No. _____

IN THE

Supreme Court of the United States

_____

STEVEN ARTHUR MORRILL,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

It is a crime for a person to induce or attempt to induce a minor to engage in illegal sexual activity. 18 U.S.C. § 2422(b). The statute criminalizes the attempt to achieve a mental state – the assent of a minor to engage in sexual activity. The statute does not punish or proscribe any actual or attempted sexual activity with a minor. The Eleventh Circuit, though, has approved jury instructions, like the one given below, that define "induce" to mean "to cause," without the necessity of instructing on *what* must be caused, and has further incorporated that definition into its pattern jury instructions. As a result, a person accused of violating § 2422(b) can be convicted for "attempting . . . to cause . . . a minor to engage in sexual activity," without any requirement that the accused attempt to achieve the assent of the minor.

The question presented is whether defining "induce" to mean "to cause," without further instructing on *what* must be caused, leaves defendants vulnerable to being convicted for conduct that is not criminal under the statute.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Steven Morrill, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion is not published but may be found in the appendix, Pet. App. 1a-3a, and at *United States v. Morrill*, 730 F. App'x 884 (11th Cir. 2018). The denial of the petition for rehearing en banc is not published but may be found in the appendix. Pet. App. 4a.

JURISDICTION

The Eleventh Circuit issued its opinion on July 12, 2018, and its order denying rehearing on September 5, 2018. *See* Pet. App. 4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 2422(b) of Title 18 provides:

> 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.

OVERVIEW

To obtain a conviction under 18 U.S.C. § 2422(b) the government must prove, in relevant part, that the defendant knowingly attempted to "induce[]" a minor to engage in illegal sexual activity. In *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004), the Eleventh Circuit defined "induce" as "[t]o stimulate the occurrence of; cause." *Id*. at 1287. The court did not address *what* must be stimulated or caused. That question was seemingly answered in *United States v. Lee*, 603 F.3d 904 (11th Cir. 2010), which held: "With regard to intent, 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.'" *Id*. at 914.

Subsequently, however, including in the case below, the Eleventh Circuit has approved jury instructions that define "induce" only as "to stimulate the occurrence of; cause." Pet. App. 3a. Recently adopted pattern jury instructions confirm that the jury need not be instructed that the assent of the minor is what must be caused. Thus, despite *Lee*, the jury never hears an instruction that, to obtain a conviction under § 2422(b), "the government must prove that the defendant intended to cause assent on the part of the minor." As a result, an accused in the Eleventh Circuit can be convicted for attempting to "cause" a minor to engage in illegal sexual activity, without any need to prove an attempt to cause

assent on the part of the minor or to transform or overcome the will of a minor.

STATEMENT OF THE CASE

1. FBI Special Agent Kevin Kaufman, acting in the role of "a bad dad" with two step-daughters who were nine and eleven years old, posted an advertisement on Craigslist. Doc. 77 at 136-41. Mr. Morrill responded to the ad. Doc. 77 at 148; *see* Doc. 48-3 at 1.

Over the course of the next ten days, Mr. Morrill and Agent Kaufman exchanged numerous emails. Doc. 77 at 150-86; *see* Doc. 48-3. Agent Kaufman portrayed both his fictional step-daughters as being sexually active with him and with others and as enjoying the experience. Doc. 48-3 at 1-14. He wrote that the eleven-year-old "is very into it and knows what makes people happy." *Id*. at 7. He also wrote that the nine-year-old "loves to make her man happy." *Id*. at 14.

Mr. Morrill described what he would like to do sexually if he met the daughters, and Agent Kaufman and Mr. Morrill made plans to meet. Doc. 48-3 at 10-55. Mr. Morrill went to the planned meeting place and was arrested. Doc. 77 at 188-90. He was charged pursuant to 18 U.S.C. § 2422(b) with attempted persuasion, inducement, or enticement of a minor to engage in sexual activity. Doc. 9.

2. Mr. Morrill proceeded to trial. At the charge conference, relying on *Lee*, Mr. Morrill asked the court to define "induce" as meaning "to stimulate the

occurrence [of] or to cause . . . the assent of the minor to engage in a sex act." Doc. 77 at 253. Relying on *Murrell*, the government asked the court to define "induce" as "to stimulate the occurrence of or to cause," without specifying what had to be caused. Doc. 77 at 253-54. The court sided with the government while noting the defense objection. *Id*. at 254-55.

In relevant part, the jury was given this instruction on the substantive offense:

> It is a Federal crime for anyone, using any facility of interstate or foreign commerce, including transmissions by computer on the Internet, to persuade, induce, or entice a minor, that is, anyone under 18 years old, to engage in any sexual activity for which any person could be charged with a criminal offense.
>
> The Accused can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:
>
> > **First**: the Accused knowingly persuaded, induced, or enticed a minor to engage in sexual activity, as charged;
> > . . .
>
> The Accused need not communicate directly with the minor; it is sufficient if the Accused persuades, induces, or entices the individual to engage in unlawful sexual activity by communicating with an adult intermediary for that purpose.
>
> As used in this instruction, "induce" means to stimulate the occurrence of or to cause.

Doc. 51 at 7-8; Doc. 79 at 13-14.[1] The jury was further instructed that Mr. Morrill was "charged with attempting to commit the offense of persuading, inducing, or enticing a minor to engage in sexual activity," and could be found guilty only if the government proved he "knowingly intended to commit the crime of persuading, inducing, or enticing a minor to engage in sexual activity, as charged" and "engaged in conduct which constituted a substantial step toward the commission of the crime." Doc. 51 at 9; Doc. 79 at 15. The jury was cautioned that Mr. Morrill was "on trial only for the specific offense alleged in the Indictment." Doc. 51 at 10.

3. In opening statement, the government told the jury that the emails would show Mr. Morrill "intended to further one illicit purpose and it was to bring about this sexual encounter with these minors." Doc. 77 at 116.

In closing, the government argued that it had proven all three modalities of committing the crime – persuasion, inducement, and enticement. Doc. 79 at 21. As to inducement, the government reminded the jurors that the court's instructions told them "inducement means to stimulate the occurrence of or to cause." *Id*. at 24. The prosecutor continued: "And that is exactly what the evidence shows here. He intended to cause the minor to engage in sexual activity." *Id*. at 24-25. The goal of

[1] Trial was held in April 2017. In September 2017, the Eleventh Circuit added a pattern jury instruction on attempt to violate § 2422(b). *See* Eleventh Circuit Pattern Jury Instructions (Criminal) No. O92.3 (2017). *See* Pet. App. 5a-7a. The instruction adopted the *Murrell* standard: "As used in this instruction, 'induce' means to stimulate the occurrence of or to cause." Pet. App. 7a.

Mr. Morrill's emails to Agent Kaufman, the prosecutor asserted, was "to stimulate the occurrence of the act that he wanted to perform ultimately, which was his sexual encounter with the child." *Id*. at 26. Mr. Morrill "intended to cause this sexual encounter with the two minors." *Id*. at 27. The prosecutor argued that, by traveling from his home to the arranged meeting spot, Mr. Morrill "showed persistence in his desire to bring about this sexual encounter." *Id*.

In rebuttal, the prosecutor acknowledged that the fictional daughters "were presented as children with experience, previous experience engaging in sexual activity," but argued that a child "can never consent to this type of activity." Doc. 79 at 43-44. Noting that Mr. Morrill had been charged with inducement, the prosecutor said "inducing, in this case when you read the definition, stimulating the occurrence of. What was he stimulating? Well, he was stimulating a sexual encounter with a minor. Inducement to engage a minor in sexual activity through an adult intermediary." *Id*. at 46. While the daughters were fictional, the prosecutor asserted "had there been real minors, [Mr. Morrill] would have followed through with his criminal intent. And that is why he's guilty in this case." *Id*. at 48.

4. The jury returned a verdict of guilty. Doc. 52; Doc. 79 at 55-56. The district court used a general verdict form, so the verdict does not show whether the jurors had convicted based on persuasion, inducement, or enticement, or some combination of the three. Doc. 52.

5. On appeal, Mr. Morrill argued that the instruction given on the meaning of "induce" was legally incorrect because it permitted the jury to convict on the basis that Mr. Morrill attempted to cause a minor to engage in sexual activity, without regard to any attempt to achieve assent on the part of the minor. Pet. App. 2. The panel acknowledged that, to obtain a conviction 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. Pet. App. 3 (citing and quoting from *Lee*, 603 F.3d at 914). The panel, though, held that the district court correctly defined "induce" by employing the same definition used in *Murrell*, "to stimulate the occurrence of; cause." Pet. App. 3 (quoting *Murrell*, 368 F.3d 1283, 1286).

According to the panel, the district court did not need to include the phrase "the assent of" in its definition because the jury had been repeatedly instructed that the government had to prove that Morrill was guilty of "persuading, inducing, or enticing a minor to engage in sexual activity." Pet. App. 3. The panel ended its terse opinion with this *ipse dixit*: "The instructions required the jury to find that Morrill acted with the intent to induce a minor, not with the intent to engage in sexual activity with a minor." *Id*. The panel did not address the fact that, as instructed by the district court, the jury could replace "induce" with "cause," and thus convict Mr. Morrill on the basis that he attempted "to cause" a minor to

engage in sexual activity, without any requirement that he attempted to change the minor's mental state.

REASONS FOR GRANTING THE WRIT

I. The instruction given below, now found in the Eleventh Circuit's pattern jury instructions, erroneously allows a jury to convict on a § 2422(b) charge on the basis that the accused attempted to cause a minor to engage in sexual activity without regard to whether the accused attempted to change the mind of the minor, that is, cause the minor to assent to engaging in sexual activity.

Section 2422(b) criminalizes an attempt to achieve a mental state – the assent of a minor to engage in sexual activity. *See*, *e.g.*, *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007) ("Section 2422(b) criminalizes an intentional attempt to achieve a *mental* state—a minor's assent—regardless of the accused's intentions vis-à-vis the actual consummation of sexual activities with the minor."); *United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) (same); *United States v. Brand*, 467 F.3d 179, 202 (2d Cir. 2006) ("A conviction under § 2422(b) requires a finding only of an attempt to entice or an intent to entice, and not an intent to perform the sexual act following the persuasion."). While engaging in sex with a minor is proscribed by other laws, § 2422(b) does not punish or proscribe any actual sexual activity.

> 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. Hence, a conviction under the statute only requires a finding that the defendant

had an intent to persuade or to attempt to persuade.

United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000).

In this case, however, the jury was instructed in such a manner that it could have convicted on the basis that "the Accused knowingly . . . caused . . . a minor to engage in sexual activity, as charged." The district court instructed the jury that the first element the government had to prove was that "the Accused knowingly persuaded, induced, or enticed a minor to engage in sexual activity, as charged." Doc. 51 at 7. Consistent with *Murrell*, the jury was further instructed that: "As used in this instruction, 'induce' means to stimulate the occurrence of or to cause." *Id*. at 8. Plugging the "to cause" definition of "induce" into the first element of the crime, then, the jury could have concluded that Mr. Morell "knowingly . . . caused . . . a minor to engage in sexual activity, as charged." That, however, is not what § 2422(b) proscribes. As explained above, the criminal conduct proscribed by § 2422(b) is the attempt to cause the minor's assent, not the attempt to cause the occurrence of an actual sex act.

The *Murrell* definition of "induce" as meaning "to stimulate the occurrence of; cause," 368 F.3d at 1287 (citation omitted), is thus incomplete as it begs the questions "to stimulate the occurrence of *what*," or "to cause *what*"? The court supplied the correct answer in *Lee*: "With regard to intent, 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." 603 F.3d at 914 (internal quotation marks omitted). The Eleventh Circuit, though, has declined to require a jury instruction based on *Lee* that informs the jury of *what* it is that must be stimulated or caused. In fact, as here, the Eleventh Circuit has affirmed jury instructions that apply only the *Murrell* definition, without adding the *Lee* clarification. This legal error, now enshrined in a pattern jury instruction, should be corrected so that Mr. Morrill and others similarly charged are not convicted under § 2422(b) for conduct that is not proscribed by § 2422(b).

II. This case is an excellent vehicle for considering this important issue.

The jury instruction issue raised by this petition was fully argued and preserved in the district court. The same issue was fully briefed and addressed on the merits by the court of appeals. The issue is thus ripe for review by this Court. Further, the issue is important as it affects every person in Alabama, Florida, and Georgia who is charged with violating § 2422(b). The decision below also threatens to create a circuit split by permitting a § 2422(b) conviction based on an attempt to engage in sex with a minor, not on an attempt to change the will of a minor.

III. The decision below is wrong.

Substituting "cause" for "induce," the instruction given below permitted the jury to convict Mr. Morrill on the basis that "the Accused knowingly persuaded,

~~induced~~ >>caused<<, or enticed a minor to engage in sexual activity, as charged. Doc. 51 at 7-8; Doc. 79 at 13-14. The crime proscribed by § 2422(b), though, is not an attempt to cause a minor to engage in sexual activity; it is an attempt to cause a minor to assent to engage in sexual activity. In other words, this particular statute does not proscribe either forcibly causing an unwilling minor to engage in sexual activity, or engaging in sexual activity with a minor who is already willing and needs no persuasion, inducement, or enticement to engage in sexual activity.

The planned defense here, as set out in the defense's opening statement, was that Mr. Morrill did not violate § 2422(b) because Agent Kaufman portrayed his fictional children as already willing to engage in sexual activity, with no further inducement needed. *See*, *e.g.*, Doc. 77 at 124-25 ("Did Mr. Morrill ever try to change a child's mind? . . . No. That's what the case is about. That's what the charge is about. Mr. Morrill is innocent of wanting to change a child's mind. He answered an ad that suggested from the get-go that we were dealing with children who were already involved in such activity."); *id*. at 125 ("[W]as he doing anything to try to change the child's mind, to try to convince a young child to have sex with him? He wasn't. The agent assured him at the very top of their conversation, I've been active with my 9- and 11-year-old stepdaughters. I married into a great situation. So the agent is telling Mr. Morrill there's nothing -- there's

no enticement needed. Ready to go."); *id*. at 129 ("[F]ocus on the charge in the case, which is, was he trying to change the mind of a child? No. He was presented with a father who had already done that. He had already done that. That's already accomplished."). That defense was vitiated by the district court's refusal, when instructing the jury, to add the *Lee* clarification to the definition of "induce."

On the other hand, the prosecution in closing argument took full advantage of the court's incomplete definition of "induce," repeatedly imploring the jury to find Mr. Morrill guilty because he attempted to have sex with a minor. *See*, *e.g.*, Doc. 79 at 24-25 ("[T]he jury instructions . . . tell[] you that inducement means to stimulate the occurrence of or to cause. And that is exactly what the evidence shows here. He intended to cause the minor to engage in sexual activity"); *id*. at 27 (Mr. Morrill "intended to cause this sexual encounter with the two minors."); *id*. at 46 ("[I]nducing, in this case when you read the definition, stimulating the occurrence of. What was he stimulating? Well, he was stimulating a sexual encounter with a minor. Inducement to engage a minor in sexual activity through an adult intermediary.").

Mr. Morrill was thus denied a fair trial because the faulty instruction vitiated a viable defense and enabled the jury to find Mr. Morrill guilty on the basis of conduct not criminalized by § 2422(b).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13495
Non-Argument Calendar

D.C. Docket No. 6:16-cr-00251-RBD-GJK-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEVEN ARTHUR MORRILL,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(July 12, 2018)

Before WILLIAM PRYOR, BRANCH and FAY, Circuit Judges.

PER CURIAM:

Steven Morrill appeals his conviction for attempting to induce a minor to engage in sexual activity. 18 U.S.C. § 2422(b). Morrill argues that the district court erred by instructing the jury that "induce means to stimulate the occurrence of or to cause" because that definition could have caused him to be convicted for causing a minor to engage in sexual activity instead of causing the minor to assent to engage in unlawful sexual activity. We affirm.

"We review *de novo* the legal correctness of jury instructions, but we review the district court's phrasing for abuse of discretion." *United States v. Seabrooks*, 839 F.3d 1326, 1332 (11th Cir. 2016). "We review jury instructions 'to determine whether the instructions misstated the law or misled the jury to the prejudice of the objecting party.'" *Id.* at 1333 (quoting *United States v. Gibson*, 708 F.3d 1256, 1275 (11th Cir. 2013)).

Section 2422(b) punishes "[w]hoever, using the mail or any facility or means of interstate or foreign commerce, . . . knowingly persuades, induces, entices, or coerces any individual . . . [less than] 18 years [old], to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so . . . ." 18 U.S.C. § 2422(b). An attempt occurs if the defendant, "using the internet, act[s] with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex." *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004). We have explained that

"induce" means "to stimulate the occurrence of; cause." *Id.* at 1287. "With regard to intent, 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." *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010) (internal quotation marks and citation omitted). We held in *Murrell* that, "[b]y negotiating with the purported father of a minor, [the defendant] attempted to stimulate or cause the minor to engage in sexual activity with him," which "fit[] squarely within the definition of 'induce.'" 368 F.3d at 1287.

The district court did not err in instructing the jury about the charged offense. The district court correctly defined "induce" by employing the same definition we used in *Murrell*. *See United States v. Rutgerson*, 822 F.3d 1223, 1232 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2158 (2017). And the district court did not need to include the phrase "the assent of" in its definition. The district court instructed the jury repeatedly that the government had to prove that Morrill was guilty of "persuading, inducing, or enticing a minor to engage in sexual activity." The instructions required the jury to find that Morrill acted with the intent to induce a minor, not with the intent to engage in sexual activity with a minor. *See Murrell*, 368 F.3d at 1286.

We **AFFIRM** Morrill's conviction.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13495-HH

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

STEVEN ARTHUR MORRILL,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

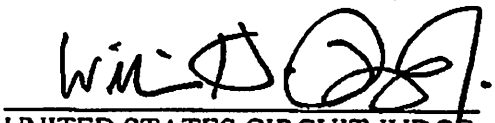
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, BRANCH and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42

O92.3

Attempted Coercion and Enticement of a Minor

to Engage in Sexual Activity

18 U.S.C. § 2422(b)

It is a Federal crime for anyone, using [the mail] [or] any facility [or means] of interstate or foreign commerce [including a cellular telephone or the Internet], to attempt to [persuade] [induce] [entice] [coerce] a minor to engage in [prostitution] [any sexual activity for which any person could be charged with a criminal offense], even if the attempt fails.

The Defendant is charged in [Count(s)] with attempting to commit the offense of enticement of a minor.

The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly intended to persuade, induce, entice, or coerce [individual named in the indictment] to engage in [prostitution] [sexual activity], as charged;

(2) the Defendant used [the mail] [the Internet] [a cellular telephone]

[describe other facility of interstate or foreign commerce as alleged in indictment] to do so;

(3) at the time, the Defendant believed that [individual named in the indictment] was less than 18 years old;

(4) if the sexual activity had occurred, one or more of the individual(s) engaging in sexual activity could have been charged with a criminal offense under the law of [identify the state or specify the United States] [If only prostitution is charged, delete this element.]; and

(5) the Defendant took a substantial step towards committing the offense.

It is not necessary for the Government to prove that the intended victim was in fact less than 18 years of age; but it is necessary for the Government to prove that Defendant believed such individual to be under that age.

Also, it is not necessary for the Government to prove that the individual was actually [persuaded] [or induced] [or enticed] [or coerced] to engage in [prostitution or] sexual activity; but it is necessary for the Government to prove that the Defendant intended to engage in [prostitution or] some form of unlawful sexual activity with the individual and knowingly took some action that was a

substantial step toward bringing about or engaging in that [prostitution or] sexual activity. A "substantial step" is an important action leading up to committing an offense – not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in the persuasion, inducement, enticement, or coercion.

So, the Government must prove that if the intended sexual activity had occurred, one or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the laws of [state] [the United States]. As a matter of law, the following acts are crimes under [state] [federal] law. [Describe the applicable state or federal law]. [If only prostitution is charged, delete this paragraph.]

[As used in this instruction, "induce" means to stimulate the occurrence of or to cause.]

[As used in this instruction, the term "prostitution" means engaging in or agreeing or offering to engage in any lewd act with or for another person in exchange for money or other consideration.]

[[A telephone] [A cellular telephone] [The Internet] is a facility of interstate commerce.]

ANNOTATIONS AND COMMENTS

18 USC § 2422(b) provides:

(b) 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.

Maximum Penalty: Life imprisonment and applicable fine. Minimum sentence is ten (10) years of imprisonment and applicable fine. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children. This offense also carries a minimum of five years of supervised release up to a maximum of lifetime supervised release.

United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004) ("Combining the definition of attempt with the plain language of § 2422(b), the government must first prove that [the defendant], using the internet, acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex. 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. That is, if a person persuaded a minor to engage in sexual conduct (e.g. with himself or a third party), without then actually committing any sex act himself, he would nevertheless violate § 2422(b)."") (internal footnotes omitted).

United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002) (superseded by statute on other grounds); *United States v. Farley*, 607 F.3d 1294 (11th Cir. 2010). An actual minor is not required for an attempt conviction under 18 U.S.C. § 2422(b), it is sufficient that the defendant believed that a minor was involved.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The defendant need not communicate directly with the minor; it is sufficient if the defendant induces (or attempts to induce) the minor via an adult intermediary. *United States v. Hornaday*, 392 F.3d 1306, 1310-11 (11th Cir. 2004); *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004). In *Murrell*, the Eleventh Circuit also approved "to stimulate the occurrence of; cause" as the definition of "induce."

The Internet is an instrumentality of interstate commerce. *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004). Telephones and cellular telephones are instrumentalities of interstate commerce, even when they are used intrastate. *United States v. Evans*, 476 F.3d 1176, 1180-81 (11th Cir. 2007).

The term "prostitution" is not defined in Title 18. The Supreme Court has defined the term as the "offering of the body to indiscriminate lewdness for hire." *Cleveland v. United States*, 329 U.S. 14, 17 (1946). The term should not be defined by reference to state law, as doing so would make the term superfluous, since the statute already punishes "any sexual activity for which any person can be charged with a criminal offense."

The term "sexual activity for which any person can be charged with a criminal offense" includes the production of child pornography, as defined in 18 U.S.C. § 2256(8). 18 U.S.C. § 2427.