No. 14-10350-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FAWAD SHAH SYED,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Georgia, No. 1:13-cr-00061-JRH-BKE

APPELLANT'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under FRAP 26.1 and 11th Cir. Rule 26.1-2(e), Appellant Fawad Syed certifies that this is a complete list of the persons and entities with an interest in the outcome of this appeal:

Clark, Michael Andrew (Andy)

Durham, James D.

Greenwood, Nancy

Hall, Hon. J. Randal

Rafferty, Brian

Saul, Travis

Syed, Fawad Shah

Tanner, Brian

Tarver, Edward J.

FRAP 35(a) STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

United States v. Murrell, 368 F.3d 1283 (11th Cir. 2004);

United States v. Lee, 603 F.3d 904 (11th Cir. 2010); and

United States v. Rothenberg, 610 F.3d 621 (11th Cir. 2010).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one question of exceptional importance:

Under 18 U.S.C. § 2422(b), can an attempted online enticement conviction be supported by proof of a substantial step toward **engaging** in prohibited sexual activity (such as travel to meet a minor), or must there instead be a substantial step toward **persuading** a minor through interstate means to engage in sexual activity (such as sexually explicit online communications)?

/s/ Andy Clark
Andy Clark
Attorney of Record for Fawad Shah Syed

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STATEMENT OF THE ISSUE

Under 18 U.S.C. § 2422(b), can an attempted online enticement conviction be supported by proof of a substantial step toward **engaging** in prohibited sexual activity (such as travel to meet a minor), or must there instead be a substantial step toward **persuading** a minor through interstate means to engage in sexual activity (such as sexually explicit online communications)?

STATEMENT OF THE PROCEEDINGS

A jury found Fawad Shah 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. (Doc. 73.) He had moved for a judgment of acquittal (Tr. 296:17-299:7), which the district court denied. (Tr. 307:16.) He appealed to this Court, arguing: "Traveling to meet a minor is not a substantial step under § 2422(b)," because, "[w]hether 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 the internet, which is what § 2422(b) punishes." (Opening Br. at i.) On September 17, 2015, a three-judge panel of this Court affirmed Syed's convictions and sentence.

STATEMENT OF THE FACTS

The § 2422(b) charge against Syed was based on his text chats with Mark Dobbins, a sheriff's investigator. (Tr. 34:3-7.) Dobbins, in the persona of a fictitious 14-year-old girl named Samantha, exchanged text messages for several days with Syed, who used the name Daniel. (Tr. 36:4-13, 40:6-10.) The chats were read to the jury. (Tr. 74:19-112:18.)

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. (Tr. 77:17-18; 80:9-21.) The chats were sometimes flirtatious without being sexual. Syed called Samantha "sweetie" or "babe." (*E.g.*, Tr. 90:9, 102:19.) He mentioned the possibility of "dating" her. (Tr. 89:19.) The only body parts mentioned were hair, eyes, skin, legs, and Syed's chest. Syed asked Samantha about her looks only after she asked him about his. (Tr. 93:7-19.) When describing himself, Syed made clear that he did not mean for his comments to be interpreted as sexual: "Been told my skin is very soft for a guy and, no, I'm not implying that in a sexual way." (Tr. 93:9-11.)

Syed asked Samantha how "intimate" she had been with her last boyfriend (Tr. 95:25), and how "romantic" she was (Tr. 96:8), but clarified that he "wasn't referring to anything sexual." (Tr. 96:13.) After Samantha told him "[j]ust touching and kissing" (Tr. 97:13), Syed did not request any more details about her history of intimacy.

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. 101:13.) He said, "I'm just not sure about taking some of my clothes off on our first date." (Tr. 94:16-17.) When she asked where they should meet, Syed said, "Wherever. It doesn't matter." (Tr. 101:15.) 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. 107:22-24.) 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. 108:3-4.) He told her he had "no expectations at all" (Tr. 109:12-13) 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. 109:19-21.) It was Samantha

(*i.e.*, Investigator Dobbins), not Syed, who first suggested that they meet at Samantha's apartment. (Tr. 101:14, 317:7.)

Syed was arrested when he arrived at the apartment to which Samantha had directed him. He was carrying 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. (Tr. 113:24-114:5.)

ARGUMENT AND CITATIONS OF AUTHORITY

I. Introduction

This Court has repeatedly held that 18 U.S.C. § 2422(b) does not prohibit attempts to have sex with a minor. It prohibits attempts to persuade a minor, using interstate communications, to have sex. To sustain a § 2422(b) attempt conviction, "the government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact.… The statute criminalizes an intentional attempt to achieve a mental state – a minor's assent." *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010) (citation and quotation marks omitted).

The panel's decision here conflicts with this precedent. The jury's substantial step finding was supported, the panel stated, by evidence

that Syed "arranged to meet Samantha alone at her apartment, and … arrived at Samantha's apartment carrying alcohol, condoms, and pepper spray." (Panel Op. at 10.) That cannot be true. Traveling to meet a minor in person is not a substantial step toward causing her assent online. No one thinks Syed went to Samantha's apartment for the purpose of logging onto the internet there and using it then to persuade her into sex. Alcohol, condoms, and pepper spray have nothing to do with it. They might be tools for having sex, but they are not tools for "achiev[ing] a mental state" through interstate communications.

This Court has said several times that travel to meet a minor is not necessary for a § 2422(b) substantial step. *E.g.*, *United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010) (Section 2422(b) "contemplates oral or written communications as the principal if not the exclusive means of committing the offense"). Syed now asks the Court to clarify that travel alone is not sufficient. The unique facts of this case make it an excellent vehicle for addressing this important question. Undisputedly, "**Syed … did not explicitly ask Samantha to have sex with him or explicitly indicate his desire to have sex with**

her." (Panel Op. at 9; emphasis added.) That makes this case different from any other § 2422(b) conviction in this circuit's precedent.

The panel opinion applies a "totality of the circumstances" test, with no mooring in precedent, to the substantial step issue. (Panel Op. at 9.) This language crept into the Court's vocabulary beginning in *United States v. Yost*, 479 F.3d 815, 820 (2007). *Yost* cited no precedent for it, and there is none. No other circuit applies it, and this circuit has applied it only in § 2422(b) cases. It conflicts with the better-reasoned rule that what constitutes a substantial step depends on "the nature of the underlying offense to which the attempt is tied." *Rothenberg*, 610 F.3d at 627.

Syed's online communications alone could not possibly have sufficed for a § 2422(b) conviction. Because his travel to meet Samantha is irrelevant to the substantial step analysis, the evidence did not support his conviction, no matter what review standard is applied. Syed respectfully requests that the Court grant rehearing en banc.

II. The panel decision conflicts with circuit precedent holding that § 2422(b) punishes persuasion, not sex.

Section 2422(b) states:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, … knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in … any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be [punished].

The leading authority in this circuit on § 2422(b) is *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004). *Murrell* was the first case in any circuit court involving an "adult intermediary." The Court relied on the Sixth Circuit's decision in *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), where that court stated:

> While it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.

Id. at 639. The Court rejected Murrell's argument that "he could not have intended to induce a minor to engage in illegal sex acts without actually speaking to a person he believed to be a minor." *Murrell*, 368 F.3d at 1287. "The underlying criminal conduct that Congress expressly

proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself," and "[b]y negotiating with the purported father of a minor … Murrell's conduct fit[] squarely within the definition of 'induce.'" *Id.* at 1286, 1287. *Murrell* has been followed in dozens of cases around the country.

This Court reaffirmed the principles of *Murrell* in *Lee*, 603 F.3d 904. Lee "argue[d] that the government had to prove that he intended to travel to California to engage in sexual acts with the children." *Id.* at 914 (quotation marks omitted). The Court disagreed:

> With regard to conduct, the government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact. Section 2422(b) expressly proscribe[s] . . . the persuasion, inducement, enticement, or coercion of [a] minor to engage in illicit sexual activity, and not the sexual activity itself. The statute criminalizes an intentional attempt to achieve a mental state – a minor's assent.

Id. (citation and quotation marks omitted).

In *Rothenberg*, 610 F.3d 621, this Court went a step beyond *Murrell* and *Lee* in affirming a sentencing enhancement triggered by a § 2422(b) violation. Rothenberg only "coached and encouraged other adults," online, about how to sexually abuse minors. *Id.* at 625. There

was no suggestion in the chats at issue that Rothenberg himself would engage in any sexual activity. He argued that "mere talk or speech unaccompanied by some other form of overt conduct cannot constitute a substantial step." *Id.* at 626. The Court disagreed. Noting that whether an action constitutes a substantial step depends on "the nature of the underlying offense to which the attempt is tied," the Court held that "the very nature of the underlying offense – 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." *Id.* at 627.

One of the few courts to depart from the reasoning of *Murrell* was the Seventh Circuit in *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008). Understanding *Gladish* is useful because of its contrast with this circuit's decisions. *See Lee*, 603 F.3d at 921 (Martin, J., concurring in part and dissenting in part) (comparing *Gladish* to Eleventh Circuit cases). The court in *Gladish* held that the defendant should have been acquitted under § 2422(b), even though he told a purported minor "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,'" 536 F.3d at 650, and

even though he "discussed the possibility of traveling to meet" the minor. *Id.* at 648. Judge Posner, writing for the court, reasoned: "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." *Id.* at 650. This is wrong. Online enticement is inherently a crime of communication. The substantial step almost has to be speech, because the crime itself – persuasion – is accomplished through interstate speech.

The case that should be a roadmap for the Court's decision here is *United States v. Nitschke*, 843 F. Supp. 2d 4 (D.D.C. 2011). Relying heavily on this Court's decisions in *Murrell* and *Lee*, the court in *Nitschke* determined that § 2422(b) intent "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." *Nitschke*, 843 F. Supp. 2d at 11. Using interstate communications to arrange 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.* at 15. Travel also could not be a substantial step:

> **[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.

Id. at 16 (emphasis added). That is precisely the reasoning Syed asks the Court to adopt here. It is compelled by the reasoning of *Murrell*, *Lee*, and *Rothenberg*. The District of Columbia Circuit recently cited *Nitschke* with approval. *United States v. Hite*, 769 F.3d 1154, 1164 (D.C. Cir. 2014) (vacating § 2422(b) conviction). Until this case, this Court was never presented with a fact pattern that required the Court to consider the issue.

The panel's opinion emphasized that it was looking at the "totality of the defendant's conduct" in evaluating the substantial step evidence. (Panel Op. at 8.) This "totality" test originated in *Yost*, 479 F.3d 815,

which cited no authority for it. *Id.* at 820. No other circuit court applies such a totality test. Even in this circuit, it appears only to have been applied in § 2422(b) cases, and only a handful of those. It should be discarded. It conflicts with the rule that what constitutes a substantial step depends on "the nature of the underlying offense to which the attempt is tied." *Rothenberg*, 610 F.3d at 627. Elsewhere, the rule is that a substantial step "must be necessary to the consummation of the crime." *United States v. Spencer*, 439 F.3d 905, 915 (8th Cir. 2006) (citation and quotation marks omitted). *See also*, *e.g.*, *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1102 (9th Cir. 2011) (same); *United States v. Brand*, 467 F.3d 179, 202 (2d Cir. 2006) (same); *Bailey*, 223 F.3d at 640 (6th Cir. 2000) (same). That rule should apply here.

The panel opinion noted that "[i]n 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." (Panel Op. at 9.) This is true, but in each of those cases, there were sexually explicit interstate communications sufficient to sustain the convictions on their own. *See United States v. Lanzon*, 639 F.3d 1293, 1296 (11th Cir. 2011) (in a "text conversation," defendant said he

wanted "oral" and "hot passionate sex" with girl); *Yost*, 479 F.3d at 817-18 (11th Cir. 2007) (graphic Yahoo! chats); *Murrell*, 368 F.3d at 1285 (in phone conversation, defendant "expressed that he wanted to have oral sex and intercourse with [girl]"); *United States v. Root*, 296 F.3d 1222, 1224-26 (11th Cir. 2002) (graphic instant messages). Until now, the Court has never needed to grapple with the question of whether travel, without sexually explicit interstate communications, can sustain a § 2422(b) conviction. To the extent prior cases have described travel to meet a minor or making plans to meet a minor as a § 2422(b) substantial step, those statements are dicta. Because the panel opinion conflicts with circuit precedent holding that § 2422(b) criminalizes attempts to persuade, not attempts to have sex, the Court should grant rehearing en banc.

III. The interpretation of § 2422(b) is a question of exceptional importance.

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 (accessed Oct. 7, 2015). 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." The stakes for defendants are high. Syed was sentenced to nearly 25 years in prison. This Court has affirmed a life sentence for a § 2422(b) violation. *See United States v. Worsham*, 479 Fed. Appx. 200, 206 (11th Cir. 2012).

The Supreme Court has never addressed § 2422(b), leaving its interpretation to the circuit courts. With *Murrell*, this Court set a precedent that has been followed in most other circuits. The district court's decision in *Nitschke*, which the D.C. Circuit applied in *Hite*, built on this Court's precedent to determine that "travel ultimately has nothing to do with this crime." *Nitschke*, 843 F. Supp. 2d at 16. The Court should use this case to make clear that *Nitschke* was a correct interpretation of this Court's precedent.

The correct interpretation of § 2422(b) matters. 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. District courts are confused. By granting rehearing en banc, the Court can reaffirm that § 2422(b) punishes attempted persuasion online, not attempted sex.

CONCLUSION

Syed respectfully requests that the Court grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2015, I filed and served on all parties the foregoing Appellant's Petition for Rehearing En Banc using the Court's CM/ECF system, and by sending paper copies to counsel and the Court via third-party commercial carrier.

/s/ Andy Clark
Andy Clark

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-10350
Non-Argument Calendar

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

(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.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Amy C. Nerenberg
Acting Clerk of Court

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September 17, 2015

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 14-10350-BB
Case Style: USA v. Fawad Syed
District Court Docket No: 1:13-cr-00061-JRH-BKE-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, BB at (404) 335-6179.

Sincerely,

AMY C. NERENBERG, Acting Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion