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-Appellee.

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

APPELLANT'S OPENING BRIEF

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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.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Fawad Syed respectfully requests oral argument. This case depends on a tricky distinction in 18 U.S.C. § 2422(b). That law punishes attempting to persuade a minor to have sex through use of the internet. It does not punish attempting to have sex with a minor. To sustain a § 2422(b) attempt conviction, a defendant must have taken a substantial step, not toward having sex with a minor, but toward persuading a minor to have sex through use of the internet. Traveling to meet a minor is not a substantial step under § 2422(b), when properly understood. 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 the internet, which is what § 2422(b) punishes. *See United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010) (§ 2422(b) "contemplates oral or written communications as the principal if not the exclusive means of committing the offense").

This distinction has eluded some courts, including the trial court here. Oral argument will aid the Court in drawing this fine line.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because this is a direct appeal from a final judgment and sentence entered in the United States 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. The appeal is timely under FRAP 4(b) because Syed filed the notice of appeal on January 24, 2014 (Doc. 90), within 14 days of the January 23, 2014 judgment. (Doc. 89.)

STATEMENT OF THE ISSUES

I. Whether the evidence was insufficient to sustain the conviction, where attempted online enticement under 18 U.S.C. § 2422(b) requires a substantial step toward persuading a minor to engage in sexual activity using interstate communications, and Syed took no such step?

II. Whether the prosecutor committed prejudicial misconduct by repeatedly stating that Syed took a substantial step toward violating § 2422(b) by setting up a meeting with a minor and traveling to that meeting, when as a matter of law he did not?

III. Whether the trial court erred by admitting prior acts evidence under Rule of Evidence 404(b), where:

a. Syed's first meeting with his wife occurred 13 years prior to the alleged crime,

b. Syed's texts with a teenager could not show the relevant intent, because Syed did not persuade the teenager to have sex,

c. neither prior act could show modus operandi, because Syed's identity was not at issue, and

d. the unfairly prejudicial effect of the prior acts outweighed any probative value?

IV. Whether the trial court erred by applying a sentencing enhancement under U.S. Sentencing Guidelines Manual § 4b1.5(b), when there is no evidence that Syed "engaged in a pattern of activity involving prohibited sexual conduct"?

STATEMENT OF THE CASE

This is a direct appeal from a final judgment of conviction and sentence.

I. The Proceedings and Dispositions Below.

Syed is incarcerated. He was arrested on February 11, 2013, in Richmond County, Georgia. (Doc. 5 p. 8 ¶ 23.) He was indicted on charges of attempted online enticement of a minor (18 U.S.C. § 2422(b)), destruction and alteration of records in a federal investigation (18 U.S.C. § 1519), and attempted destruction and alteration of records in a federal investigation (*Id.*). (Doc. 19.)

Syed pled not guilty. (Doc. 25.) The United States filed notice of its intent to use Rule 404(b) evidence at trial (Doc. 55), to which Syed objected. (Doc. 60.) The court deferred ruling on the Rule 404(b) evidence until trial, when it admitted the evidence. (Tr. 182:5, 210:13.) At the close of the government's case, Syed moved under Federal Rule of Criminal Procedure 29 for a judgment of acquittal on the online enticement charge (Tr. 296:17-299:7), which the district court denied. (Tr. 307:16.) The jury returned verdicts of guilty on all three charges. (Doc. 73.)

The district court sentenced Syed to 294 months in prison on the online enticement charge, and 240 months on each of the destruction of evidence charges, the sentences to be served consecutively. (Doc. 89.) Syed filed a timely notice of appeal. (Doc. 90.)

II. Statement of the Facts.

A. Fawad Shah Syed.

At the time he was arrested, Syed was working as a contractor for the U.S. Army at Fort Gordon in Augusta, Georgia. (Tr. 308:21.) He has two children. (Tr. 309:10.) Other than a misdemeanor when he was a teenager, Syed had no criminal record before this case, and had never been arrested for or charged with a sex crime. (Tr. 309:1-8.)

Syed did not have roots in the Augusta area, so he often went online to meet people. (Tr. 312:5-16.) He met women online and sometimes had affairs with them. (Tr. 320:10-14.) He "[a]lmost always" carried condoms in his pocket for this reason. (Tr. 321:25-322:4.) To conceal his affairs from his family, Syed lied about himself in his online communications with women. (Tr. 320:15-20.) He also concealed information about himself in online communications to protect his safety. A few months before the alleged crimes, Syed had been the

victim of an attempted robbery while trying to sell a television to someone he met on Craigslist. (Tr. 319:23-320:7.)

Syed testified that he had conversations with teenagers because "[t]hey're easier to meet, easier to talk to, and I'm just somebody with low self-esteem. I'm very insecure and it's just – I mean, a flaw in my personality that forced me to meet pretty much anybody who would give me some sort of attention." (Tr. 312:19-22.)

B. Syed's conversations with "Samantha."

The § 2422(b) charge against Syed was based on his text conversations with Mark Dobbins, an Investigator with the Richmond County, Georgia Sheriff's Office. (Tr. 34:3-7.) Dobbins created a profile for a fictitious 14-year-old girl named Samantha using a chat network called Meet24. (Tr. 36:4-13, 40:6-10.) Using the name "Daniel," Syed exchanged text messages with Dobbins, who posed as Samantha. These conversations occurred between February 8 and February 11, 2013. They were read to the jury. (Tr. 74:19-112:18.)

Although Samantha's profile indicated that she was 14 years old, Syed doubted that she was actually that young (as, in fact, Investigator Dobbins was not). Syed told Samantha "you sound way mature for your

age. Otherwise, I wouldn't be talking to you." (Tr. 82:11-13; *see also* Tr. 84:1 ("you seem kind of mature for your age group").) After talking to an adult female investigator portraying Samantha on the phone, Syed said, "you cannot be 14" because "[y]ou sound so much older." (Tr. 100:15, 100:18.) Syed misrepresented his own age, first as 23 (Tr. 75:7), then as 28. (Tr. 97:24.)

Although the conversations 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 conversations were about completely non-sexual topics, like dogs or their separate plans for the day. (Tr. 77:17-18; 80:9-21.) The conversations 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.) Although Syed described himself physically (misrepresenting himself in doing so), and asked Samantha to describe herself physically, the only body parts mentioned were hair, eyes, skin, legs, and Syed's chest. He asked Samantha about her looks only after she had 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. *See also* Tr. 97:6-7 ("Elaborate on what you said about little intimacy in your past relationship.").) 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.) And further: "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 their meeting, 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.)

C. Syed's arrest.

Syed was arrested when he arrived at the apartment to which he had been directed by Samantha. In his possession were 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.) He had purchased the alcohol at a Kroger on his way from his home to the apartment. (Tr. 124:17-18.) Syed's uncontradicted testimony was that he brought the condoms from his home and that he routinely carried them. (Tr. 344:14.) After being arrested, Syed called his wife and asked her to wipe information from his iPhone and home computer, which she did. (Tr. 323:8-10.)

D. The prior acts evidence.

Over objection, the government introduced evidence at trial regarding two prior acts: (1) Syed's initial meeting with his ex-wife in 2000, and (2) Syed's text message exchanges with a teenager in 2012.

1. Syed's initial meeting with his ex-wife in 2000.

Nicole Neumann is Syed's ex-wife. She met Syed in 2000, when she was 17 years old. (Tr. 184:22.) They met online in an AOL chat room. (Tr. 185:4-7.) Although Syed testified that he and Neumann did not have sex until she was 18 years old, Neumann testified that she and Syed had sex on the first day they met. (Tr. 205:18-21.) Asked, "Did you know that that was going to happen?", Neumann answered, "No, but he told me later that he always intended me to just be a one-night stand." (Tr. 205:23-24.) Neumann testified that Syed concealed his true age from her in their online conversations (Tr. 185:10-13), and that he told her his name was Daniel. (Tr. 186:21.)

2. Syed's text message exchanges with a teenager.

A computer forensic specialist testified at trial regarding text messages found on Syed's computer. A teenager (an actual 13-year-old girl, not an investigator impersonating one) contacted Syed in 2012. (Tr. 238:4-6.) There is no discussion in any of the text messages of Syed

and the teenager engaging in sexual activity. (Tr. 241:6-13.) The only suggestion of any sexual content in the text messages occurred when Syed asked the teenager what her "turn-ons" were. (Tr. 242:15.) Syed and the teenager discussed meeting in person (Tr. 232:11-16), but Syed told her, "Talking and hanging out is cool with me." (Tr. 239:2-4.) Syed suggested meeting at public places such as a Dairy Queen or a mall. (Tr. 241:14-18.) He told her he was 22 years old. (Tr. 231:9.) At the teenager's suggestion, they agreed to meet at a cemetery. (Tr. 235:5.) Syed went to the cemetery, and he and the teenager saw each other from a distance, but she walked away and they did not meet in person. (Tr. 342:25-343:2.) Syed was not accused of any crime in connection with the teenager.

III. Standard of Review.

Insufficiency of the evidence is a question of law subject to *de novo* review. *See United States v. Kelly*, 888 F.2d 732, 740 (11th Cir. 1989). This Court "view[s] the evidence in the light most favorable to the Government, with all reasonable inferences and credibility choices made in the Government's favor." *Id.* If there is not evidence "from

which a reasonable factfinder could find guilt beyond a reasonable doubt, the conviction must be reversed." *Id.*

Prosecutorial misconduct in opening statements or closing argument is reviewed for plain error where, as here, the defendant did not contemporaneously object. *See United States v. Anthony*, 345 Fed. Appx. 459, 465 (11th Cir. 2009); *United States v. Bailey*, 123 F.3d 1381, 1400 (11th Cir. 1997).

The district court's admission of prior acts evidence under Rule 404(b) is reviewed for abuse of discretion. *See United States v. Ramirez*, 426 F.3d 1344, 1354 (11th Cir. 2005).

"With respect to Sentencing Guidelines issues, this Court reviews purely legal questions *de novo*, a district court's factual findings for clear error, and, in most cases, a district court's application of the guidelines to the facts with due deference." *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir. 2010) (citation and quotation marks omitted).

SUMMARY OF THE ARGUMENT

This is foremost an 18 U.S.C. § 2422(b) online enticement case. Syed exchanged text messages that had mild sexual overtones with an investigator, whom Syed might or might not have believed was a minor named Samantha. Syed never asked Samantha to have sex with him or had any sexually explicit conversations with her. He went to meet her and was arrested. A jury found him guilty and he was sentenced to 294 months in prison.

There are four grounds for reversal. First, no reasonable factfinder could have found the essential elements of the crimes beyond a reasonable doubt. Second, prosecutorial misconduct denied Syed a fair trial. Third, the trial court allowed prior acts evidence that was inadmissible under Rule 404(b). Fourth, the trial court sentenced Syed erroneously.

Section 2422(b) does not punish attempting to engage in sexual activity with a minor; it punishes attempting to persuade a minor to engage in sexual activity through use of interstate communications (in this case, the internet). Like any criminal attempt, a § 2422(b) attempt conviction requires both a state of mind and a substantial step toward

completion of the crime. Here, there was insufficient evidence that Syed took a substantial step toward persuading a minor through use of the internet. The trial court and the prosecution got this wrong because they viewed travel to meet the minor, or setting a time to meet her, as the required substantial step. (*E.g.*, Tr. 28:12-14 (Prosecutor: "He then showed up with condoms and liquor at the appointed time – certainly, a substantial step in accomplishing his goal."); Tr. 307:6-9 (Court: "[T]he 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…").) But showing up at an apartment with condoms and alcohol cannot possibly be a substantial step toward completion of the crime of online enticement. It might be a substantial step toward having sex, but it is not a substantial step toward using the internet to persuade a minor to engage in sexual activity, which is what § 2422(b) criminalizes. Properly viewed, the core of the § 2422(b) violation – the persuasion, enticement, inducement, or coercion – must take place online. Syed's text exchanges with Samantha, although highly inappropriate for an adult male stranger to have with a 14-year-old girl, were not sexually explicit and

did not even come close to attempting to persuade Samantha to have sex. Because no reasonable factfinder could have found that Syed took a substantial step toward using the internet to persuade Samantha to have sex, he should have been acquitted.

The second reason for reversal is that the prosecutor committed misconduct. She repeatedly and incorrectly argued that Syed took a substantial step toward a § 2422(b) violation by traveling to meet Samantha or by setting a time to meet her. As discussed above, those are not substantial steps toward a § 2422(b) violation, and the prosecutor's incorrect statements prejudiced the jury and denied Syed a fair trial.

Third, the government introduced Rule 404(b) evidence of two alleged prior acts over Syed's objection. Syed's ex-wife testified regarding the circumstances of her online first meeting with Syed, and a computer examiner testified regarding text messages between Syed and a teenager. Neither of these alleged prior acts should have been admitted. Syed met his ex-wife in 2000, thirteen years before the alleged crime here, far too long ago for that meeting to have significant probative value. The texts with the teenager could not prove the

relevant intent (*i.e.*, to persuade a minor to have sex), because Syed did not persuade the teenager to have sex with him. Modus operandi – the trial court's other justification for allowing the prior acts evidence – is only relevant to establishing a defendant's identity, and Syed's identity was not at issue. The prejudicial effect of this prior acts evidence far outweighed any probative value, and its admission was not harmless.

The fourth reversible error occurred during sentencing, when the trial court applied a five-point enhancement under U.S. Sentencing Guidelines Manual § 4b1.5(b). That enhancement applies only when the "defendant engaged in a pattern of activity involving prohibited sexual conduct." Syed did not engage in any such pattern of activity and the trial court should not have applied the enhancement.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Evidence Was Insufficient to Prove Syed Took a Substantial Step Toward Online Enticement.

Because Syed's February 2013 chats were not with an actual minor, Syed was charged with only attempted online enticement. As with any attempt crime, attempted online enticement requires two showings: a state of mind, and a substantial step toward completion of the crime. *United States v. Lee*, 603 F.3d 904, 913-14 (11th Cir. 2010). Syed did not take a substantial step toward the completion of a § 2422(b) violation, and there was no evidence from which a reasonable factfinder could have found that he did. Thus, the trial court erred by not granting Syed's motion for a judgment of acquittal.

A. Section 2422(b) punishes attempts to achieve a mental state, not attempts to have sex.

To understand why none of Syed's actions constituted a substantial step, it is necessary first to understand what a completed § 2422(b) violation looks like. 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].

Section 2422(b) does not criminalize attempting to engage in sexual activity with a minor (which Congress likely has no power to regulate). It also does not criminalize use of the internet as part of an attempt to engage in sexual activity with a minor (which Congress might have the power to prohibit, but hasn't). *See United States v. Root*, 296 F.3d 1222, 1230 (11th Cir. 2002) ("mere contact … for the purposes of engaging in illegal sexual activity … is not criminalized in 18 U.S.C. § 2422(b)") (quotation marks omitted). Section 2422(b) criminalizes use of the internet as a tool to persuade (or induce, entice, or coerce) a minor to engage in sexual activity.

This Court has repeatedly made clear that § 2422(b) punishes interstate communications designed to affect a minor's mental state, and nothing else. "With regard to intent under § 2422(b), the government must prove that the defendant intended to cause assent on the part of the minor, not that he acted with the specific intent to engage in sexual activity. Thus, the statute 'criminalizes an intentional attempt to achieve a mental state – a minor's assent.'" *United States v. Hardy*, 520 Fed. Appx. 835, 837 (11th Cir. 2013) (quoting *Lee*, 603 F.3d at 914). *See also United States v. Muentes*, 316 Fed. Appx. 921, 926

(11th Cir. 2009) (finding erroneous a jury instruction "stat[ing] the Government was required to prove the defendant intended to engage in some form of unlawful sexual activity with the minor"). "The underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself." *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004).

It may be counterintuitive for a statute to punish communications persuading a minor to have sex, while not punishing sex itself, but that is what § 2422(b) does. "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." *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000); *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…."). At least part of the explanation is that § 2422(b) is only

one component of a broader statutory scheme. A different federal statute, 18 U.S.C. § 2423(b), prohibits traveling in interstate commerce for the purpose of engaging in illicit sexual conduct. "Section 2422(b) … was designed to protect children from the act of solicitation itself – a harm distinct from that proscribed by § 2423(b)." *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011). Syed was not accused of violating § 2423(b), and he did not cross state lines when he travelled to meet Samantha.

The only relevant substantial steps for a § 2422(b) attempt are those toward achieving a minor's assent to engage in sexual activity through use of the internet. *See Lee*, 603 F.3d at 914 ("[T]he government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact."). There was no evidence of any such substantial step here.

B. Neither traveling to meet Samantha, nor setting up a meeting, was a substantial step toward violating § 2422(b).

The prosecutor here misrepresented the substantial step requirement. She described Syed's travel to meet Samantha as a substantial step toward a § 2422(b) violation:

> Even though there was no actual 14-year-old involved, he believed there was and he took a substantial step toward meeting her to engage in illicit sexual conduct. (Opening Statement, Tr. 27:15-17.)
>
> He then showed up with condoms and liquor at the appointed time – certainly, a substantial step in accomplishing his goal. (Opening Statement, Tr. 28:12-14.)

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 the internet. *See United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010) ("[T]he 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."). Section 2422(b) is a crime accomplished through communication. This was perhaps best explained by the District Court for the District of Columbia, in dismissing a § 2422(b) indictment:

> [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.

United States v. Nitschke, 843 F. Supp. 2d 4, 16 (D.D.C. 2011).

For the same reasons, the fact that Syed was carrying alcohol and condoms is irrelevant to the substantial step analysis. Condoms are a tool for having sex; they are not a tool for persuading someone to have sex. Alcohol might be a tool for persuading someone to have sex, but it is not a tool for persuading someone to have sex over the internet, which is what § 2422(b) proscribes. The persuasion must take place online, or in an attempt, the goal must have been to persuade online. The prosecutor further hinted that Syed may have been carrying pepper spray to use against Samantha. (*E.g.*, Tr. 357:9-10 (Prosecutor: "And you had condoms in your pocket and pepper spray in your hand; correct?").) There was evidence that Syed carried the pepper spray for self-protection, since he had recently been the victim of an attempted robbery while trying to sell a television to someone he met online. (Tr. 319:23-320:7.) But even assuming the worst – that he carried the pepper spray to disable Samantha – that would not be a substantial step toward a § 2422(b) violation. It would be reprehensible, but would

not get him any closer to the crime of achieving a minor's assent through use of the internet. *See Lee*, 603 F.3d at 914; *cf. United States v. Hite*, 769 F.3d 1154, 1167 (D.C. Cir. 2014) (vacating § 2422(b) conviction for erroneous jury instruction, and noting, "simply 'to cause' sexual activity with a minor does not necessarily require any effort to transform or overcome the will of the minor").

The prosecutor here also argued that Syed took a substantial step toward a § 2422(b) violation by using the internet to make plans to meet Samantha:

> [I]t's the Government's position that that substantial step towards committing the crime was setting up a time to meet with Samantha and, also, appearing at the location where that meeting was scheduled to take place…. (Closing Statement, Tr. 364:10-14.)
>
> So that's what the evidence will show and proves beyond a reasonable doubt the substantial step that was taken was actually going to meet her – to set up the time and to actually meet with her was a substantial step to demonstrate that this wasn't just some idle conversation not really interested in getting together with the person. (Closing Statement, Tr. 378:13-18.)

This was also wrong, as a matter of law. Setting up a time to meet someone in person is not a substantial step toward persuading a person to have sex through use of the internet. 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. Again, setting a meeting time might (or might not) have been a substantial step toward having sex, but having sex is not what § 2422(b) prohibits.

Importantly, Syed is not arguing – and he can win this appeal without showing – that traveling to meet a minor or setting up a meeting is completely irrelevant. It might be relevant, to the extent it might illuminate what a defendant's state of mind was during online chats. It is not relevant to whether a defendant took a substantial step. (The condoms, alcohol, and pepper spray similarly might be relevant to the limited extent they might show Syed's earlier state of mind. Even if relevant, all this evidence might be more prejudicial than probative, or inadmissible for some other reason, when the elements of the crime are construed properly.) Also, Syed is not arguing, and need not demonstrate, that a substantial step toward a § 2422(b) violation could only occur through interstate communications. The persuasion itself must occur through interstate communications, but theoretically, someone could take a substantial step toward violating § 2422(b) by

some other action. There is no evidence that Syed took any such other step here.

C. Syed did not take any substantial step toward violating § 2422(b) in his text exchanges.

Other than traveling to the apartment (with condoms, alcohol, and pepper spray), and setting up a meeting time, the United States did not argue that there was any other evidence of a substantial step. There was no such other evidence. "[A] defendant takes a substantial step toward completing a crime when his objective acts mark his conduct as criminal and, as a whole, strongly corroborate the required culpability." *Lee*, 603 F.3d at 914 (citation and quotation marks omitted). "A substantial step must be more than remote preparation, and must be conduct strongly corroborative of the firmness of the defendant's criminal intent." *United States v. Ballinger*, 395 F.3d 1218, 1238 n.8 (11th Cir. 2005) (citation and quotation marks omitted).

Syed's messages to Samantha are, at most, remote preparation for a § 2422(b) violation. They appear to be less sexually explicit than those in any case in which this Court has affirmed a § 2422(b) online enticement conviction. *Cf.*, *e.g.*, *United States v. Reddy*, 562 Fed. Appx. 735, 737 (11th Cir. 2014) (defendant "specifically and repeatedly asked

the [minor] whether he agreed to perform oral sex"); *United States v. Rivera*, 372 Fed. Appx. 958, 961 (11th Cir. 2010) (defendant "made suggestions to [minor] about various sexual activities they could engage in"); *United States v. Gates*, 351 Fed. Appx. 362, 365 (11th Cir. 2009) (defendant discussed having oral sex with minor); *United States v. Schmitz*, 322 Fed. Appx. 765, 768 (11th Cir. 2009) (defendant expressed desire to pursue a sexual relationship with minor); *United States v. Muentes*, 316 Fed. Appx. 921, 924 (11th Cir. 2009) (defendant "repeatedly expressed [his] desire to procure sex with a minor"); *United States v. Yost*, 479 F.3d 815, 817 (11th Cir. 2007) (defendant asked minor to perform oral sex); *United States v. Searcy*, 418 F.3d 1193, 1194 (11th Cir. 2005) (defendant "said that he wanted to have sex with the detective's daughter"); *United States v. Panfil*, 338 F.3d 1299, 1300 (11th Cir. 2003) (defendant "offered to furnish oral sex" to minor); *United States v. Root*, 296 F.3d 1222, 1229 (11th Cir. 2002) (defendant asked minor to "kiss him, touch his genitalia, perform and receive oral sex, and engage in sexual intercourse").

Syed never did any of those things. He never asked Samantha to have any sexual contact with him. He never discussed any sexual acts

with her. He never mentioned his or her genitalia. The very worst thing he did was mention the possibility that "down the road" "when you're older" they might "get intimate." (Tr. 107:22-108:4.) *Cf. United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (no substantial step where defendant asked minor "u had sex with a guy" and "u looking for younger or older"). The cumulative impression of the texts read together is not any more damning than the texts read separately. The conversations did not strongly corroborate an intent to violate § 2422(b) and were not a substantial step.

D. This Court has described traveling to meet a minor as a substantial step, but only in dicta.

It is true that this Court has described traveling to meet a minor, or making plans to meet a minor, as a substantial step toward a § 2422(b) violation. *E.g.*, *United States v. Lanzon*, 639 F.3d 1293, 1299 (11th Cir. 2011) (noting defendant "drove several miles to the arranged meeting place … and carried condoms and mint lubricant in his truck"); *Murrell*, 368 F.3d at 1288 (noting defendant "traveled two hours" to meet minor and "carried a teddy bear, $300.00 in cash, and a box of condoms when he arrived at the meeting site"); *Root*, 296 F.3d at 1229 (noting defendant "drove five hours" to meet minor). But in none of

these cases was travel or setting up a meeting the only substantial step taken by the defendant; there were substantial steps toward persuasion in the communications themselves. *E.g.*, *Lanzon*, 639 F.3d at 1296 ("Detective Clifton asked what Lanzon wanted to do with the 14-year-old, and Lanzon responded, '[I] love oral,' 'hot passionate sex,' and 'totally satisfying a female.'"). Nor does the specific argument presented here – that travel or setting up a meeting time cannot be a § 2422(b) substantial step – appear to have been addressed by this Court. These descriptions of travel or setting up meetings as substantial steps are dicta and not binding. *See United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) ("[D]icta is defined as those portions of an opinion that are not necessary to deciding the case then before us.") (citation and quotation marks omitted).

It may be useful to contrast the approach taken in this Circuit with that of the Seventh Circuit in *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008). The court in *Gladish* held that the defendant should have been acquitted under § 2422(b), even though he had told the 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,'" *id.* at

650, and even though he "discussed the possibility of traveling to meet" the minor. *Id.* at 648. 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. Although much of *Gladish*'s reasoning is persuasive and consistent with Eleventh Circuit authority, this part of its analysis gets § 2422(b) wrong. Online enticement is inherently a crime of communication. The substantial step almost has to be speech, because the crime itself is accomplished through speech. *See also Lee*, 603 F.3d at 921 (Martin, J., concurring in part and dissenting in part) (citing *Gladish* in contrast with Eleventh Circuit jurisprudence).

The Eleventh Circuit approach is perhaps most clearly illustrated in *Rothenberg*, 610 F.3d 621. At issue there were conversations in which "Rothenberg actively coached and encouraged other adults in graphic detail about how to sexually abuse minors in their care or under their influence." *Id.* at 625. Unlike in the typical "adult intermediary" case, there was no suggestion in the conversations that Rothenberg himself

would engage in any sexual activity with a minor. *Id.* In other words, Rothenberg was only talking – he was "all hot air," to use Judge Posner's phrase from *Gladish*, 536 F.3d at 650. The issue in *Rothenberg* was "whether a sexually solicitous communication by means of interstate commerce, without more, can ever constitute a substantial step" toward a § 2422(b) violation; this Court held that it could. 610 F.3d at 626. Section 2422(b) "necessarily contemplates oral or written communications as the principal if not the exclusive means of committing the offense," such that speech alone could fulfill the requirement of a substantial step. *Id.* at 627. *Rothenberg* has been criticized in some quarters. *See* Note, "Reforming Attempt Liability Under 18 U.S.C. § 2422(b): An Insubstantial Step Back From *United States v. Rothenberg*," 61 Duke L.J. 693 (2011). But even if this Court were to take a step back from *Rothenberg*, the correct result in this case (acquittal) would be dictated by *Lee*, *Yost*, *Murrell*, *Root*, and a host of other Eleventh Circuit cases, and the language of § 2422(b) itself.

Because there was insufficient evidence for a reasonable factfinder to conclude that Syed took a substantial step toward committing the crime of online enticement, this Court should vacate or reverse the

judgment and direct the district court to enter a judgment of acquittal on the § 2422(b) charge.

II. By Arguing that Travel or Setting a Meeting Time Was a Substantial Step, the Prosecutor Committed Misconduct.

As discussed in Section I.B above, the prosecutor here repeatedly argued that Syed took a substantial step toward violating § 2422(b) by traveling to meet Samantha, while carrying condoms, pepper spray, and alcohol, and by setting a time to meet her. As a matter of law, those statements were incorrect, and they prejudiced the jury, requiring a new trial.

"To find prosecutorial misconduct, a two-element test must be met: (1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998) (citation and quotation marks omitted). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome [of the trial] would be different." *Id.* Legally erroneous arguments by a prosecutor may be grounds for a new trial. *See Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633 (1985); *Hite*, 769 F.3d at 1167 (vacating conviction where "the prosecutor suggested

to the jury in closing argument that Hite could be convicted by proof that he merely arranged to have sex with the fictitious children, rather than by proof he attempted to transform or overcome their will").

Here, the prosecutor's remarks were improper because they were erroneous, and there is at least a reasonable probability that they affected the outcome of Syed's trial. The jury, relying on them, could have found that Syed took a substantial step toward a § 2422(b) violation by traveling to meet Samantha or making plans to meet her, when as a matter of law it could not so find. Although there is no indication that the prosecutor's misconduct was intentional – indeed, she might have been relying on the dicta discussed in Section I.D above – misconduct can justify a new trial even where a prosecutor acted in good faith. *See*, *e.g.*, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). Viewed in the context of everything that happened at trial, together with the other errors, *see United States v. Hands*, 184 F.3d 1322, 1334 (11th Cir. 1999), this prosecutorial misconduct requires that, if Syed is not acquitted outright, he must be given a new trial.

III. The Trial Court Erred by Allowing Prior Acts Evidence.

Under Rule 404(b)(1), "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." However, such "evidence 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).

This Circuit applies a three-part test to admissions of evidence under Rule 404(b). "First, the evidence must be relevant to an issue other than the defendant's character; Second, the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; Third, the probative value of the evidence must not be substantially outweighed by its undue prejudice…." *United States v. Matthews*, 431 F.3d 1296, 1310-11 (11th Cir. 2005) (quotation marks omitted).

The district court admitted two "other act[s]" subject to Rule 404(b) into evidence: Syed's first meeting with his ex-wife in 2000, and Syed's text messages with a teenager in 2012. Each prior act was used

for the improper purpose of proving Syed's character, so that the jury would make the impermissible inference that he acted in accordance with such character in his February 2013 conversations with Samantha. Each erroneous admission of evidence is an independently-sufficient cause for reversal and a new trial.

A. Syed met his ex-wife in 2000, too long ago to be probative.

For Rule 404(b) evidence to be probative, it is important that the extrinsic act be at least somewhat close in time to the alleged crime. Although there is no bright-line rule for when extrinsic evidence becomes too old to be usable, "temporal remoteness depreciates the probity of the extrinsic offense." *United States v. Beechum*, 582 F.2d 898, 915 (5th Cir. 1978). *See also United States v. Carter*, 516 F.2d 431, 435 (5th Cir. 1975) ("[T]he probative value of Carter's criminal record was considerably diminished by the ten year hiatus, to such an extent that it was outweighed by the prejudice to Carter resulting from its admission.").

Syed met his ex-wife in late 2000; the alleged crime occurred in early 2013. Courts have found that prior acts much closer in time than this were too old to be admissible. *See*, *e.g.*, *United States v. Dothard*,

666 F.2d 498, 504 (11th Cir. 1982) (finding "[t]he temporal remoteness of the extrinsic act depleted this evidence of any force of probity whatsoever" where extrinsic act was four years prior to alleged crime).

Temporal remoteness is particularly important for a crime such as online enticement, given the enormous social and technological changes that took place online between 2000 and 2013. Syed conducted his 2013 conversations with Samantha using an iPhone, a type of device that did not exist until 2007. *See* https://www.apple.com/pr/library/2007/01/09Apple-Reinvents-the-Phone-with-iPhone.html (accessed Jan. 27, 2015). When Syed met his ex-wife in an AOL chat room in 2000, AOL's dial-up internet service was the most common way for Americans to access the internet, and AOL was acquiring Time Warner in the largest merger in history; by 2013, only 3% of Americans used dial-up access. *See* http://money.cnn.com/2000/01/10/deals/aol_warner/ (accessed Jan. 27, 2015); "3% of Americans use dial-up at home," http://www.pewresearch.org/fact-tank/2013/08/21/3-of-americans-use-dial-up-at-home/ (accessed Jan. 27, 2015). Few people used the internet in 2013 the same way they used it in 2000. Syed's online activities in 2000 are not relevant to or probative of anything in 2013.

B. The texts with a teenager were not probative of the relevant intent, because Syed did not persuade the teenager to have sex.

As discussed in Section I above, § 2422(b) criminalizes attempting to persuade a minor to engage in sexual activity through use of the internet. The prosecution offered, and the trial court allowed, evidence of Syed's texts with a teenager in 2012, in part because the texts purportedly showed Syed's intent. But they do not show any intent that is relevant to § 2422(b).

Syed's texts with the teenager were almost completely devoid of sexual content. They cannot reasonably be construed as an attempt to persuade a minor to engage in sexual activity. Just as importantly, they did not in fact succeed in persuading a minor to engage in sexual activity. The teenager never indicated in the texts that she had been persuaded to have sex with Syed, and she did not have sex with him.

What "intent," then, did the evidence regarding the teenager show? Syed's actions with respect to the teenager were highly inappropriate, but similar to his actions with respect to Samantha, they were not a § 2422(b) violation. "For extrinsic offenses to be relevant to an issue other than character, they must be shown to be *offenses*…."

United States v. Veltmann, 6 F.3d 1483, 1499 (11th Cir. 1993) (emphasis in original); *see also Beechum*, 582 F.2d at 912 ("Obviously, the line of reasoning that deems an extrinsic offense relevant to the issue of intent is valid only if an offense was in fact committed and the defendant in fact committed it."). Syed's interactions with the teenager showed only that he intended to have highly inappropriate, very mildly sexual conversations, not any criminal intent.

A similar analysis applies to Syed's first meeting with his ex-wife. By her own testimony, she did not know they were going to have sex when they chatted online, but only after they met in person. (Tr. 205:23-24.) In other words, Syed had not persuaded her online to engage in sexual activity. Thus, his interactions with her showed at most that Syed intended to have sex; they did not show that he intended to persuade anyone to have sex online, which is the relevant intent for § 2422(b).

C. Prior acts were inadmissible to prove modus operandi, because Syed's identity was not at issue.

The trial court allowed prior acts evidence because it was "very probative on the issue of intent and modus operandi." (Tr. 182:4-5 (discussing Syed's first meeting with his ex-wife); *see also* Tr. 209:25-

210:1 ("what I find is that it is probative to the issue of intent, modus operandi") (discussing text messages with teenager).) Modus operandi, like intent, was an improper justification for admitting the prior acts evidence. Modus operandi is only a justification for allowing extrinsic evidence if the defendant's identity is at issue, *see Chavez v. City of Albuquerque*, 402 F.3d 1039, 1046 (10th Cir. 2005), and it was not at issue here. Syed conceded that he had engaged in the text conversations with Samantha. (Tr. 312:2.) A defendant need not actually stipulate to an issue to avoid introduction of Rule 404(b) evidence on that issue. *See United States v. Matthews*, 411 F.3d 1210, 1227 (11th Cir. 2005); *see generally Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644 (1997). The prior acts evidence was not admissible to prove modus operandi.

D. The unfair prejudicial effect of the prior acts evidence substantially outweighed any probative value.

Under both Rule 404(b) and Rule 403, the prior acts evidence should have been excluded because its unfairly prejudicial effect outweighed any probative value. The probative value of the prior acts evidence was low, for all the reasons discussed above. The unfair prejudicial effect was substantial. "The public regards sexually-based

offenses as particularly heinous." *United States v. Stout*, 509 F.3d 796, 802 (6th Cir. 2007). There was a likelihood that the jury would convict Syed based on his past conduct, rather than the conduct at issue in this case. *See United States v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000) (vacating arson conviction where trial court admitted evidence of prior fire). Although the government's need for the prior acts evidence was high, it was high only because the other evidence of Syed's intent was weak. It was an abuse of discretion to admit the prior acts evidence.

IV. The Trial Court Erroneously Sentenced Syed.

At sentencing, the district court applied a five-point enhancement under U.S.S.G. § 4b1.5(b). (Sent. Tr. 17:8-11.) That section applies only when the defendant "engaged in a pattern of activity involving prohibited sexual conduct." The two separate occasions that the district court found constituted a "pattern" were the two prior acts discussed in Section III above: Syed's first meeting with his ex-wife in 2000, and his interactions with a teenager in 2012. For all the reasons discussed above, the interactions with the teenager were not "prohibited sexual conduct" at all. And Syed's first meeting with his ex-wife might have been some crime, depending on what exactly happened, but it was not

online enticement as argued by the government. (Sent. Tr. 12:13-14 ("So, that in and of itself could qualify as an online enticement encounter that we have direct testimony on during the trial.").) At most, there was evidence of one prior instance of prohibited sexual conduct, which is insufficient to constitute a pattern. *See* U.S.S.G. § 4b1.5 cmt. 4. The § 4b1.5(b) enhancement should not have applied.

If Syed is acquitted or receives a new trial on the § 2422(b) charge, he should also be retried, not just resentenced, on the destruction of records charges under 18 U.S.C. § 1519. The government devoted little time to the § 1519 charge at trial. (*See* Tr. 378:21-22 (Prosecutor: "the other two charges we didn't spend nearly as much time on having to do with the destruction of records….").) As for the defense, Syed conceded that he told his wife to destroy records. (Tr. 323:8-10.) Defense counsel focused its strategy on an argument that Syed did not know that a federal investigation was underway, apparently unaware that this Court had ruled, less than two weeks before trial, that proof of a defendant's knowledge that an investigation is federal is unnecessary. *See United States v. McQueen*, 727 F.3d 1144 (11th Cir. 2013). Given the admission of the unfairly prejudicial prior acts evidence, and the

prosecutor's incorrect statements about the substantial step requirement, there is a reasonable probability that the jury convicted Syed under § 1519 only because of the way he had been improperly portrayed: as a habitual sex offender who brought condoms, alcohol, and pepper spray to meet Samantha. The cumulative effect of the errors here denied Syed due process and calls the outcome of the entire trial into doubt. *See United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005). Moreover, the sentence of 240 months for violation of § 1519 was substantively unreasonable. *See generally United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010). Syed did not get a fair trial, or a fair sentence, on the destruction of records charges.

CONCLUSION

Syed respectfully requests that the judgment be reversed or vacated, and that this case be remanded to the district court with direction that he be acquitted, granted a new trial, and/or resentenced.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 7,951 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook.

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January 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2015, I filed and served on all parties the foregoing Appellant's Opening Brief 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