engaged in conversations with the purported mother of a thirteen-year-old daughter and engaged in specific conversations about the "discreet sexual relationship" he desired. Murrell had also, on a separate occasion, entered another AOL chat room entitled, "Rent F Vry Yng." In that conversation, there were extended conversations that included recommendations for how an encounter would happen.

Murrell argued he never communicated directly with either minor child and thus could not be convicted of a 2422(b)-offense based upon the plain language of the statute. The Eleventh Circuit stated it was unnecessary to communicate directly with a minor, relying on its prior holding in *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002). Of critical importance was the *Murrell* court's self-chosen definition of "induce" to mean to "stimulate or to cause

the occurrence of." Under this definition, the *Murrell* court ruled simply negotiating with an adult intermediary was enough to prove Murrell was attempting to cause the minor to engage in sexual activity. Reliance upon *Murrell* by the courts below in the instant case, upon the facts, was misplaced.

In *United States v. Lee*, 603 F.3d 904 (11th Cir. 2010), the Eleventh Circuit revisited the issue first presented in *Murrell*. In *Lee*, the Eleventh Circuit held that the focus of the analysis about whether a 2422(b) violation took place is on the actions the defendant takes in trying to use the adult intermediary to convince the two minor girls to engage in sexual activity.

In *Lee*, the defendant spent considerable time and effort which was directed at the mother of two fictitious teenage girls whose online profile noted her interests in "Young Girls and Older Men Loving Each Other" and "Family Love is Best" (a euphemism for incest). Lee repeatedly made references to the fake mother about his desire to "teach the girls" and his desire to "help a young lady become a woman." He also sent explicit photos to the fake mother with instructions to show the young girls and asked repeatedly for photographs of the young girls in sexually explicit poses. The conversations went on for months.

Under the facts of that case, the Eleventh Circuit held there was sufficient evidence to convict

Lee because the conversations went beyond mere preparation. Lee's actions constituted grooming behavior. Over the course of several months, the court ruled, he repeatedly discussed in graphic detail when and how he wanted to have sex with the minors. In this case, Wilkerson never engaged in conduct even remotely close to Lee's extensive, graphic and direct communications.

In *United States v. Lanzon*, 639 F.3d 1293 (11th Cir. 2011), the conversations Lanzon engaged in included discussing what he wanted the fictitious minor to wear and what sexual techniques would "make her happy." He also inquired about what kind of candy the minor liked. The Eleventh Circuit determined that actually engaging in a sex act was not required to support a conviction because the focus is on the attempt rather than the sex act itself. The focus is on the content of the conversations and not the intent to actually engage in a sex act with the fake minor.

In *United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010), Rothenberg and a fake father, who already was having sex with his fake daughter, engaged in illicit sexual discussions in a chat room about Rothenberg joining the father-daughter sexual relationship. Rothenberg traveled to meet and once there, continued to engage in the illicit sexual conversations. The Eleventh Circuit ruled that what amounts to a substantial step toward the commission of a crime is a fact question that will vary from case to

case. Critically, the focus is not on the act itself but rather on the communications to determine if a substantial step was taken sufficient to support a 2422(b) conviction.

II. IT WAS ERROR FOR THE DISTRICT COURT TO DENY DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THERE WERE NO COMMUNICATIONS TO ESTABLISHED INTENT TO ENTICE A FICTITIOUS MINOR, EITHER DIRECTLY OR INDIRECTLY THROUGH AN ADULT INTERMEDIARY, USING A MEANS OF INTERSTATE COMMERCE.

The attempted conduct prohibited by §2422(b) is not an attempt to have sex with a minor. "[M]ere contact for the purposes of engaging in illegal sexual activity is not criminalized in 18 U.S.C. § 2422(b)." *See Root*, 296 F.3d at 1223. "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 sexual act itself." *See Murrell*, 368 F.3d at 1286. In *Lee*, the Eleventh Circuit held that to prove the requisite intent under 18 U.S.C. §2422(b), "the government must prove the defendant intended to cause assent on the part of the minor, not that he acted with the specific intent to engage in sexual activity." *See Lee*, 603 F.3d at 914; *see also Murrell*, 368 F.3d at 1286; Bailey, 228 F.3d at 639 (the intent to entice and the intent to have sex "are two clearly separate and

different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves."); *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011) ("[s]ection 2422(b) ... was designed to protect children from the act of solicitation itself - a harm distinct from that proscribed by §2423 [which criminalizes an intent to engage in illicit sex]."

Here, the Government's evidence does not demonstrate the requisite intent under 2422(b). There is no evidence that Wilkerson sought through his communications to criminally persuade a minor, through an intermediary using a means of interstate commerce. The Government's chief witness, Agent McElyea, testified there was nothing in the context of the emails or statements where Wilkerson asked to communicate directly or indirectly with the fictitious daughter. App. 61. In fact, he said, Wilkerson never indicated an interest in even meeting the fictitious minor. *Id*.

Further, Agent McElyea said Wilkerson, during the communications, never asked the fake father whether the fictitious daughter had any special interests, made no requests to pass along any messages, never submitted sexually explicit photographs he wanted the adult intermediary to share with the fictitious minor and never engaged in any communication that could be considered grooming behavior. App. 62-63. Wilkerson did not make any promises to the fake father or the fictitious daughter,

did not offer anything of value in excess of what was asked of him, and did not offer any enhancements or bonuses or anything above and beyond what he was informed would be the cost of receiving oral sex with fictitious daughter. *Id*., at 114. Wilkerson did not invite the fictitious minor to go anywhere, offer to pay for a room, a meal, or any other inducement directed at the minor. Furthermore, the fake father never gave Wilkerson any reason to believe that their communications would be shared with the fictitious daughter or that the fictitious daughter would be consulted about or in any way asked to participate in the discussions.

In sum, in contrast to the vast majority of §2422(b) cases, Wilkerson did not say or do anything that would necessarily or even logically have resulted in communication from the fake father to the fictitious child. Section 2422(b) unambiguously requires that the offense, or the attempted offense, occur "using ... any facility or means of interstate or foreign commerce." 18 U.S.C. §2422(b); *see also United States v. Thomas,* 410 F.3d 1235, 1245 (10th Cir. 2005) (required elements are "use of a facility of interstate commerce to knowingly persuade, induce, entice, or coerce" a minor to have sex); *United States v. Douglas,* 626 F.3d 161, 164 (2d Cir. 2010); *Murrell*, 368 F.3d at 1286 ("Combining the definition of attempt with the plain language of §2422(b), the government must first prove that Murrell, using the internet, acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex.")

By the same token, the substantial step in the attempt analysis must be a substantial step in enticing a minor using a facility or means of interstate commerce, such as a computer or cell phone. *See United States v. Nestor*, 574 F.3d 159, 160 (3d Cir. 2009) ("The question then becomes whether [the defendant] took a substantial step toward th[e] end [proscribed by §2422(b)], using means of interstate commerce.") A substantial step toward an enticement that does not use means of interstate commerce may constitute an attempt to commit some other crime, but it does not constitute an attempt to violate §2422(b). *Id*.

The requisite intent under §2422(b) is the intent to entice a minor using facilities of interstate commerce, and, as it relates to Count I of the Superseding Indictment, all use of those facilities ceased in this case prior to any such meeting. In light of the statutory requirement that the attempt occur using a facility or means of interstate commerce (and in addition to the other reasons stated above), the government's apparent theory that Wilkerson violated §2422(b) by "intending to attempt to entice" the minor at a future physical meeting with the adult intermediary is not tenable.

Thus, because the evidence was insufficient as a matter of law under §2422(b), the District Court erred in denying Wilkerson's motion for judgment of acquittal. This Court should reverse the convictions and vacate the charges against Wilkerson.

III. IT WAS ERROR FOR THE DISTRICT COURT TO DENY DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THERE WAS NO EVIDENCE OF A SUBSTANTIAL STEP TOWARD CAUSING A MINOR'S ASSENT TO ENGAGE IN SEXUAL ACTIVITY USING A MEANS OF INTERSTATE COMMERCE.

The attempted conduct prohibited by §2422(b) is not an attempt to have sex with a minor. "[M]ere contact for the purposes of engaging in illegal sexual activity is not criminalized in 18 U.S.C. § 2422(b)." *See Root*, 296 F.3d at 1223. "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 sexual act itself." *See Murrell*, 368 F.3d at 1286. In *Lee*, the court held the Government must prove "that the defendant took a substantial step towards causing assent not toward causing sexual contact." *See Lee*, 603 F.3d at 914.

Here, the Government's evidence failed to prove Wilkerson took a substantial step, required under §2422(b), to entice the fictitious daughter through the fake father, using a facility or means of interstate commerce.

The required intent under §2422(b) is not an intent to entice the minor in person at a face-to-face

meeting, but rather to entice, as the statute requires, using a facility or means of interstate commerce. Wilkerson's travel to Lake Mary for a potential meeting with the fake father also cannot constitute a substantial step. Even assuming arguendo that the substantial step could take place other than by a means expressly designated in §2422(b) ("the mail or any facility or means of interstate or foreign commerce") – which it cannot - Wilkerson's travel does not qualify under §2422(b). Section 2422(b) criminalizes certain communications between an adult and a minor or between an adult and an adult intermediary that attempts to transform the minor into his victim." *See Hughes*, 632 F.3d at 961.

It is illogical to suggest that physically traveling to an in-person meeting place is a substantial step in a crime that is predicated upon communication by means of interstate or foreign commerce. Physical travel is not a communicative act. *See United States v. Goetzke*, 494 F.3d 1231, 1237 n.4 ("the crime is persuasion, inducement, enticement, or coercion - not performing a physical act.").

Here, multiple circuits to consider the issue, have held that an attempt to violate §2422(b) is completed entirely through the defendant's communications, online and/or with a cell phone. *See Goetzke*, 494 F.3d at 1236; *Thomas*, 410 F.3d at 1245; *Murrell*, 368 F.3d at 1286 ("if a person persuaded a minor to engage in sexual conduct (with himself or a third party), without then actually committing any sex

act himself, he would nevertheless violate §2422(b)"); *Bailey*, 228 F.3d at 640 (sufficient evidence of substantial step in enticement offense where defendant sent emails to minor proposing oral sex but did not ever travel to meet girl).

Furthermore, under the law of attempt, the defendant's substantial step must be "necessary to the consummation of the crime." *See United States v. Manley*, 632 F.2d 978, 987-88 (2d Cir. 1980); *see also United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007) (defendant's conversation with purported mother of fictitious daughters "b[ore] the familiar hallmarks of criminal attempt" because, inter alia, "they were necessary to the consummation of the crime"). Wilkerson physical travel to Lake Mary was not "necessary to the consummation of an offense" under §2422(b) and therefore cannot constitute a substantial step in the crime under the law of attempt.

Finally, insofar as the Government believes that §2422(b) criminalizes an alleged plan by defendant to attempt to entice the fictitious minor at a face-to-face meeting at a future point in time - i.e., once Wilkerson had been introduced to the fictitious daughter by the fake father - that position reflects a misunderstanding of attempts under §2422(b). The reason defendants in §2422(b) cases involving fictitious minors may be guilty of attempts instead of completed crimes is not because the defendants were planning an enticement but did not yet have the chance to make the required illegal communication.

Instead, it is because they attempted the enticement through an illegal communication but were unsuccessful because the minors were not real. *See United States v. Taylor*, 640 F.3d 255, 257 (7th Cir. 2011) ("It's because [the purported minor] was actually an adult that the defendant was charged with and convicted of an attempt rather than a completed crime"); *Yost*, 479 F.3d at 819 ("Yost was convicted of attempt under the statute because no actual minors were involved"); *United States v. Meek*, 366 F.3d 705, 718-19 (9th Cir. 2004) ("the attempt provision here is no different than an attempted solicitation of prostitution where the criminal conduct is the knowing effort to solicit an individual for prostitution. That the individual turns out to be a decoy undercover officer does not vitiate the criminal conduct.").

A plan to attempt something in the future is not an attempt at all; it is a mere preparation. Section 2422(b) and the law of attempt criminalizes "attempt[s]," not planned future attempts. *See* 18 U.S.C. §2422(b); *Goetzke*, 494 F.3d at 1237 (defendant Goetzke "sent [the minor] letters replete with compliments, efforts to impress, affectionate emotion, sexual advances, and dazzling incentives to return to Montana, and proposed that [the minor] return during the upcoming summer. In short, Goetzke made his move.").

To be liable under §2422(b), Wilkerson must already have attempted to induce the fictitious daughter via facilities of interstate commerce, either

directly or indirectly through the fake father, before arriving at the face-to-face meeting. Criminal liability under §2422(b) cannot be predicated on an alleged "intent to attempt to entice" at some future time. To constitute a substantial step, a defendant's actions "must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *See Goetzke*, 494 F.3d at 1237 (*quoting United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995)). Here, Wilkerson never took a substantial step toward an attempt to persuade, entice, or induce the fictitious daughter, either in person or through the fake father, via facilities of interstate commerce.

As it relates to Count One (the July 2014 emails), there was nothing more than discussion of a possible future attempt to meet. No agreement was ever reached, and no meeting ever took place. As it relates to Count Two (the October 2014 emails) while the traveling occurred following the communications, the meeting to facilitate the introduction of the fictitious daughter did not. Wilkerson's travel to the meeting place cannot constitute a substantial step, as physically traveling from one location to another is simply not a step in illicitly communicating with a minor, directly or indirectly through an adult intermediary, on the internet, on a cell phone, or through the mail.

Thus, because there is no evidence that Wilkerson took a substantial step toward attempted

enticement of the fictitious daughter using a cell phone, the internet, or the mail, no reasonable jury as a matter of law could find sufficient basis to convict Wilkerson under §2422(b). The District Court erred when it denied Wilkerson's motion for judgment of acquittal and this Court should reverse the conviction and dismiss the Superseding Indictment.

IV. DEFENDANT'S COMMUNICATIONS SOLELY WITH AN ADULT INTERMEDIARY ARE NOT ILLEGAL UNDER FLA. STAT. 800.04 AND THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AS A MATTER OF LAW.

Wilkerson argued the Government's evidence failed to establish there was "a knowing attempt to persuade, induce, or entice someone Wilkerson believed to be a minor to engage in sexual activity which could be charged as a criminal offense in the State of Florida." App. 66. The Government alleged in its Superseding Indictment the underlying state law predicate generally was Fla. Stat. 800.04, which criminalizes sexual activity with a minor.

Wilkerson argued there was no testimony about what the crime in Florida would be if, in fact, it had been committed, no testimony about any statutory basis, and "no description of any kind from any witness before the court that would suggest that we have established for the jury's consideration that had

this charade been allowed to continue forward and had a potential meeting actually occurred, that somehow a violation of Florida Statute would have thereby been perpetrated." App. 67.

The Government argued that had Wilkerson received oral sex from a minor it would have been unlawful under Fla. Stat. 800.04. App. 70-71. The Government admitted there was no evidence in the record concerning the underlying state law predicate but suggested the District Court should instruct the jury as a matter of law that receiving oral sex from a minor, assuming the meeting took place and assuming Wilkerson followed through receiving oral sex from the fictitious daughter, was a violation of Florida law because oral sex is considered "sexual activity" under Florida law.

However, this was incorrect as a matter of law because soliciting an adult to commit lewd or lascivious conduct is not illegal under Fla. Stat. 800.04. It is a crime only if the defendant actually committed, versus attempted to commit, lewd or lascivious conduct. Under Fla. Stat. 800.04, the age of the person actually solicited is an element of the offense and therefore it is only a crime if there is actually a person under sixteen years old that is actually solicited. *See Pamblanco v. State*, 111 So.3d 249, 252 (Fla. 5th DCA 2013); *see also* Fla. Std. Jury Instr. (Crim.) 11.10(d).

"To commit lewd or lascivious conduct, it seems clear the request must be made to someone under sixteen. It is not enough a defendant believes the victim is under sixteen." *See Pamblanco*, 111 So.3d at 252.

Florida law specifically addresses situations where the defendant, to be found guilty, simply must believe the person being solicited is under sixteen. *See, e.g.,* Fla. Stat. 847.0135 (making it an offense to travel to meet a child or a person believed to be a child for the illicit purposes outlined in the statute). The Government chose to identify Fla. Stat. 800.04 as its underlying predicate and there was no evidence Wilkerson violated that statute. It was, therefore, an error of law to deny Wilkerson's motion to dismiss on this ground.

V. THE DISTRICT COURT ERRED BY APPLYING A TWO-LEVEL MULTI-COUNT ENHANCEMENT AT SENTENCING WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION ON COUNT ONE, AND APPLYING A FIVE-LEVEL SENTENCING ENHANCEMENT UNDER U.S.S.G. §4B1.5(B) WHERE THERE WAS NO EVIDENCE THAT DEFENDANT "ENGAGED IN A PATTERN OF ACTIVITY INVOLVING PROHIBITED SEXUAL CONDUCT."

"A district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *See Peugh v. United States*, 133 S.Ct. 2072, 2080 (2013) (*citing Gall v. United States*, 552 U.S. 38, 49 (2007)). Failure to calculate the correct Guidelines range renders a sentence procedurally defective. *See Gall*, 552 U.S. at 51.

Wilkerson's sentence was enhanced incorrectly two levels based upon multiple counts and five levels based upon a "pattern of activity" pursuant to U.S.S.G. §4B1.5. In both instances, the District Court abused its discretion in overruling Wilkerson's objection at sentencing to these enhancements.

The Government conceded there was no "victim" and the Government's chief witness at trial testified he was posing as a fake father trying to pimp out his fictitious daughter when he posted both solicitations. There was no evidence these were separate minors. Further, as noted above as it relates to Count One of the Superseding Indictment, there was insufficient evidence to sustain a conviction. Absent sufficient evidence, the multi-count enhancement is inapplicable.

The District Court also erred in imposing a five-level enhancement on the grounds that Wilkerson had engaged in a pattern of activity involving prohibited

sexual conduct. This enhancement is identified in U.S.S.G. §4B1.5(b)(1) and provides for an enhancement "[i]n any case in which the defendant's instant offense of conviction is a covered sex crime ... and the defendant engaged in a pattern of activity involving prohibited sexual conduct." *See United States v. Carter*, 292 Fed. Appx. 16, 20 (11th Cir. 2008). However, the attempted enticement offense for which Wilkerson was convicted is not a covered offense under that guideline section.

A "pattern of activity involving prohibited sexual conduct" exists if, on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor. *See United States v. Castleberry*, 594 Fed. Appx. 612, 613 (11th Cir. 2015). Castleberry references specifically Comment Note 4(B)(i) under USSG § 4B1.5. The Supreme Court has made clear that "commentary in the [Sentencing] Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *See United States v. Hall*, 714 F.3d 1270, 1272-73 (11th Cir. 2013) (*citing Stinson v. United States*, 508 U.S. 36 (1993) (reversing the Eleventh Circuit's previous holding that such commentary was not binding on federal courts); *see United States v. Beckles*, 565 F.3d 832, 842 n.1 (11th Cir. 2009).

Comment Note 4 defines "prohibited sexual conduct" as including "any offense described in 18

U.S.C. §2426(b)(1)(A). This section of the code defines the sex offenses applicable to include those under chapter 109A, chapter 110, or section 1591. To be applicable, the Government had to demonstrate Wilkerson engaged in prohibited sexual conduct with a minor on at least two separate occasions.

Chapter 117 offenses, of which Wilkerson was convicted, are not listed as applicable sex offenses. As argued above, there was insufficient evidence to sustain a conviction as to Count One of the Superseding Indictment and therefore there is no "pattern of activity" that includes prohibited conduct on at least two different occasions. Based upon the clear statutory language, it was error for the District Court to impose this enhancement.

The Government argued the enhancement applied because Wilkerson was convicted of two counts of enticing a minor to engage in prostitution. App. 93-94. This is a flatly incorrect statement of the conviction and the Government conceded the commercial sex act enhancement, which Probation wanted, did not apply. App. 92. Despite this, the Government then argued Wilkerson was convicted of a qualifying Section 1591 offense, which is factually wrong.

> According to the guidelines -- and we're looking at United States Sentencing Guideline Commentary note 4(A)(i) for purposes of subsection B, prohibited sexual conduct, means any of the

> following: Any offense described in Title 18, United States Code, Section 2426(b)(1)(A) or (B). Title 18, Section 2426(b)(1), includes any offense under Chapter 109A, 110, or Section 1591. In this case, his attempt to engage a minor in prostitution is conduct that falls squarely under 1591, commercial sex trafficking of a minor. If the offense of conviction qualifies as prohibited sexual conduct, the pattern of activity enhancement is available if the district court finds only one additional occasion of prohibited sexual conduct.

App. 95-96

The Government repeatedly misstated to the District Court the conviction involved prohibited sexual conduct under U.S.S.G. 4B1.5, specifically, "the offense conduct involves commercial sex trafficking of a minor." Wilkerson argued the Government was trying to use the "prostitution issue" to meet the §4B1.5 application and that its application was wrong as a matter of law because Wilkerson was never convicted of a 1591 offense. App. 97-98.

The District Court incorrectly applied the enhancement based upon a misapprehension of its language. The District Court stated because there were two separate attempt convictions, with "two separate notional minors," the enhancement applies.

App. 81-82. This misstates how the enhancement is applied and under what circumstances it is applied. First, factually, the District Court erred in finding there was sufficient evidence of "two separate notional minors." Second the enhancement is not applicable to a Chapter 117 offense conviction.

The District Court, however, failed to recognize the correct application of the 4B1.5 enhancement.

> But as I look at 4B1.5 and the comments, the comment for application of the subsection notes that for purposes of subsection B, the defendant engaged in a pattern of activity involving prohibited sexual conduct, if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor. The offense with which the defendant was charged and for which he was convicted involved prohibited sexual conduct of a minor.

App. 99.

The District Court then identified that the case had nothing to do with prostitution or "anything related to prostitution." The District Court suggested, "this argument that both (Wilkerson) and the Government are going off chasing this rabbit down the prostitution rabbit hole has no relevance to the

application of this particular enhancement." App. 101-102. This statement demonstrates the District Court's clear misapprehension of the guideline commentary. The District Court continued. "But if, in fact, it is two separate offenses involving a notional minor in July or June as well as another one later in the year in October, then that qualifies as a pattern of activity under the enhancement if those facts are true." *Id*.

It was error to convict Wilkerson of two separate counts of 18 U.S.C. § 2422(b). This error has had profound consequences under the sentencing and enhancement guidelines. The Government filed a Superseding Indictment on January 28th, 2015. This Superseding Indictment differed from the original, in that it added a second count of 18 U.S.C. § 2422(b). This is a highly debatable issue which has been raised throughout the course of this litigation. The reality is that Steven McElvea engaged Wilkerson concerning the same proposition, on the same platform, for the same price, for presumably, the same fictional daughter in a relentless and unwavering fashion.

Wilkerson may have been interested in this illegal activity, but he cannot be punished for alleged *mens rea* alone. Case law supports this position. See *United States v. Mahannah*, 193 F. Supp. 3d 151, 156 (N.D.N.Y. 2016)(Holding that while defendant may have had interest in illegal activity, even while going so far as to meet with minor, he did not attempt to persuade minor).

Both counts for which Wilkerson was charged with occurred in the greater Orlando area. It is Wilkerson's contention that these ads were a part of the same scheme and sting operation, albeit over a period of months. The precedent is clear, in the sense that someone may be convicted under 18 U.S.C. § 2422(b), despite not actually harming a real victim. It also follows that someone may be convicted twice for harming two different victims, just as it follows someone may be convicted for harming the same victim twice. What is not so clear, in the instant case, is if there were in fact, two victims, and if there was, did Wilkerson's conduct rise to the level sufficient to sustain a conviction in both instances?

At trial, the Government offered into evidence that Wilkerson completed a "substantial step" by going to meet the fictitious victim. It was only when Wilkerson left the confines of his home, and went to meet a victim, that the Government effectuated an arrest. This, along with the original indictment, demonstrates The Government's belief that Wilkerson's conduct only amounted to one criminal act, if any at all; not the two he was charged with.

The District Court overruled Wilkerson's objection noting it was applying the enhancement based upon "the Court's interpretation that the pattern of activity relates to the prohibited sexual conduct of a minor, the two separate enticement convictions and not on the basis of a commercial sex

act." App. 104-105. The problem, however, is that the proof was insufficient to sustain a conviction as to Count One of the Superseding Indictment, which is one of the instances the District Court relied upon, and further, Wilkerson's convictions are not covered offenses that would permit the 4B1.5 enhancement.

Failure to calculate the correct Guidelines range renders a sentence procedurally defective. *See Gall*, 552 U.S. at 51. It was error for the District Court to impose the enhancement and this Court should vacate the sentence and remand this matter for a re-sentencing.

CONCLUSION

For the reasons set forth herein, Petitioner, Dennis Wilkerson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on July 13, 2017.

Respectfully submitted on this 11th day of December, 2017.

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