ENTICEMENT OF ANOTHER FOR SEXUAL ACTIVITY AND TRAVEL TO ENGAGE IN ILLICIT SEXUAL CONDUCT WITH A MINOR

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Two federal statutory tools:

A. **18 USC 2422(a) (Enticement)** makes it a crime to knowingly entice, or to attempt to entice, a person to travel in interstate commerce for sexual activity for which any person can be charged with a crime

B. **18 USC 2423(b) (Travel)** makes it a crime to travel in interstate commerce for the purpose of engaging in illicit sexual conduct with another person

Applicability of statutes to minors

A. The **Enticement** provision has no specific reference to the age of the person enticed. Age becomes pertinent through the phrase "sexual activity for which any person can be charged with a crime"

1. Applicable underlying federal law (18 USC 2241-2244)

2. Applicable state statute

B. The **Travel** provision has three references to the age of the victim which are encompassed in the definition of "illicit sexual conduct"

1. Direct reference that "illicit sexual conduct" involves sexual activity with a person under 18. *18 USC 2423(f)(1)*

2. "Illicit sexual conduct" refers to the definition of "sexual act" as defined in 18 USC 2246, which imposes liability in one circumstance only if the victim is under 16

3. Through the references to violations of 18 USC 2241-2244, several of which impose harsher penalties for conduct with a child under 12 and, impose harsher penalties and create some defenses for conduct with a child between 12 and 16.

Enticement vs Travel

A. **Enticement cases**

1. An ***Attempted Enticement*** case is premised on an attempt to

entice, thus, the relevant intent is ***intent to persuade, induce, entice or coerce*** a person to engage in illegal sexual activity, and not the ***intent to engage*** in illegal sexual activity

2. An ***Actual Enticement*** case involves ***intent to persuade, induce, entice or coerce*** a person to engage in illegal sexual activity plus actual travel in interstate commerce by the person being enticed

3. Punishment is up to 20 years imprisonment

B. **Travel cases**

1. An ***Attempted Travel*** case involves ***intent to engage*** in a proscribed sexual act, and an attempt to travel in interstate commerce

2. An ***Actual Travel*** case involves ***intent to engage*** in a proscribed sexual act, and travel in interstate commerce by the defendant

3. Punishment is up to 30 years imprisonment

C. **Enticement** and **Travel** are different offenses and can be pursued in same case

1. Both typically involve internet chats of an explicit sexual nature, and travel

2. Most cases involve an "attempt" to commit an enticement offense, and actual commission of the travel offense

Age of Victim issues

A. Age of an actual victim is a factual issue

1. Not necessary to prove that defendant **knew** age of intended victim

B. In an attempt case, it is not necessary to prove the age of any "actual victim"

1. It is sufficient to prove that defendant believed he was communicating with an underage person, or that he was traveling to meet an underage person

B. Conversation/chat does not have to be with an actual minor

United States v. Tykarsky, 446 F.3d 458, 464-67 (3rd Cir. 2006)
United States v. Farner, 251 F.3d 510, 512-13 (5th Cir. 2001)
United States v Morris, 549 F3d 548 (7th Cir. 2008)
United States v. Blazek, 431 F.3d 1104, 1107-08 (8th Cir. 2005), *reh. den, reh. en banc den,* 2006 US App LEXIS 2556; *cert. den* 547 US 1082 (2006).
United States v. Meek, 366 F.3d 705, 717-20 (9th Cir. 2004)
United States v. Sims, 428 F.3d 945, 959-60 (10th Cir. 2005)
United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002)
United States v. Kaye, 451 F. Supp.2d 775 (E.D. Va. 2006), *affirmed,* 243 Fed. Appx. 763 (4th Cir. 2007)

C. Conversation/chat does not have to be with a person posing as a minor, but can be with a person who is, or who is posing as, the parent or custodian of a minor

United States v. Murrell, 368 F.3d 1283 (11th Cir. 2004) (conversation with purported father about having sex with his underage daughter)
United States v. Carter, 2006 WL 997867(E.D. Calif. 2006)(chat with undercover officer posing as mother of 8 year old and custodian of 10 year old niece)
United States v. Spurlock, 386 F.Supp. 1072 (W.D. Mo. 2005)(chat with undercover officer posing as mother of 2 minor girls)
United States v. Nestor, 574 F.3d 159 (3rd Cir. 2009)(Defendant who uses adult intermediary, rather than direct contact with child, to attempt to persuade, induce, entice, or coerce child to engage in sexual activity can be held to violate 18 USCS § 2422(b))

For an attempt case, it is necessary to prove intent and that the defendant took a "substantial step" to effectuate the crime. What is a "substantial step" in an attempted enticement case?

A. Actual travel

B. Attempt to actually engage in illegal sexual act

C. Content of conversation alone?

--the content of the conversation alone is enough

United States v. Bailey, 228 F.3d 637 (6th Cir. 2000)

--Communications with actual minors rather than undercover agent
--One minor testified that defendant used graphic detail to describe what sex acts he would perform on her
--A second minor testified that the defendant sent her his pager number and tried to get her to call him to arrange a meeting
--A third minor testified that, after she sent a picture of herself to the defendant, he sent her details of her clothing, school, etc. implying that he had followed her.

United States v. Geotzke, 494 F.3d 1231 (9th Cir. 2007)

Letters replete with compliments, efforts to impress, affectionate emotion, sexual advances, and dazzling incentives to return to Montana sent to actual minor with whom the defendant had a prior relationship

–**content of the conversation alone is not enough**

United States v. Gladish, 536 F.3d 646 (7th Cir. 2008)

Chats with undercover agent along with attached video showing the defendant masturbating were insufficient evidence of a "substantial step". Court of Appeals suggested that some act such as booking travel plans, purchasing a gift, or "grooming behavior" was necessary

"We disagree with the government's suggestion that the line runs between "harmless banter" and a conversation in which the defendant unmistakably proposes sex. . .Treating speech (even obscene speech) as the "substantial step" would abolish any requirement of a substantial step. It would imply that if X says to Y, "I'm planning to rob a bank," X has committed the crime of attempted bank robbery, even though X says such things often and never acts. The requirement of proving a substantial step serves to

distinguish people who pose real threats from those who are all hot air; in the case of Gladish, hot air is all the record shows." *536 F.3d at 649.*

Grooming

"Grooming" is a term utilized by the Internet Crimes Against Children Task Force which refers to "a way that . . . adult subjects [converse] with persons on the Internet that are under the age of 18. For example, . . . the subject might talk about things that the . . . person under age 18 would be interested in such as what they like to do with their friends, where they like to eat, what they like to do for fun . . . . The purpose of the grooming is to build a trusting relationship between the two parties." (Trial Tr. vol. II, 132.)

Typical Defenses

A. Impossibility:

Raised in cases which arise from sting operations where undercover officer posed as a child on the internet

"Since the purported victim was not actually an underage person, it was not possible to complete the crime."

1. "Factual impossibility" claim is generally rejected under criminal law, not just as it relates to ICAC cases

--*United States v. Tykarsky,* 446 F.3d 458 (3rd Cir. 2006)

In light of text, legislative purpose and history of 18 USCS § 2422(b), and unlikeliness that Congress has intended now-disfavored doctrine of legal impossibility to apply, Court of Appeals for Third Circuit found that lack of actual minor is not defense to charge of attempted persuasion, inducement, enticement or coercion of minor in violation of § 2422(b), and court joins Courts of Appeals for Fifth, Ninth, Tenth and Eleventh Circuits in concluding that conviction under attempt provision of § 2422(b) does not require involvement of actual minor.

--*United States v. Spurlock*, 386 F.Supp 2d 1072 (W.D. Mo. 2005)

For enticement case, the crime is using the interstate facility in an attempt to entice the victim, so the crime is completed with the enticement efforts and whether the sexual activity could take place is not relevant.

2. Even in sentencing context, a "virtual" victim is the basis for liability and an enhanced sentence

–*United States v. Graham*, 413 F3d 1211 (10th Cir. 2005)

The targets of sting operations are not relieved of criminal liability merely because their intended victim turned out to be an undercover agent and not a child

--*United States v. Lebovitz*, 401 F.3d 1263, 1268 (11th Cir. 2005)

Whether a victim is fictitious is irrelevant to the application of a federal statute or sentencing guideline prohibiting sexual conduct with a minor.

--*United States v. Butler*, 92 F.3d 960, 963 (9th Cir. 1996)

In response to argument that § 2A3.2 [U.S.S.G.] should apply instead of § 2A3.1 [U.S.S.G.] because the three victims were virtual, the court stated "the fact that Appellant was unable to complete the crime because the victims were fictitious is not the determining factor. Rather, Appellant's intent and conduct constitute attempted criminal sexual abuse of three young children."

B. Denial of intent based on belief that "child" was of legal age

1. Derives from the requirement that the only age relevant for an **attempt** case is the defendant's belief as to the victim's age

2. *United States v. Kaye*, 451 F.Supp.2d 775 (E.D. Va 2006), *affmd* 243 Fed. App. 763 (4th Cir. 2007)

Defendant was a resident of Maryland. He engaged in on line chats with undercover volunteer, a 26 year old male who represented himself to be a 13 year old male. The two exchanged photographs with the volunteer having sent one of a male younger than him. The defendant and "victim" also talked by phone. The "victim" for the phone conversation was a 24 year old female volunteer. The defendant was arrested when he drove to Virginia to met the "victim."

The defendant offered expert testimony that the photo of the victim was consistent with a photo of a child over 18, and additional expert testimony that the voice of the victim was that of a person older than the purported 13 year old victim.

The Court admitted the evidence but nonetheless found the defendant guilty because, based on the entirety of the evidence, the Court concluded that the "defendant thought he was speaking with the same person with whom he had chatted on line, and that the person was a 13 year old boy."

C. Fantasy

"It was just cyber-sex. I was role playing and believed the person with whom I was communicating was also role playing."

1. More common among wealthier, more educated defendants

2. *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008)

"His talk and his sending her a video of himself masturbating (the basis of his unchallenged conviction for violating 18 U.S.C. § 1470) are equally consistent with his having intended to obtain sexual satisfaction vicariously. There is no indication that he has ever had sex with an underage girl. Indeed, since she furnished no proof of her age, he could not have been sure and may indeed have doubted that she was a girl, or even a woman. He may have thought (this is common in Internet relationships) that they were both enacting a fantasy."

3. *United States v. Rockett, Jr.*, (1:09CR477, EDVa)

Defendant, a high school/college volleyball referee and coach, engaged in on-line sex chat with a purported 13 year old girl. He traveled to met the girl and brought with him a vibrator, dildo, anal beads, and aloe vera gel. He defended on the basis that he engaged in on-line virtual games and fantasy and that he believed the person with whom he was communicating was also engaging in a fantasy role. He offered two European women as defense witnesses with whom he had engaged in fantasy games through various web sites including one with whom he had engaged in medieval fantasy games, some of which were of a sexual nature. Defendant was convicted.

D. The Good Samaritan

"I was engaging in internet chat about sex with a minor to help him/her understand the dangers associated with that conduct, and to discourage him/her from continuing to do so."

1. *United States v. Zahursky*, 580 F.3d 515 (7th Cir. 2009)

Defendant was convicted of traveling to meet underage female for sex after arranging to do so, and after soliciting her and other minors to engage is a three-some. The defendant contended that he engaged in the conversations as "reverse psychology" to get the girls to leave the internet chat rooms.

E. Entrapment

1. Two aspects of entrapment defense

–the defendant lacked pre-disposition to commit offense
–the defendant was enticed, and induced by law enforcement to commit the offense

2. Burden remains on the government to show that there was no entrapment once a sufficient basis has been establish to warrant instruction on the defense

2. Inducement

–factually dependant determination

–content of conversations critical
–defendant rarely succeeds

3. Pre-disposition

–only necessary to address pre-disposition if some degree of inducement has been demonstrated

4. *State of Nebraska v. Pischel*, 762 N.W.2d 595 (Neb. 2009)

–In March, Pischel began chat with undercover agent posing as a 15 year old girl. Pischel expressed disinterest in young girls, and the agent responded "whatever"

–In June, Pischel initiated a new and continuous contact which became sexually explicit. Pischel arranged a meeting but then canceled the meeting. The agent expressed disappointment.

–After several days, Pischel initiated another conversation and asked if he was invited to meet the girl for oral sex. He was arrested when he arrived at the meeting site.

–Court rejected entrapment instruction and Court of Appeals affirmed: Pischel had laid out insufficient basis to demonstrate inducement by the government, and, therefore government obligation to show pre-disposition had not been triggered.

5. *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000)

–Poehlman was a cross dresser who was previously married and had children

–Poehlman began chat with woman with whom he sought an adult relationship. Woman was an agent who was purporting to be the mother of three pre-teen children for whom she sought sexual instruction

–During the course of the conversations, the agent continuously rebuffed Poehlman's suggestions about a relationship between him and the adult woman

–Poehlman began discussing giving the young girls proper sexual education and eventually traveled to California to meet the mother and begin educating the girls. He was arrested

–Court held that Poehlman had been induced to commit the crime and that there was no evidence of a pre-disposition

–While pre-disposition and inducement are separate elements of entrapment, they are intertwined: the greater the pre-disposition, the less need for much inducement

–Pre-disposition refers to the inclination to commit the crime prior to involvement by the government. Nonetheless, evidence of conduct after the inducement may be relevant to show a pre-existing state of mind.

F. Jurisdictional based defenses

1. Manufacturing of federal jurisdiction

–*United States v. Brockdorff*, 992 F.Supp 22 (D.C. 1997)

Defendant traveled from Maryland into Washington DC to meet with whom he thought was a 13 year old girl for sex. Defendant challenged jurisdiction on the basis that the government had intentionally chosen a location inside the District in order to create the interstate travel necessary for jurisdiction, and, therefore, the case should be dismissed. The Court rejected the claim.

2. Choice of State Law in Enticement cases under 2422

–One element of the statute refers to "sexual activity for which any person can be charged with a crime"

–Can be based on application of applicable federal law, or state law

–*United States v. Garner*, 67 MJ 734, 2009 CCA LEXIS 172 (10th Cir. 2009)

Violation of Uniform Military Code as underlying basis for conviction under 2422(b)

--*United States v Cochran*,510 F Supp 2d 470 (N.D. Ind.)

Nothing in text of 18 USC § 2422(b) suggests that Congress intended to limit phrase "sexual activity" to definition of "sexual act" in 18 USC § 2246; in absence of any definitions to contrary, it is presumed that Congress meant what it said when it prohibited any sexual activity for which any person can be charged with criminal offense, which would include activity that violates Ind. Code § 35-42-4-5(c).

–Which state law is applicable?

–*United States v. Patten,* 397 F.3d 1100 (8th Cir. 2005)

Patten, who lived in Minnesota, attempted to entice a an agent pretending to be a 16 year old girl who lived in North Dakota to meet him for sex. When the two spoke on the phone, the girl told Patten that she did not have a car, and Patten said that he would "come over and get her". The two arranged to meet at a store in Fargo, North Dakota. Patten was arrested when he arrived and was prosecuted in North Dakota. Sex with a 16 year old would have been in violation of North Dakota law, but not a violation of Minnesota law.

Patten challenged the application of North Dakota law. Over the government's objection, the District Court instructed that the government had to prove that the sexual activity was intended in North Dakota. The jury convicted.

The Court of Appeals sustained the conviction and rejected the government's argument that as long as the discussion, in part, took place in North Dakota, there was a violation of 2422. The Court of Appeals stated that it was a factual issue for the jury as to where the sexual activity was anticipated, and that had

it been clear Patten was trying to entice the 16 year old to Minnesota, it would not have been a violation of federal law.

Evidentiary issues

A. Search and Seizure

1. Vehicle search

2. Personnel search

3. Search of residence

4. Search of computer

B. Items that traveler's bring

1. Condoms

2. Lubricants

3. Items that connect them to the on-line chats such as

--photos
--directions

4. "Grooming" items like bubble bath, bath oils etc.

5. Alcohol

6. *United States v. Dodd*, 349 F. Supp. 2d 1039 (W.D. Tex. 2004)

–Pursuant to a warrant, officers searched hotel room rented by the defendant and found
--one unopened box of Magnum condoms,
--one unopened box of Trojan ENZ condoms,
--one unopened box of Durex condoms
--one tube of K-Y Jelly personal lubricant,
--four bottles of TGIF Pina Colada alcoholic beverage,
--two small bottles of Red Label scotch,
--one bottle of Lander Aloe Vera bubble bath,

–an 8-1/2" x 11" color photograph of the file "Shelly.jpg."

7. *United States v. Young*, 2010 U.S. App. LEXIS 14656 (8th Cir. 2010)

   --Young arranged to meet 14 year old Emily at a hotel. Emily was to walk to the hotel from the park. Young promised to leave Emily a note on his windshield with her name on it that told her in which room to find him. Young knew Emily liked to take baths.

   --During the search incident to Young's arrest, officers discovered a condom on Young's person. After obtaining a search warrant for Young's car, officers recovered a note with the name "Emily" written on it and a bottle of bubble bath.

8. *State of Nebraska v. Pischel*, 762 N.W.2d 595 (Neb. 2009)

   –Found 2 condoms during search of car, and various items that tied the defendant to the web name and the on line conversations during search of the defendant's residence.

9. *United States v. Zahursky*, 580 F.3d 515 (7th Cir. 2009)

   –After finding nothing on the defendant's person, the police conducted a warrant less search of defendant's car and found condoms, lubricants, and a map with directions from his house to the meet location

C. Evidence of Other Crimes (F.R. Evid. 404(b))

1. *United States v Johnson,* 132 F.3d 1279 (9th Cir. 1997)

   Evidence that defendant sexually abused two teenagers thirteen years prior to his trial on charges of violating 18 USCS § 2423(a) was admissible to show intent, since it was sufficiently similar to charged conduct to render it probative despite passage of time.

2. *United States v Curtin*, 588 F.3d 993 (9th Cir. 2009)

At defendant's trial for violating 18 USCS §§ 2423(b), 2422(b), and 3583(k), evidence of number of sexually explicit stories on his personal digital assistant was admissible under Fed. R. Evid. 403 as more relevant than prejudicial in light of defendant's claim that he only intended to find adults who wanted to role-play and his counsel's attempts to show that story was small, insignificant part of PDA's total content.

3. *United States v. Zahursky*, 580 F.3d 515 (7th Cir. 2009)

Defendant had solicited agent purporting to be a 14 year old girl for sex, including sex with another minor in a three-some. During the course of the conversations, defendant claimed that he had previously had sex with a person of the age of the victim.

At trial, the defendant denied that he intended to have sex with the purported 14 year old. Rather, he contended, that he engaged in the on-line chats as "reverse psychology" to dissuade the minor from participating in chat rooms and that he traveled to meet "her" because he had become persuaded that she was a cop.

Three forms of other crime evidence admitted:

(1) Testimony of underage victim with whom defendant had sex 5 years earlier when she was 14

(2) E-mails with "holly1989cutie" who was identified to victim as another 14 year old with whom the defendant was conversing and who was willing to engage in a threesome with the defendant and the victim.

(3) E-mails with "Xanthery" in which the defendant proclaimed that he previously had sex with a 14 year old.

D. Expert Testimony

Host of experts are offered both by the government and by the defense. Primary issues concern whether the expert testimony is

helpful to a pertinent trial issue, and whether the opinion offered violates the prohibition against offering an opinion on the defendant's intent in the instant case.

1. Profile of child molester

--*United States v Romero*, 189 F.3d 576 (7th Cir. 1999), cert den 529 US 1011 (2000) (admitted)

--*United States v Hayward*, 359 F.3d 631 (3rd Cir. 2004)(admitted)

2. Fantasy defense

-- *United States v Hofus*, 598 F3d 1171 (9th Cir. 2010)

Expert testimony that defendant valued sexual texting in fantasy alone and was unlikely to actually engage in sex with minor victim was properly excluded because it was irrelevant to whether he had attempted to entice a minor.

3. Age of "victim"

--*United States v. Rockett, Jr.*, (1:09CR477, EDVa)

Testimony of linguistics expert that content of conversation from purported victim was too sophisticated for a child of the victim's age offered in support of assertion that defendant believed the "victim" to be of adult age

--*United States v. Kaye*, 451 F.Supp.2d 775 (E.D. Va 2006), *affmd* 243 Fed. App. 763 (4th Cir. 2007)

The defendant offered expert testimony that the photo of the victim was consistent with a photo of a child over 18, and additional expert testimony that the voice of the victim was that of a person older than the purported 13 year old victim.

Constitutional challenges

A. First Amendment

1. *United States v Dhingra*, 2004 US App LEXIS 15288 (9th Cir. 2004)

--18 USC § 2422(b) regulated conduct, not speech, and did not depend on which community's standards applied; its reference to local criminal laws did not render statute over broad under First Amendment.

2. *United States v Dwinells* , 508 F3d 63 (1st Cir. 2007).

–18 USC 2422 was not over broad in light of Internet-specific principles laid down by U.S. Supreme Court as it covered situations in which nothing but unprotected speech was either threatened or chilled; there was no possibility that intruding minors might, by their mere presence in Internet forum, render protected speech illegal; and, if protected communication fell outside scope of § 2422(b) for some reason, mere introduction of minor's presence would not bring communication without that scope.

B. Due Process

1. *United States v Panfil*, 338 F3d 1299 (11th Cir. 2003)

--18 USC 2422 was not unconstitutionally over broad; statutory terms "entice" and "induce" were not ambiguous or subject to varying standards; indeed, language of § 2422(b) was clear; and because these terms and term "sexual activity for which any person can be charged with criminal offense" had plain and ordinary meanings, statute was not void for vagueness; furthermore, statute ensured that only those who "knowingly" engaged in illegal conduct were subject to prosecution; this scienter requirement discouraged "unscrupulous enforcement" and clarified § 2422(b).

C. Right to travel

1. *United States v. Brockdorff*, 992 F.Supp 22 (D.C. 1997)

–Right to Travel does not mean right to travel unimpeded for illegal purposes