No. _____

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**In the Supreme Court of the United States**

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FAWAD SHAH SYED,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**Motion for Leave to Proceed *In Forma Pauperis***

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The Petitioner asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Leave to proceed was sought and granted in the Court of Appeals for the Eleventh Circuit, which appointed the undersigned counsel in the attached order.

Andy Clark
*Counsel of Record*

February 22, 2016

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 14-10350-B

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FAWAD SHAH SYED,
a.k.a. Daniel,

Defendant-Appellant.

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

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ORDER:

Michael Andrew Clark is by this Order appointed to represent Fawad Shah Syed on appeal. Mr. Clark shall have fourteen (14) days from the filing of this Order to file the transcript order form.

The District Court is DIRECTED to provide Mr. Clark with access to any matters under seal in that court.

Randy B. Martin

UNITED STATES CIRCUIT JUDGE

No. _____

**In the Supreme Court of the United States**

FAWAD SHAH SYED,

*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 Writ of Certiorari

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## QUESTION PRESENTED

The Telecommunications Act of 1996, 18 U.S.C. § 2422(b), prohibits using interstate communications to "persuade[], induce[], entice[], or coerce[]" a minor to engage in sexual activity. It also prohibits attempting to do so. An attempt conviction requires evidence that the defendant took a substantial step toward completing the crime. The question presented, on which the Eleventh Circuit and the D.C. Circuit are in direct conflict, is:

Does an action that might only "cause" a minor to engage in sexual activity – such as travel to meet the minor in person – satisfy the substantial step requirement for a § 2422(b) attempt?

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## OPINIONS BELOW

The Eleventh Circuit's opinion affirming the district court's judgment is available at 616 Fed. Appx. 973, 2015 U.S. App. LEXIS 16551 (11th Cir. Sept. 17, 2015). Pet. App. 1a. The transcript of the district court's order denying Petitioner Fawad Syed's motion for a judgment of acquittal is attached. Pet. App. 26a.

## JURISDICTION

The District Court for the Southern District of Georgia entered judgment and sentence on January 23, 2014. Pet. App. 34a. The Eleventh Circuit affirmed on September 17, 2015. Pet. App. 1a. The Eleventh Circuit denied rehearing on November 23, 2015. Pet. App. 23a.

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

## STATUTORY PROVISION INVOLVED

The Telecommunications Act of 1996, 18 U.S.C. § 2422(b), states:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can 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.

## STATEMENT OF THE CASE

This is an attempted online enticement of a minor case under 18 U.S.C. § 2422(b). This case differs from most enticement cases. The online chats at issue were not sexual and, taken alone, could not have sustained a conviction. Instead, to satisfy the "substantial step" requirement for a criminal attempt, the Government relied on evidence that Petitioner Fawad Syed traveled to meet a minor in person, bringing condoms with him. The Eleventh Circuit, which affirmed Syed's conviction, is in direct conflict with the D.C. Circuit over § 2422(b)'s meaning in attempt cases. The Eleventh Circuit holds that § 2422(b) bars attempts to "stimulate or cause" sexual activity. The D.C. Circuit holds that the statutory language – barring attempts to

"persuade[], induce[], entice[], or coerce[]" – does not encompass an attempt to "cause." Separately, many circuit courts have considered travel relevant to the substantial step inquiry.

The time is ripe for this Court, which has never addressed sexual solicitation of minors online, to clarify and correct the law. Because the plain language of § 2422(b) prohibits attempting through interstate communications to change a minor's mental state, not attempting to have (or "cause") sex with a minor, travel to meet a minor face-to-face is irrelevant to the substantial step element and cannot sustain a conviction.

1. Syed lived in Georgia. Between February 8 and February 11, 2013, he exchanged more than 1,000 electronic text messages with a sheriff's investigator. The investigator chatted in the persona of a fictitious 14-year-old girl named Samantha.

Although the chats between Syed and Samantha had mild sexual overtones, Syed never asked Samantha to engage in sexual activity with him. He never discussed or described any sexual activity. Many of the chats were about non-sexual topics, like dogs or their separate plans for the day. The chats were sometimes flirtatious without being sexual.

Syed called Samantha "sweetie" or "babe." (*E.g.*, Tr. 90, 102.) He mentioned the possibility of "dating" her. (Tr. 89.) The only body parts either party mentioned were hair, eyes, skin, legs, and Syed's chest.

Syed told Samantha that he did not intend their chats to be sexual: "Been told my skin is very soft for a guy and, no, I'm not implying that in a sexual way." (Tr. 93.) He asked Samantha how "intimate" she had been with her last boyfriend, and how "romantic" she was, but clarified that he "wasn't referring to anything sexual." (Tr. 95-96.) After Samantha told him "[j]ust touching and kissing," Syed did not request any more details about her history of intimacy. (Tr. 97.)

They began discussing the possibility of meeting in person. When Samantha asked Syed what they would do at their first meeting, he replied, "hang out, talk, chill." (Tr. 101.) He said, "I'm just not sure about taking some of my clothes off on our first date." (Tr. 94.) When she asked where they should meet, Syed said, "Wherever. It doesn't matter." (Tr. 101.) He said he wanted to see what "chemistry" they had, and clarified, "I'm not expecting anything. Especially your age, babe. I mean, for something like that to happen, it'd have to be way spent he [*sic*] road when you're older." (Tr. 107.) He said: "If we like each other

more and ever want to get intimate, I'd have to be – it'd have to be down the road." (Tr. 108.) He told her he had "no expectations at all" for the meeting they were planning, and: "We can drink if you feel like it, but you don't have to. Just a thought. I was gonna chill with you." (Tr. 109.)

It was Samantha (*i.e.*, the investigator), not Syed, who first suggested that they meet at Samantha's apartment. Syed drove to the apartment, also in Georgia, where he was arrested. He brought a can of Boddingtons ale, a six-pack of Mike's Lite Hard Lemonade, a can of pepper spray, three unopened condoms, and an iPhone.

2. A jury found Syed guilty of attempted online enticement of a minor under 18 U.S.C. § 2422(b), and two other crimes, in the District Court for the Southern District of Georgia. The district court asserted subject-matter jurisdiction under 18 U.S.C. § 3231 because Syed was accused of violating federal laws. Syed moved for a judgment of acquittal, which the district court denied. Pet. App. 28a-32a. The district court sentenced him to 294 months in prison on the online enticement charge. Pet. App. 36a.

3. Syed appealed to Eleventh Circuit, arguing that travel to meet a minor is not a substantial step under § 2422(b), because,

whether or not it is a substantial step toward sex, it is not a substantial step toward persuading a minor to have sex through use of interstate communications. The Eleventh Circuit affirmed Syed's convictions and sentence. Pet. App. 1a. Because Syed's trial counsel had not renewed the motion for judgment of acquittal at the close all the evidence, the Eleventh Circuit applied the "manifest miscarriage of justice" standard. Pet. App. 7a. In determining whether Syed took a substantial step toward violating § 2422(b), the Eleventh Circuit "look[ed] at the totality of the defendant's conduct." Pet. App. 9a. (This "totality" test for substantial steps has been applied only in the Eleventh Circuit, and only in § 2422(b) cases.) "[L]ooking at the totality of the circumstances," the Eleventh Circuit did "not believe that the evidence is so tenuous that [Syed's] conviction is shocking," where among other things Syed "arrived at Samantha's apartment carrying alcohol, condoms, and pepper spray." Pet. App. 10a-11a.

## REASONS FOR GRANTING THE PETITION

The Telecommunications Act of 1996, 18 U.S.C. § 2422(b), prohibits using interstate communications to "persuade[], induce[], entice[], or coerce[]" a minor to engage in sexual activity. The circuits are in direct conflict over what those four words mean in attempt cases. The Eleventh Circuit broadly interprets them, so that § 2422(b) criminalizes attempts to "stimulate or cause" sexual activity. *See United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004) (adopting American Heritage Dictionary definition of "induce" as "to stimulate the occurrence of; cause"). Other circuits interpret these words more narrowly. The D.C. Circuit specifically rejects the argument that § 2422(b) criminalizes attempts to "cause" sexual activity, and has vacated a § 2422(b) conviction on that basis. *See United States v. Hite*, 769 F.3d 1154, 1167 (D.C. Cir. 2014) ("[T]he preeminent characteristic of the conduct prohibited under § 2422(b) is transforming or overcoming the minor's will.… 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.").

The facts of this case illustrate perfectly why this circuit split matters. Petitioner Fawad Syed exchanged electronic text messages with an investigator portraying a minor named Samantha. When he went to meet her and was arrested, he was carrying condoms, alcohol, and pepper spray. But – unlike in almost every other § 2422(b) case – Syed never asked Samantha to have sex with him or discussed having sex with her, in interstate communications or elsewhere. *See* Pet. App. 10a ("Mr. Syed is correct that he did not explicitly ask Samantha to have sex with him or explicitly indicate his desire to have sex with her."). Since his online communications could not have satisfied the requirement of a "substantial step" toward the completed crime, the Government argued, and the Eleventh Circuit agreed, that by travelling to meet Samantha, Syed took a substantial step toward a § 2422(b) violation.

The Eleventh Circuit's holding here, and its precedent that § 2422(b) criminalizes attempts to "cause" sexual activity, reflect a misunderstanding of what § 2422(b) prohibits. It prohibits attempting to persuade (or coerce, or induce, or entice) a minor to engage in sexual activity. It does not prohibit attempting to have sex with a minor.

Persuasion, not sex, is the actus reus. "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. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000). Condoms, for example, are irrelevant to the § 2422(b) substantial step inquiry. Condoms are a tool for having sex. They are not a tool for persuasion (and certainly not a tool for persuasion through use of interstate communications). Carrying condoms might have satisfied the Eleventh Circuit's broad interpretation of § 2422(b)'s substantial step element, but it would not have satisfied the D.C. Circuit's narrower interpretation. Picking up condoms is a step toward "causing" a minor to have sex, but not toward persuading, inducing, coercing, or enticing a minor to have sex.

Beyond the direct conflict between the Eleventh Circuit and the D.C. Circuit, many circuit courts in dicta have described travel to meet a minor as relevant to the § 2422(b) inquiry, or even sufficient by itself. *E.g.*, *United States v. Howard*, 766 F.3d 414, 421 (5th Cir. 2014) ("Travel to a meeting place is, therefore, sufficient to establish attempt."). Far from being sufficient, travel is actually irrelevant to the

substantial step element. As a district court explained after a thorough analysis of § 2422(b)'s text:

> [T]ravel ultimately has nothing to do with this crime. A § 2422(b) violation occurs, if at all, before any travel is undertaken; indeed, no travel is even necessary. The crime is complete with the persuasion or attempted persuasion, both of which are necessarily confined to the interstate communications between a defendant and the minor or an adult intermediary. Travel for a face-to-face meeting thus cannot be a substantial step because such face-to-face persuasion is not criminalized.

*United States v. Nitschke*, 843 F. Supp. 2d 4, 15 (D.D.C. 2011). It is the reasoning of *Nitschke*, which the D.C. Circuit approvingly cited in *Hite*, that this Court should ultimately adopt. And because travel, not explicit communications, was the basis for Syed's conviction, this case presents unique facts that make it a strong candidate for certiorari review.

## I. The circuits are in direct conflict over § 2422(b)'s meaning.

The circuits broadly agree that § 2422(b)'s purpose is to prohibit attempts to affect a minor's mental state online, not attempts to have sex with a minor. *See*, *e.g.*, *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007) ("Section 2422(b) criminalizes an intentional attempt to achieve a *mental* state – a minor's assent – regardless of the accused's

intentions vis-a-vis the actual consummation of sexual activities with the minor."); *United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) (same); *United States v. McMillan*, 744 F.3d 1033, 1036 (7th Cir. 2014) ("The essence of this crime is the defendant's effect (or attempted effect) on the child's mind."); *United States v. Berg*, 640 F.3d 239, 252 (7th Cir. 2011) ("The statute's focus is on the intended effect on the minor rather than the defendant's intent to engage in sexual activity."); *United States v. Hite*, 769 F.3d 1154, 1161 (D.C. Cir. 2014) ("§ 2422(b) is intended to prohibit acts that seek to transform or overcome the will of a minor"); *see also United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012) ("The primary evil that Congress meant to avert by enacting § 2422(b) was the psychological sexualization of children.…"). The Eleventh Circuit has made similar statements, but defines "induce" so broadly that it eviscerates the statute's focus on the minor's mental state.

### A. The Eleventh Circuit: "induce" includes "stimulate or cause."

The Eleventh Circuit first interpreted § 2422(b)'s "persuade[], induce[], entice[], or coerce[]" to also mean "stimulate or cause" in *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004). *Murrell* was the first § 2422(b) case in any circuit court involving an "adult

intermediary." In such cases, the defendant does not communicate directly with any minor or purported minor; instead, the defendant communicates with an adult, typically one who has influence over a minor, such as a parent or guardian. Murrell expressed an interest in sex with a minor in online communications with a detective posing as a minor's father. *Id.* at 1284-85. The Eleventh Circuit rejected his argument that § 2422(b) applies only to direct communications with a minor or a purported minor. Focusing on the statute's use of the word "induce," the court reasoned:

> "Induce" can be defined in two ways. It can be defined as "to lead or move by influence or persuasion; to prevail upon," or alternatively, "to stimulate the occurrence of; cause." The Am. Heritage Dictionary of the English Language 671 (William Morris ed., Houghton Mifflin Co. 1981). We must construe the word to avoid making § 2422 superfluous. To that end, we disfavor the former interpretation of "induce," which is essentially synonymous with the word "persuade." By negotiating with the purported father of a minor, Murrell attempted to stimulate or cause the minor to engage in sexual activity with him. Consequently, Murrell's conduct fits squarely within the definition of "induce."

*Murrell*, 368 F.3d at 1287 (some citation omitted). *Murrell* has gone on to become one of the most-cited § 2422(b) cases in any circuit.

### B. The D.C. Circuit: "induce" does not include "cause."

The D.C. Circuit rejected *Murrell*'s interpretation of § 2422(b) in *Hite*, 769 F.3d 1154. There, the trial court instructed the jury to convict if the defendant "intended to persuade an adult to **cause** a minor to engage in unlawful sexual activity." *Id.* at 1166 (quoting instruction; emphasis in *Hite*). This was reversible error. As the D.C. Circuit reasoned:

> [T]he preeminent characteristic of the conduct prohibited under § 2422(b) is transforming or overcoming the minor's will, whether through "inducement," "persuasion," "enticement," or "coercion." 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 1167.

Although the D.C. Circuit is the only circuit court to have specifically rejected the argument that "induce" includes "cause," other circuits have also interpreted § 2422(b) more narrowly than the Eleventh Circuit. *See*, *e.g.*, *United States v. Rashkovski*, 301 F.3d 1133, 1136 (9th Cir. 2002) ("'induce' is 'to move by persuasion or influence'") (quoting Merriam-Webster's Collegiate Dictionary (2002)).

## II. The Eleventh Circuit's holding is wrong and conflicts with the plain text of § 2422(b).

The most precise and thorough explanation of § 2422(b)'s text is in a district court opinion, *United States v. Nitschke*, 843 F. Supp. 2d 4 (D.D.C. 2011). The D.C. Circuit approvingly cited *Nitschke* in *Hite*, 769 F.3d at 1164. The court granted Nitschke's motion to dismiss the § 2422(b) attempt count against him, finding that the undisputed facts did not show either intent or a substantial step. The court first noted the broadly-accepted principle that "the intent criminalized by § 2422(b) is the intent to persuade, induce, entice, or coerce a minor, not the intent to have sex with a minor." *Nitschke*, 843 F. Supp. 2d at 11. The court further found that "[t]he intent to persuade … must be an intent to persuade using a means of interstate commerce," and therefore § 2422(b) "does not criminalize an intent to persuade at some later point in person." *Id.* Although the facts showed Nitschke "had a sexual interest in minors, they [did] not demonstrate an intent to entice or induce the fictitious minor via the internet." *Id.* at 14. "Simple interest in prepubescent sex – or even an intent to engage in such acts — cannot be enough to establish an intent to persuade…. [A] willingness and

desire to have sex does not demonstrate an intent to persuade a minor via the internet." *Id.*

*Nitschke*'s facts also did not show a substantial step. "A substantial step towards violating § 2422(b) must necessarily be a step towards persuading, enticing, inducing, or coercing a minor via a means of interstate commerce." *Nitschke*, 843 F. Supp. 2d at 15. Arranging a face-to-face meeting could not be a substantial step: "Later face-to-face persuasion … is not criminalized under § 2422(b); accordingly, arranging to meet for such persuasion cannot be a substantial step either." *Id.* Travel also could not be a substantial step: "Travel for a face-to-face meeting … cannot be a substantial step because such face-to-face persuasion is not criminalized." *Id.* at 16. The court found cases describing travel as a substantial step in dicta unpersuasive, because "travel ultimately has nothing to do with this crime," *id.*, and dismissed the § 2422(b) charge.

*Nitschke*, which the D.C. Circuit approvingly cited in *Hite*, 769 F.3d at 1164, itself adopted much of its reasoning from Judge Janice Rogers Brown's dissent in *United States v. Laureys*, 653 F.3d 27 (D.C. Cir. 2011). (Because Laureys did not properly raise the error Judge

Brown addressed, the majority reviewed for plain error and found none. Judge Brown dissented because she believed the error was plain.) Judge Brown argued that the Eleventh Circuit's opinion in *Murrell* was "on weak footing" because "[t]he *Murrell* panel mistakenly assumed § 2422(b) penalizes any attempt to solicit sex with a minor." *Id.* at 39. Judge Brown identified four reasons for "reject[ing] *Murrell*'s flawed reading of § 2422(b)." *Id.* at 41. First, defining "induce" to include "stimulate or cause" "is incompatible with that word's statutory context," because "'induce' only means 'cause' when its object is inanimate." *Id.* (citation omitted). Second, "induce" "is not 'essentially synonymous with the word 'persuade,'" and therefore is not superfluous in § 2422(b). *Id.* Third, Judge Brown looked to the statutory history, tracing § 2422(b)'s language to the Mann Act of 1910, "which used 'induce' and 'cause' in the same sentence." *Id.* at 42. Thus, Congress must have intended different meanings, and "induce" "does not simply mean 'cause,' but instead has in common with 'persuade,' 'entice,' and 'coerce' an element of mental force." *Id.* Finally, Judge Brown rejected *Murrell*'s argument that the purpose of § 2422(b) would be undermined by a narrow reading. Noting the panoply of other federal statutes

addressing sexual predators (including 18 U.S.C. § 2423(b), which specifically prohibits traveling in interstate commerce for the purpose of engaging in illicit sexual conduct), Judge Brown found that "Section 2422(b) is unique in targeting efforts to overbear the wills of children online." *Id.*

*Hite*, *Nitschke*, and Judge Brown's *Laureys* dissent are right, and *Murrell* is wrong. Section 2422(b) is a crime of persuasion, inherently accomplished through communication. The persuasion must take place in interstate communications, or in an attempt, the goal must have been to persuade through interstate communications.

The only relevant substantial steps for a § 2422(b) attempt are those toward achieving a minor's assent to engage in sexual activity through interstate communications. Substantial steps must always be toward the particular crime being charged. *See United States v. Farhane*, 634 F.3d 127, 148 (2d Cir. 2011) ("[I]mportant to a substantial-step assessment is an understanding of the underlying conduct proscribed by the crime being attempted.… [A] substantial step to commit a robbery must be conduct planned clearly to culminate in that particular harm.…"); *United States v. Smith*, 264 F.3d 1012, 1016

(10th Cir. 2001) ("The 'substantial step' … must be an act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime."). Thus, traveling to meet a minor is not a substantial step toward accomplishing a violation of § 2422(b). Having sex with a minor is not a § 2422(b) violation. The violation begins and ends when the minor is persuaded to have sex through use of interstate communications.

Similarly, setting up a time to meet someone in person is not a substantial step toward persuading a person to have sex through use of interstate communications. In this case, for example, there is no indication Syed was going to Samantha's apartment for the purpose of then using the internet to communicate with her; that would be absurd. Setting a meeting time might be a substantial step toward having sex, but having sex is not what § 2422(b) prohibits.

Circuit courts have offered varying interpretations of whether travel to meet a minor, or setting a meeting time, is necessary for a § 2422(b) substantial step, merely relevant to the substantial step inquiry, or sufficient by itself to establish a substantial step. But all of these interpretations are wrong. The Seventh Circuit's opinion in

*United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), by Judge Richard Posner, illustrates why. The court held that a defendant should have been acquitted under § 2422(b), even though he told a purported minor in an internet chat room "things like 'ill suck yoru titties' and 'ill kiss yrou inner thighs' and 'ill let ya suck me and learn about how to do that,'" *id.* at 650, and even though he "discussed the possibility of traveling to meet" the minor. *Id.* at 648. The court reasoned:

> In the usual prosecution based on a sting operation for attempting to have sex with an underage girl, the defendant after obtaining the pretend girl's consent goes to meet her and is arrested upon arrival. It is always possible that had the intended victim been a real girl the defendant would have gotten cold feet at the last minute and not completed the crime even though he was in position to do so. But there is a sufficient likelihood that he would have completed it to allow a jury to deem the visit to meet the pretend girl a substantial step toward completion.…
>
> Travel is not a sine qua non of finding a substantial step in a section 2422(b) case. The substantial step can be making arrangements for meeting the girl, as by agreeing on a time and place for the meeting. It can be taking other preparatory steps, such as making a hotel reservation, purchasing a gift, or buying a bus or train ticket, especially one that is nonrefundable.…

> 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.

*Gladish*, 536 F.3d at 648-50 (citation omitted). This would be a fine analysis, if § 2422(b) criminalized sex. But read this passage with an understanding that § 2422(b) criminalizes persuasion, and it is replete with errors. The defendant in Judge Posner's typical sting operation is guilty under § 2422(b) as soon as he "obtain[s] the pretend girl's consent." He has already "completed the crime," not just put himself in a position to do so. Buying a train ticket, whether it is nonrefundable or not, gets the defendant no closer to persuading the minor online. And in a § 2422(b) case, the substantial step almost has to be speech, because the crime itself is accomplished through speech. Rules that apply to bank robbery do not apply in the same way to a crime that inherently takes place through communication.

Syed is not arguing that traveling to meet a minor or setting up a meeting is completely irrelevant. It might be relevant, but only to the

intent element, not the substantial step element. And Syed is not arguing that a substantial step toward a § 2422(b) violation could only occur through interstate communications. The persuasion itself must occur or be intended to occur through interstate communications, but theoretically, someone could take a substantial step toward violating § 2422(b) by some other action preparatory to interstate communications.

Syed is also not arguing that § 2422(b) violates the Commerce Clause. Section 2422(b)'s plain text makes clear that it applies only to persuasion through interstate communications. Indeed, § 2422(b) most likely extends to less than the full extent of Congress's power in this area. But if the Eleventh Circuit's interpretation of § 2422(b) were to prevail, § 2422(b) likely would exceed Congress's Commerce Clause power. The fact of interstate communications is what gives Congress the power to regulate here at all. *See United States v. Mandel*, 647 F.3d 710, 716 (7th Cir. 2011) ("It is the use of a facility of interstate commerce which transforms what would otherwise be a state offense … into one that is within the federal government's authority under the Commerce Clause to proscribe and prosecute.") (discussing 18

U.S.C. § 1958(a)). "[T]he power to regulate commerce, though broad indeed, has limits." *United States v. Lopez*, 514 U.S. 549, 557 (1995) (citation and quotation marks omitted). The Court should interpret § 2422(b) in a way that avoids any constitutional infirmities. *See Jones v. United States*, 529 U.S. 848, 859 (2000) (interpreting 18 U.S.C. § 844(i) not to apply to arson of owner-occupied private residence not used in interstate commerce). Syed did not cross state lines when he went to meet Samantha, and did nothing criminal in his online communications with her.

Twenty years ago, § 2422(b) did not exist in any form. It became law as part of the Telecommunications Act of 1996. It is a regulation of interstate commerce, especially internet communications, not of sex. Some courts have lost sight of that constitutional imperative. The Court should grant the writ to establish that the D.C. Circuit's interpretation of § 2422(b) is the correct one.

## III. This case is an ideal vehicle for interpreting § 2422(b).

Section § 2422(b) cases usually involve sexually explicit communications plus travel, or less often, sexually explicit communications without travel. This case is unusual in that travel

alone was the primary basis for the conviction. It appears that no circuit court has addressed a § 2422(b) case involving online chats as tepid as those between Syed and Samantha. *But cf. United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (reversing conviction where defendant asked minor "u had sex with a guy," "u looking for younger or older," and "u free tonight"). The trial court, the circuit court, and the Government have all acknowledged that the evidence against Syed in the online chats themselves was weak at best. *See* Pet. App. 30a ("The Court acknowledges that, in fact, none of the 1006 text messages contains a specific request by the Defendant to Samantha for sex."); Pet. App. 10a ("Mr. Syed is correct that he did not explicitly ask Samantha to have sex with him or explicitly indicate his desire to have sex with her."); Appeal Brief of United States 34 ("[Syed's] communications with 'Samantha' did not explicitly set out his intent to have sex with her.").

Section 2422(b) convictions are often easy cases, in which the evidence of the defendant's guilt is overwhelming. "Easy cases at times produce bad law, for in the rush to reach a clearly ordained result, courts may offer up principles, doctrines, and statements that calmer

reflection, and a fuller understanding of their implications in concrete settings, would eschew." *Heckler v. Chaney*, 470 U.S. 821, 840 (1985) (Marhsall, J., concurring). That seems to be what has happened with § 2422(b). Defendants often use pornographic detail in their online attempts to persuade minors into sex. *See, e.g.*, *United States v. Yost*, 479 F.3d 815 (2007). It has not been necessary in such cases to think very hard about whether carrying condoms to an attempted meeting adds anything to the prosecution's case. Because the online chats here are relatively so anodyne, this case's facts put § 2422(b)'s meaning to the test.

## IV. Interpreting § 2422(b) correctly is important.

The use of the internet to facilitate sexual exploitation of children is a serious problem, and Congress has made fighting it a priority. The Internet Crimes Against Children task force program, which was involved in the operation that led to Syed's arrest, had a $27 million budget in 2014, and conducted more than 58,000 investigations that year, leading to more than 8,100 arrests. *See* http://www.ojjdp.gov/programs/progsummary.asp?pi=3. According to the U.S. Sentencing Commission, the guideline for a conviction under

§ 2422(b) was applied 275 times in fiscal 2014. *See* Use of Guidelines and Specific Offense Characteristics; Guideline Calculation Based (F.Y. 2014), available at http://goo.gl/P6TeVq. The stakes for defendants are high. Since enacting § 2422(b) as part of the Telecommunications Act of 1996, Congress has three times increased the penalty for violating it, from "not more than 10 years" imprisonment, to "not more than 15 years," to "not less than 5 years and not more than 30 years," to "not less than 10 years or for life." Syed was sentenced to nearly 25 years in prison.

Courts are getting § 2422(b) wrong, and in a way that will inevitably lead not only to wrongful convictions (like Syed's), but also to violators walking free. For example, in *United States v. Farley*, No. 3:14cr21, 2014 U.S. Dist. LEXIS 136454 (E.D. Va. Sept. 26, 2014), after a bench trial, the court found a defendant not guilty under § 2422(b), even though he "engaged in plainly reprehensible and sick conduct" online, because he "did not take any steps to meet any of the children with whom he talked." *Id.* at **7, 8 (citing *Gladish*, 536 F.3d at 650). *Farley* may have reached the right result, but at least this part of its reasoning is wrong. The government should not have needed to prove

that Farley took steps to meet children to secure a § 2422(b) conviction. Lower courts are confused. By granting the writ, the Court can clarify that § 2422(b) punishes attempted persuasion online, not attempted sex.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel of Record*

February 22, 2016

No. _____

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**In the Supreme Court of the United States**

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FAWAD SHAH SYED,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

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**Appendix to the Petition for Writ of Certiorari**

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**Appendix A**

Eleventh Circuit's opinion

Sept. 17, 2015

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 14-10350
Non-Argument Calendar

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D.C. Docket No. 1:13-cr-00061-JRH-BKE-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FAWAD SHAH SYED,
a.k.a. Daniel,

Defendant - Appellant.

---

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

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(September 17, 2015)

Before HULL, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Fawad Syed appeals his convictions and total 294-month sentence for one count of attempted online enticement of a minor, in violation of 18 U.S.C. § 2422(b); one count of destruction of records, in violation of 18 U.S.C. § 1519; and one count of attempted destruction of records, also in violation of 18 U.S.C § 1519.

On appeal, Mr. Syed contends that (1) the evidence was insufficient to show he took a substantial step toward violating § 2422(b); (2) the prosecutor committed misconduct warranting a new trial by misstating the law regarding § 2422(b); (3) the district court abused its discretion by admitting evidence of his prior online communications with two minors under Fed. R. Evid. 404(b)(2); and (4) the district court erroneously sentenced him by applying an enhancement under U.S.S.G. § 4B1.5(b)(1) for a pattern of prohibited sexual conduct. For the reasons that follow, we affirm.[1]

## I

Mr. Syed became the subject of an undercover law enforcement operation after a member of the FBI's Cybercrimes and Computer Exploitation Task Force posed as a 14-year-old female named "Samantha" on a mobile-based chat network. The chat network allowed users to communicate via the Internet using mobile

[1] Mr. Syed does not challenge his two § 1519 convictions or sentences, other than to argue in passing that the errors related to the § 2422(b) conviction infected the entire district-court proceeding. If we were to grant a new trial or resentencing on the § 2422(b) conviction, Mr. Syed argues that we should also grant a new trial or resentencing on the two destruction-of-records counts. Because we affirm the § 2422(b) conviction and sentence, Mr. Syed's request for relief on the § 1519 counts is denied as moot.

phones or other devices. The investigator used a photo of one of his female colleagues, taken when that colleague was 14 or 15 years old, to create a profile on the chat network.

Mr. Syed, under the user name "Daniel," contacted the investigator posing as Samantha on February 8, 2013. Samantha told Daniel that she was a 14-year old female who lived in Augusta, Georgia. Daniel responded that he was a 23-year-old male who also lived in Augusta. Daniel's chat network profile, however, said he was 31 years old. In reality, Mr. Syed was 46 years old and married at the time.

Daniel asked Samantha for her phone number, and the two began sending one another text messages. Both Daniel and Samantha used Google Voice—an Internet application that allows users to communicate via telephones—for text messaging. The investigator determined that Daniel's phone number was associated with two names; one was fictitious, and the other was Mr. Syed.

Over the next four days, Daniel and Samantha texted one another. Daniel's text messages never explicitly asked Samantha to have a sexual relationship, but he did send a number of text messages complementing Samantha's maturity, asking about Samantha's previous romantic or intimate experiences, and stating that if they ever wanted to get intimate in the future, it would be down the road. He called her "sweetie" and "babe." He asked about whom she lived with and told her

that he did not want her father or her friends to know about their communications. Daniel asked to speak with Samantha by phone, and one of the investigator's female colleagues posed as Samantha during the call.

Daniel asked several times when he and Samantha could meet. On February 11, 2013, Daniel and Samantha agreed to meet the next day at Samantha's apartment. Later on February 11, Daniel asked to meet Samantha late that night, saying that he was being spontaneous and called it a "good surprise." He offered to drink with her and wanted to see if they would "have the same chemistry in person as [they did] on the phone." Samantha agreed that Daniel could come over to her apartment, where she was alone at the time, and gave him directions.

Mr. Syed arrived at Samantha's apartment that night with his iPhone. In one hand, he held a grocery store bag containing a pint-sized can of beer and a six-pack of Mike's Lite Hard Lemonade, which he had purchased on the way. In the other hand, he held a can of pepper spray "with [his] finger on" the can. He also had three condoms in his pocket.

Authorities arrested Mr. Syed. He called his wife and asked her to remotely wipe his iPhone and to delete his Google account. A federal grand jury charged Mr. Syed with one count of attempted online enticement of a minor under § 2422(b), and two counts of destruction of records and attempted destruction of records, both under § 1519.

At trial, the government introduced evidence of two prior instances where Mr. Syed had purportedly committed the same crime. First, Mr. Syed's now ex-wife testified that she had met him in an AOL chat room in 2000 when she was 17 years old, that he used the fake name Daniel, that he lied about his age, and that they had sex on the first day they met, which was approximately one week after they had begun texting. Second, the government recovered chats from 2012 on Mr. Syed's computer between Mr. Syed and a 13-year-old female. In the conversations with the 13-year-old, Mr. Syed again lied about his age, asked her what her turn-ons were, told her that she sounded mature, called her "my love," discussed meeting in person, planned to meet in a cemetery, told her to come alone, and told her to delete her chat account before they met in person. Mr. Syed was upset after the 13-year-old female met him and then shortly left. He texted her that it was "not cool" that she had to leave and that he had borrowed his sister's van "for nothing." He then asked whether they could meet in the future.

Mr. Syed was convicted on all three counts by a jury less than one hour after the trial ended and deliberations began. The district court sentenced Mr. Syed to 294 months on the § 2422(b) conviction, and 240 months on each § 1519 conviction, all to run concurrently. He now appeals.

## II

Mr. Syed argues that the evidence was insufficient to prove that he took a substantial step toward violating § 2422(b) because, in his online communications with the investigator who posed as 14-year-old Samantha, he did not ask Samantha to have sex with him or try to persuade her to do so. He argues that a violation of § 2422(b) begins and ends online, because § 2422(b) criminalizes using the Internet as a tool to entice a minor to engage in sexual activity, but it does not criminalize using the Internet as part of an attempt to engage in sexual activity with a minor. Thus, Mr. Syed argues that his travel to meet Samantha was not a substantial step toward violating § 2422(b) because it did not occur online.

### A

We review challenges to the sufficiency of the evidence *de novo*, and ordinarily "ask whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *See United States v. House*, 684 F.3d 1173, 1196 (11th Cir. 2012) (internal quotation marks and citation omitted). Where a defendant, however, "presents his case after denial of a motion for judgment of acquittal and then fails to renew his motion for judgment of acquittal at the end of all of the evidence, we review the defendant's challenge to the sufficiency of the evidence for a manifest miscarriage of justice." *Id.* (internal quotation marks, citation, and alterations omitted). Under the manifest miscarriage of justice

standard, we are required to affirm Mr. Syed's § 2422(b) conviction unless "the evidence on a key element of the offense is so tenuous that the conviction is shocking." *Id.* (internal quotation marks, citation, and alterations omitted). All evidence must be viewed in the light most favorable to the government, and we must accept all reasonable inferences and credibility determinations supporting the jury's verdict. *Id.*

The online enticement statute under which Mr. Syed was convicted states:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can 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) (emphasis added).

A defendant may be convicted of an attempt under § 2422(b) based on conduct directed toward a fictitious minor. *See United States v. Root*, 296 F.3d 1222, 1227 (11th Cir. 2002), *superseded on other grounds as recognized in United States v. Jerchower*, 631 F.3d 1181, 1186-87 (11th Cir. 2011). To convict Mr. Syed of an attempt under § 2422(b), the government must have shown that Mr. Syed (1) had the required intent to commit the charged crime, and (2) took actions that constituted a "substantial step" toward the commission of the crime. *See United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007).

To prove intent under § 2422(b), the government must show "that the defendant intended to cause assent on the part of the minor, not that [the defendant] acted with the specific intent to engage in sexual activity." *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010) (internal quotation marks and citation omitted). To prove the requisite conduct, the government must show "that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact." *Id.* The government shows that the defendant took a substantial step when the defendant's objective acts mark his conduct as criminal and, as a whole, strongly corroborate the required culpability." *Yost*, 479 F.3d at 819 (internal quotation marks and citation omitted).

We have explained that the very nature of persuading, inducing, or enticing engagement in unlawful sexual activity "necessarily contemplates oral or written communications as the principal if not the exclusive means of committing the offense." *United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010) (affirming the district court's sentence enhancements for § 2422(b)-type conduct because the defendant's chats instructed adults on how to molest young children and persuade the children to comply with the abuse). When determining whether the record supports a finding that the defendant took a substantial step in furtherance of a § 2422(b) violation, however, we look at the totality of the defendant's conduct. *See Lee*, 603 F.3d at 916.

**B**

We review Mr. Syed's sufficiency challenge only for a manifest miscarriage of justice because, while he moved for a judgment of acquittal on the § 2422(b) count at the close of the government's case, he failed to review his motion at the close of all the evidence. *See House*, 684 F.3d at 1196. Because Mr. Syed has not shown that the evidence on a key element of the crime—here, whether he took a substantial step—was so tenuous that his conviction was shocking, he has failed to meet his burden to show that a manifest miscarriage of justice occurred.

As previously stated, we apply a totality-of-the-circumstances analysis when determining whether a defendant has taken a substantial step toward violating § 2422(b). In prior cases, we have looked at both online and offline conduct, including a defendant's arrangement to meet a targeted minor and his arrival at the designated time and place. *See, e.g.*, *United States v. Lanzon*, 639 F.3d 1293, 1299 (2011); *Yost*, 479 F.3d at 819-20; *United States v. Murrell*, 368 F.3d 1283, 1288 (11th Cir. 2004); *Root*, 296 F.3d at 1228.

Mr. Syed is correct that he did not explicitly ask Samantha to have sex with him or explicitly indicate his desire to have sex with her. But looking at the totality of the circumstances, we do not believe that the evidence is so tenuous that his conviction is shocking. Mr. Syed (1) exchanged more than 1,000 messages

with Samantha over the course of several days, (2) employed "grooming" tactics,[2] which a law-enforcement expert testified at trial were common in child-exploitation cases, (3) arranged to meet Samantha alone at her apartment, and (4) arrived at Samantha's apartment carrying alcohol, condoms, and pepper spray. A reasonable jury could have concluded that Mr. Syed took a substantial step, marking his actions as criminal and corroborating his intent to encourage Samantha to have sex with him.

We express no view as to whether, under a *de novo* review, a defendant violates § 2422(b) when his Internet communications do not explicitly ask the minor child for sex or indicate a desire to engage in sex with the minor. We hold only that, where a defendant engages in online grooming techniques, such as the ones Mr. Syed used here, makes online arrangements to meet, and actually travels to see the minor child while carrying alcohol, condoms, and pepper spray, a defendant's conviction under § 2422(b) is not a manifest miscarriage of justice. *Cf. United States v. Cramer*, 777 F.3d 597, 602 (2d Cir. 2015) (holding that sentencing enhancement for use of a computer to entice a minor to engage in prohibited sexual conduct under U.S.S.G. § 2G1.3(b)(3) is proper even where the

[2] A law enforcement officer testified that "[g]rooming is behavior that's designed to either befriend or establish an emotional control with a young person to try to lower their inhibitions for the purpose of sexual assault or sexual exploitation of a child." Grooming involves six techniques: (1) targeting a child; (2) gaining access to the child; (3) isolating the child from their friends and family; (4) fulfilling the child's emotional needs; (5) desensitizing the child to pornography or alcohol; and (6) controlling the meeting with the child to engage them in a sexually explicit activity.

"enticement itself does not take place using a computer"); *United States v. Lay*, 583 F.3d 436, 447 (6th Cir. 2009) (holding that § 2G1.3(b)(3) sentencing enhancement "may be applied even if the defendant did not send specific sexual requests by computer" because "[e]nticement does not require crude specification of intent").

**III**

Mr. Syed contends that the prosecutor misstated the law when she argued during her opening and closing statements that his arrangements to meet and travel to see Samantha were a substantial step toward violating § 2422(b). Without these comments, he argues, there is a reasonable probability he would have been acquitted.

We review preserved prosecutorial misconduct claims *de novo*. *See United States v. Schmitz*, 634 F.3d 1247, 1259 (11th Cir. 2011). Where the defendant fails to object at trial to an alleged instance of misconduct, however, we review only for plain error. *Id.* Under plain error review, a defendant must show that (1) an error occurred, (2) the error was plain, (3) the error affected his substantial rights, and (4) the error "seriously affected the fairness of the judicial proceedings." *Id.* at 1268.

Mr. Syed did not object to the prosecutor's comments at trial. Thus, we review his prosecutorial misconduct claim for plain error. "It is the law of this

circuit that, at least where the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it." *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003).

Here, the explicit language of § 2422(b) does not specifically address whether arrangements to meet and travel to see a minor child can be a substantial step toward violating the statute. Nor does the text expressly indicate that the online enticement of the minor need be sexually explicit or that the sexual propositioning must exclusively occur online. Further, neither the Supreme Court nor we have directly resolved this issue in Mr. Syed's favor. If anything, our prior precedent has acknowledged that offline conduct can form part of the basis for a substantial step. *See, e.g.*, *Lanzon*, 639 F.3d 1299; *Yost*, 479 F.3d at 819-20; *Murrell*, 368 F.3d at 1288; *Root*, 296 F.3d at 1228. Thus, there is no plain error.

**IV**

Mr. Syed asserts that the district court abused its discretion in admitting evidence of his prior online communications with two females who were minors at the time: (1) his now ex-wife, with whom he communicated in 2000, when she was 17 years old; and (2) a 13-year-old female, with whom he communicated in 2012.

Mr. Syed acknowledges that the district court admitted his prior communications because they were probative of his intent and modus operandi.

He argues, however, that his communications with his ex-wife were too old to be probative of his intent, because people have changed the way they communicate online in the last 13 years. He contends that his communications with the 13-year-old female were not probative because they did not show that he intended to persuade her to have sex with him. Mr. Syed also asserts that modus operandi was not a valid justification for admitting the evidence because his identity was not at issue. Mr. Syed also maintains that the district court should have excluded evidence of both communications because their probative values were substantially outweighed by their unfair prejudicial effects.

**A**

We review a district court's evidentiary rulings for abuse of discretion. *See United States v. Jiminez*, 224 F.3d 1243, 1249 (11th Cir. 2000). A district court abuses its discretion when it "applies an incorrect legal standard or makes findings of fact that are clearly erroneous." *See United States v. Wilk*, 572 F.3d 1229, 1234 (11th Cir. 2009).

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Such evidence, however, "may be admissible for another purpose, such as proving motive, opportunity,

intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

Rule 404(b) evidence is not admissible unless (1) it is "relevant to one of the enumerated issues and not to the defendant's character," (2) "the prior act [is] be proved sufficiently to permit a jury determination that the defendant committed the act," and (3) "the evidence's probative value cannot be substantially outweighed by its undue prejudice, and the evidence must satisfy Rule 403." *United States v. Chavez*, 204 F.3d 1305, 1317 (11th Cir. 2000). A court may exclude relevant evidence under Rule 403 "if its probative value is substantially outweighed by a danger" of "unfair prejudice, confusing the issues, [or] misleading the jury," among other reasons. Fed. R. Evid. 403.

We have recognized that Rule 403 is "an extraordinary remedy to be used sparingly." *United States v. Meester*, 762 F.2d 867, 875 (11th Cir. 1985). The rule "is meant to . . . permit the trial judge to preserve the fairness of the proceedings," but not to "permit the court to 'even out' the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none." *Id.* A district court's evidentiary ruling under Rule 403 is "reviewable only for clear abuse." *Id.*

In determining whether evidence is probative of a defendant's intent, a district court should consider the amount of time separating the extrinsic and charged offenses, as temporal remoteness depreciates the probative value of the

extrinsic evidence. *See United States v. Beechum*, 582 F.2d 898, 915 (11th Cir. 1978) (en banc). A district court, however, has broad discretion in determining whether an extrinsic offense is too remote to be probative. *See United States v. Pollock*, 926 F.2d 1044, 1047-48 (11th Cir. 1991) (holding that a five-year gap was not an abuse of discretion, but citing other cases where a 10-year gap was past the outer limits of the court's discretion). *See United States v. San Martin*, 505 F.2d 918, 922-23 (5th Cir. 1974) (explaining that, when introducing evidence of prior crimes to show intent, "[t]he test for remoteness . . . cannot[] be a simple rule of thumb based solely on the number of years that have elapsed" and that "prior crimes involving deliberate and carefully premeditated intent . . . are far more likely to have probative value with respect to later acts" than spontaneous crimes).

**B**

Here, the district court did not abuse its discretion in determining that Mr. Syed's prior online communications with his ex-wife and the 13-year-old female were relevant to his intent in the instant case.[3] The prior communications were relevant to Mr. Syed's intent to communicate with an actual minor child, as he met both his ex-wife and the 13-year-old female in person when they were minors. Although Mr. Syed does not dispute on appeal that he believed Samantha was

[3] Because we conclude that the district court did not abuse its discretion in admitting the evidence as relevant to Mr. Syed's intent, we need not decide whether it was also admissible as evidence of modus operandi.

actually a minor child, he disputed the issue at trial. In addition, the prior communications were probative as to whether Mr. Syed's intent in the instant case was merely to establish a friendship with Samantha, as he claimed at trial, or whether he was interested in establishing a sexual relationship after attempting to entice her.

First, Mr. Syed has not demonstrated that the district court abused its discretion in determining that his communications with his ex-wife were probative, notwithstanding the passage of time. *See Pollock*, 926 F.2d at 1047. Although the conversations may have been more than 10 years old, and methods of online communication may have changed, in both his communications with his ex-wife and Samantha Mr. Syed used the same false name (Daniel), lied about his age, and said he wanted to meet in person to see if they had "chemistry." Mr. Syed's communications with his ex-wife were particularly probative, in that, according to her trial testimony (but not Mr. Syed's), Mr. Syed had sex with her the day they first met, which was one week after they began communicating online.

Second, Mr. Syed has not shown that the district court abused its discretion in determining that his communications with the 13-year-old female were probative of his intent. While the communications did not explicitly solicit sex, they contained a discussion of sexual "turn-ons." The communications showed Mr. Syed had employed "grooming" tactics—including complimenting the minor

on her maturity, discussing the topic of sex, and seeking to meet her when she was alone—the same tactics Mr. Syed employed as Daniel with Samantha.

Given that both conversations were highly probative of Mr. Syed's intent, Mr. Syed has not shown that the district court committed clear abuse in determining that the probative value of the evidence was not substantially outweighed by the risk of undue prejudice. *See Meester*, 762 F.2d at 875. The district court explicitly considered the issue, determined that the evidence was highly probative, and ruled it should be admitted. The court also gave the jury a limiting instruction to minimize the risk of prejudice. In short, the district court did not abuse its discretion in admitting the evidence to show Mr. Syed's intent.

**V**

At sentencing, Mr. Syed objected to a sentencing enhancement for a pattern of prohibited sexual conduct under U.S.S.G. § 4B1.5(b)(1), based on his communications with his then-minor ex-wife and the 13-year-old female. He argued that it would violate his Sixth Amendment rights to apply the sentencing enhancement when he was never convicted of a prior offense of prohibited sexual conduct. He conceded that his conversations with the 13-year-old female involved sexual turn ons, but he argued that they did not discuss meeting to have sex. The district court overruled Mr. Syed's objection, finding that his conduct with the 13-year-old female and his then minor ex-wife both satisfied the enhancement's

requisites. With the five-level enhancement, Mr. Syed had a total offense level of 39, a criminal history category of I, and a resulting Guidelines range of 262-327 months. The district court sentenced Mr. Syed to a total of 294 months.

On appeal, Mr. Syed argues that the district court erred by concluding that his prior communications with his then minor ex-wife and the 13-year-old female were prior instances of prohibited sexual conduct under § 4B1.5(b)(1) enhancement.[4] Mr. Syed concedes on appeal that his initial interactions with his then-minor ex-wife might have constituted some crime, but he argues that they were not the crime of online enticement of a minor. Regarding the 13-year-old female, Mr. Syed argues that his communications were not a prior occasion of online enticement with a minor because he did not try to persuade her to have sex with him. "At most, there was evidence of one prior instance of prohibited sexual conduct," but he argues that is insufficient to be a pattern.

We review purely legal questions involving the Sentencing Guidelines issues *de novo*, factual findings for clear error, and the district court's application of the Guidelines to the facts with due deference. *See Rothenberg*, 610 F.3d at 627 (holding that the "due deference" standard is subject to clear error review) (internal quotations omitted). For clear error to exist, we "must be left with a definite and

[4] Mr. Syed does not argue on appeal that the district court violated his Sixth Amendment rights by applying the § 4B1.5(b)(1) enhancement for conduct that did not result in an actual conviction. Thus, the issue is abandoned and we will not consider it. *See United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003).

firm conviction that a mistake has been committed." *Id.* Thus, "[w]here there are two permissible view of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Saingerard*, 621 F.3d 1341, 1343 (11th Cir. 2010).

The Guidelines provide a five-point offense-level increase for repeat and dangerous sex offenders against minors:

> In any case in which the defendant's instant offense of conviction is a covered sex crime, neither [the career-offender enhancement in] § 4B1.1 nor [the repeat-offender enhancement in § 4B1.5(a)] applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct.

U.S.S.G. § 4B1.5(b)(1). The Guidelines define "covered sex crime" and "prohibited sexual conduct" to include convictions under § 2422. *See id.* § 4B1.5 cmt. n.2(A)(iii) (including offenses under Chapter 117 of title 18 of the United States Code); *id.* § 4B1.5 cmt. n.4(A)(i) (same).

The Guidelines commentary states that a "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." *Id.* § 4B1.5 cmt. n.4(B)(i). A prior instance can be considered an occasion of prohibited sexual conduct even if it did not occur during the instant offense or did not result in a conviction. *See id.* § 4B1.5 cmt. n.4(B)(ii). Where the defendant's instant conviction qualifies as prohibited sexual conduct, the district court need find only

one additional qualifying instance to constitute a "pattern of activity" and apply the § 4B1.5(b)(1) enhancement. *See Rothenberg*, 610 F.3d at 625 n.5.

Here, the evidence supported the district court's determination that Mr. Syed's communications conduct with the 13-year-old female constituted an attempt that would violate § 2422(b), thus qualifying as an instance of prohibited sexual conduct under § 4B1.5(b)(1). Specifically, the trial evidence showed that, in his conversations with the 13-year-old female, Mr. Syed asked about her turn ons (and asked her to elaborate on some sexual turn ons), called her "my love," arranged to spend time with her in a cemetery, and asked her to come alone. The text messages indicated that Mr. Syed arrived at the scheduled time and place, and the 13-year-old female left shortly after her arrival. Mr. Syed was upset and texted her that he had borrowed his sister's van "for nothing" before asking if they could meet another time. Given the due deference owed to the district court, this one instance, combined with the instant conviction involving the fictitious Samantha, supported the district court's § 4B1.5(b) enhancement. *See Rothenberg*, 610 F.3d at 625 n.5.[5]

[5] Thus, we need not determine whether Mr. Syed's conduct with his ex-wife also supported the enhancement.

## VI

For the reasons discussed above, Mr. Syed's convictions and total sentence are affirmed.

**AFFIRMED.**

**Appendix B**

Eleventh Circuit's orders respecting rehearing

Nov. 23, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 14-10350-BB

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FAWAD SHAH SYED,
a.k.a. Daniel,

Defendant - Appellant.

---

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

---

BEFORE: HULL, JORDAN and ROSENBAUM, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Appellant FAWAD SHAH SYED is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 14-10350-BB

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FAWAD SHAH SYED,
a.k.a. Daniel,

Defendant - Appellant.

---

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

---

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

BEFORE: HULL, JORDAN and ROSENBAUM, 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:

UNITED STATES CIRCUIT JUDGE

ORD-42

**Appendix C**

Transcript, District Court's order

Sept. 3, 2013

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF GEORGIA**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **1:13CR00061** |
| | ) | |
| **Fawad Shah Syed,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| _____ | ) | |

**JURY TRIAL**
**BEFORE THE HONORABLE J. RANDAL HALL**
**TUESDAY, SEPTEMBER 3, 2013; 9:08 A.M.**

**AUGUSTA, GEORGIA**

**FOR THE GOVERNMENT:**

Nancy C. Greenwood, A.U.S.A.
U.S. Attorney's Office
600 James Brown Blvd., Ste. 200
Augusta, Georgia 30903
(706) 724-7728

**FOR THE DEFENDANT:**

Michael Travis Saul, Esquire
699 Broad Street, Suite 1010
Augusta, GA 30901
(706)724-1896

**COURT REPORTER:**

Lisa H. Davenport, RPR, FCRR
Post Office Box 5485
Aiken, South Carolina 29804
(706)823-6468

when you're older down the road."

So my client never once tried to coerce sex, tried to induce sex, never once tried to persuade sex, and that's what he's charged with -- sexual activity that would constitute statutory rape or child molestation. He was, in fact, the one saying that's not going to happen. For that reason, we ask Your Honor to grant the motion.

THE COURT: Very well. Give me a few minutes. Let me go back and review the evidence in light of the motion.

MR. SAUL: Judge, could we have a 10-minute bathroom break?

THE COURT: Oh, yeah. It'll probably take me 10 or 15 minutes. Just try to be back here at 11 o'clock.

(A break is taken.)

THE COURT: Before the Court is the Defendant's motion under Federal Rule of Civil Procedure 29 for judgment of acquittal on Count One which is the charge of attempted online enticement of a minor. While in the Defendant's argument he does not address the issue of whether the Defendant knew or believed the age of Samantha, the online persona, was under the age of 18, the Court will address that issue as part of its ruling on this motion.

Now, for purposes of the record and for the purposes of the Court's discussion on the motion, the Court notes that the role of the Court is simply to decide whether the evidence

viewed in the light most favorable to the Government is sufficient for a rational trier of fact to find guilt beyond a reasonable doubt. It is not the Court's duty or responsibility to assess the credibility of witnesses, to weigh the evidence, or to draw inferences of facts from the evidence.

With that standard in mind, then, on the issue of knowledge of age, the Court finds that the evidence does establish that Samantha told the Defendant her age on more than one occasion in the text messages. The Defendant's expressions of doubt or skepticism as to age can be read in one of two ways. One is real doubt or skepticism or just an attempt to appeal to Samantha's maturity as a means of building up her self-confidence in his statue with her.

One specific example from the evidence is a text message where he asked her how she could get into an R-rated movie -- a question that would not be prompted unless you believed someone was under the age of 18. Therefore, clearly, on the issue of his belief or knowing belief that Samantha was under the age of 18, there is sufficient evidence for a rational trier of fact to find guilt on that element.

Now, let's move in to the real basis for the Defendant's motion and that is insufficient evidence to find guilt on the issue of enticement -- specifically, the Defendant's assertion that there is a lack of evidence on whether the Defendant was using the computer or other instrument of interstate commerce

for purposes of enticing Samantha or coercing Samantha or inducing Samantha to engage in sexual activity such that it would be a violation of Georgia state law.

The Defendant argues that no one text says that the Defendant wants to have sex with Samantha. He further argues that no witness can identify or did identify one text showing the Defendant enticed sex. The Court acknowledges that, in fact, none of the 1006 text messages contains a specific request by the Defendant to Samantha for sex. Nevertheless, the Court does find that in looking at the totality of the messages that a rational trier of fact could, in fact, find guilt on the issue of enticement, inducement, or coercion for sex.

Specifically, the Court heard and reviewed text messages that contained initial questions regarding the home status with a particular interest on frequent absences by Samantha's father. The Defendant sent a text that asked her a personal question -- "So when was the last time you had a boyfriend" -- and other messages that indicated an interest level in her boy relationships or lack thereof. The Court reviewed a text message that the Defendant stated -- rather, Samantha stated a fear of her father finding out she was talking to a much older guy. The Court reviewed a message where the idea of a meeting was initiated by the Defendant. The Court heard a text message where the Defendant expressed concern with others knowing about

a relationship. The Court also reviewed a message where the Defendant stated that he was -- that "thinking about dating" -- not meeting or talking or chilling, but dating -- and those are the Court's words, but the word "dating" is the Defendant's word -- "an ex-Marine's daughter is a scary thought."

The Court also heard a text message where the Defendant stated that had been told that his skin was very soft for a guy, but he quickly stated, "No, I am not implying that in a sexual manner." The Court heard a question from the Defendant about, "What are your best features? What do you get most complimented on?" When Samantha responded, "My legs because I run a lot," The Defendant responded, "Okay. I was hoping you'd mention a body part that I would be able to see when we meet."

The Court notes that this exchange then began a series of more intimate questions and conversations between the Defendant and Samantha. He asked, "On a scale of ten, how romantic are you?" He then clarified what he meant and said he wasn't referring to anything sexual. He then asked a 14 -- he then asked Samantha, a persona of a 14-year-old girl, whether she likes to drink alcohol. He further asked after the alcohol question, "Elaborate on what you said about little intimacy in your past relationship." He then left the idea of future intimacy on the table. The Court then detected that he appeared to become more aggressive in his messages, specifically as to a meeting when he sensed Samantha's interest

might be waning.

The Court further heard testimony from FBI Agent Brian Ozden as to the issue of grooming and finds that the totality of the 1006 messages does reflect all six aspects of grooming that were identified by Agent Ozden. In ruling on this motion, then, the Court finds that the proof is really in the pudding and that is the Defendant arrived at an apartment to meet a 14-year-old girl who he believed was alone, armed with alcohol and condoms, and he used an instrument of interstate commerce -- in this case a smart phone and a computer -- to arrange that meeting.

Based upon these findings, then, the Court finds as a matter of law that this evidence viewed in the light most favorable to the Government is sufficient for a rational trier of fact to find guilt beyond a reasonable doubt on Count One. The Defendant's motion for a judgment of acquittal is denied.

With that, then, Mr. Saul, do you have witnesses? Do you wish to proceed? What is your plan now for the trial?

MR. SAUL: Yes, Judge, I'd call my client to the stand.

THE COURT: All right. So you do wish to call the Defendant?

MR. SAUL: Yes.

THE COURT: Let's recall the jury then.

CERTIFICATE OF OFFICIAL REPORTER

I, Lisa H. Davenport, Federal Official Court Reporter, in and for the United States District Court for the Southern District of Georgia, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Lisa H. Davenport
2014.11.14 21:59:52 -05'00'

Lisa H. Davenport, RPR, FCRR
Federal Official Court Reporter

**Appendix D**

Judgment and sentence

Jan. 23, 2014

GAS 245B (Rev. 09/11) Judgment in a Criminal Case
DC Custody TSR Sheet 1



# UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA
v.
Fawad Shah Syed, aka "Daniel"

**JUDGMENT IN A CRIMINAL CASE**

Case Number: 1:13CR00061-1
USM Number: 17946-021
M. Travis Saul
Defendant's Attorney

## THE DEFENDANT:

☐ pleaded guilty to Count(s)

☐ pleaded nolo contendere to Count(s) which was accepted by the court.

☒ was found guilty on Counts 1, 2, and 3 after a plea of not guilty.

*The defendant is adjudicated guilty of these offenses:*

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 2422(b) | Attempted online enticement of a minor | February 11, 2013 | 1 |
| 18 U.S.C. § 1519 | Destruction and alteration of records in a federal investigation | February 12, 2013 | 2 |
| 18 U.S.C. § 1519 | Attempted destruction and alteration of records in a federal investigation | February 12, 2013 | 3 |

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on Count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

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 material changes in economic circumstances.

January 21, 2014
Date of Imposition of Judgment

Signature of Judge

J. Randal Hall
United States District Judge

Name and Title of Judge

1/23/2014
Date

DEFENDANT: Fawad Shah Syed
CASE NUMBER: 1:13CR00061-1

# IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 294 months. This term consists of terms of 294 months as to Count 1 and 240 months as to each of Counts 2 and 3, all to be served concurrently to produce a total term of 294 months.

☒ The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the defendant be evaluated by Bureau of Prisons officials to establish his participation in an appropriate program of substance abuse treatment and counseling during this term of incarceration. The Court further recommends that the defendant be designated to an appropriate Bureau of Prisons facility in Petersburg, Virginia, or Butner, North Carolina, in the alternative.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

# RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Fawad Shah Syed
CASE NUMBER: 1:13CR00061-1

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 10 years. This term consists of terms of 10 years as to Count 1 and 3 years as to each of Counts 2 and 3, to be served concurrently.

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 above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☒ 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. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, 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 in a manner and frequency directed by the court or probation officer;
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 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.
14) any possession, use, or attempted use of any device to impede or evade drug testing shall be a violation of supervised release.

DEFENDANT: Fawad Shah Syed
CASE NUMBER: 1:13CR00061-1

## SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of testing for drug and alcohol abuse. Further, the defendant shall not tamper with any testing procedure.

2. The defendant shall provide the probation officer with access to any requested financial information. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

3. A curfew is imposed as a special condition of supervised release. The defendant shall comply with the conditions of a curfew from 10:00 p.m. until 6:00 a.m. for the period of supervision. During this time, the defendant will remain at his place of residence at all times and shall not leave except when such leave is approved in advance by the probation officer.

4. The defendant shall attend and participate in a sex offender treatment program. The defendant shall abide by all rules, requirements, and conditions of the treatment program, to include random polygraph examinations. The costs of treatment shall be paid by the defendant in an amount to be determined by the probation officer, based on ability to pay or availability of third-party payment.

5. The defendant shall not possess, access, subscribe to, or view any videos, magazines, literature, photographs, images, drawings, video games, or Internet web sites depicting children or adults in the nude and/or engaged in sexual activity.

6. The defendant shall not have contact with anyone under the age of 18 unless accompanied by a responsible adult (approved by the probation officer) who is aware of the defendant's background and current offense. Contact is defined as person-to-person, over the telephone, through the mail, over the Internet, and third-party contact.

7. The defendant shall register as a sex offender with appropriate federal, state, and local authorities and shall comply with all registration requirements.

8. The defendant shall submit his person, property, house, residence, office, papers, vehicle, computers (as defined in 18 U.S.C. § 1030(e)(1)), or other electronic communications or data storage devices or media, to a search conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

9. The defendant shall not possess or use a computer with access to any on-line service at any location without prior written approval of the probation officer. This prohibition includes any Internet service provider, any bulletin board system, or any other public or private computer network. The defendant shall not possess or use any computer for employment purposes without prior approval of the probation officer. The defendant shall consent to third-party disclosure to any employer, or potential employer, of any computer-related restrictions imposed by the Court.

## ACKNOWLEDGMENT

Upon finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

DEFENDANT: Fawad Shah Syed
CASE NUMBER: 1:13CR00061-1

# CRIMINAL MONETARY PENALTIES

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

| | Assessment | Fine | Restitution |
|---|---|---|---|
| TOTALS | $300 | $6,000 | Not applicable |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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 |
|---|---|---|---|

| | | |
|---|---|---|
| TOTALS | $ _____ | $ _____ |

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* 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.

DEFENDANT: Fawad Shah Syed
CASE NUMBER: 1:13CR00061-1

# 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 $ 300 due immediately, balance due

☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or

**B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

**C** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

**D** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

**E** ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

**F** ☒ Special instructions regarding the payment of criminal monetary penalties:

While in the custody of the Bureau of Prisons, the defendant shall make payments of either quarterly installments of a minimum of $25 if working non-UNICOR or a minimum of 50 percent of monthly earnings if working UNICOR. Upon release from imprisonment and while on supervised release, the defendant shall make minimum monthly payments of $ 100 over a period of 60 months. Payments are to be made payable to the Clerk, United States District Court.

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.

Pursuant to 18 U.S.C. § 3572(d)(3), the defendant shall notify the Court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine.

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

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

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

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

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.