

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DAYTON MICHAEL CRAMER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether – pursuant to 18 U.S.C. § 2422(b) – communications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable *only if* “the defendant’s interaction with the intermediary is aimed at transforming or overcoming the minor’s will in favor of engaging in illegal sexual activity.”

B. PARTIES INVOLVED

The parties involved are identified in the style of
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*The Am. Heritage Dictionary of
the English Language* 671
(William Morris ed., 1st ed. 1981). 9-10

The Petitioner, DAYTON MICHAEL CRAMER, requests that the Court to issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals entered in this case on October 3, 2019. (A-3).¹

D. CITATION TO OPINION BELOW

United States v. Cramer, 789 Fed. Appx. 153 (11th Cir. 2019).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the Eleventh Circuit Court of Appeals.

¹ References to the appendix to this petition will be made by the designation “A” followed by the appropriate page number.

F. STATUTORY PROVISION INVOLVED

18 U.S.C. § 2422(b) 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.

G. STATEMENT OF THE CASE

The Petitioner was charged in an indictment with attempting to commit enticement of a minor to engage in sexual activity using interstate commerce, pursuant to 18 U.S.C. § 2422(b). The evidence at trial established that the Petitioner's communication in this case was with an "adult intermediary" and *not* with a

minor or a law enforcement officer pretending to be a minor (i.e., the Petitioner engaged in electronic communications with an officer who pretended to be the stepmother of “Paisley” – a thirteen-year-old girl). At trial, defense counsel recognized that the Eleventh Circuit Court of Appeals has upheld § 2422(b) convictions where law enforcement officers pose as adult intermediaries,² but defense counsel nevertheless objected to a conviction based on an adult intermediary in this case. The district court overruled the objection and allowed the case to be submitted to the jury. At the conclusion of the trial, the jury returned a verdict finding the Petitioner guilty as charged. The district court subsequently sentenced the Petitioner to ten

² In *United States v. Murrell*, 368 F.3d 1283, 1288 (11th Cir. 2004), the Eleventh Circuit Court of Appeals held that “that direct communication with a minor or supposed minor is unnecessary under the text of § 2422(b).”

years' imprisonment (the minimum mandatory sentence). (A-20).

On direct appeal, the Eleventh Circuit Court of Appeals recognized that in *United States v. Hite*, 769 F.3d 1154, 1160 (D.C. Cir. 2014), the District of Columbia Court of Appeals held that “communications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable under § 2422(b), so long as the defendant’s interaction with the intermediary is aimed at transforming or overcoming the minor’s will in favor of engaging in illegal sexual activity.” (emphasis added). However, the Eleventh Circuit held that its “binding precedent forecloses a reading of the statute that would make interactions with an adult intermediary punishable only if such interactions were aimed at transforming or overcoming

the minor's will in favor of sexual activity." (A-15-16)

(footnote omitted).

H. REASON FOR GRANTING THE WRIT

There is a circuit split over the proper application of 18 U.S.C. § 2422(b) and whether communications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable only if “the defendant’s interaction with the intermediary is aimed at transforming or overcoming the minor’s will in favor of engaging in illegal sexual activity.”

As explained above, in *United States v. Hite*, 769 F.3d 1154, 1160 (D.C. Cir. 2014), the District of Columbia Court of Appeals held that “communications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable under [18 U.S.C.] § 2422(b), *so long as the defendant’s interaction with the intermediary is aimed at transforming or overcoming the minor’s will in favor of engaging in illegal sexual activity.*” (emphasis added). In *Hite*, the court stated the following:

By the same token, we reject the Government’s argument that § 2422(b)

does not require the defendant to attempt to transform or overcome the minor's will. While the statute does not preclude the use of an intermediary, it clearly establishes the "individual who has not attained the age of 18 years," § 2422(b), as the intended object of the *actus reus* verbs. See *United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) (noting that § 2422(b) "criminalizes an intentional attempt to achieve a mental state – a minor's assent – regardless of the accused's intentions [concerning] the actual consummation of sexual activities with the minor") (quoting *United States v. Berk*, 652 F.3d 132, 140 (1st Cir. 2011) (internal quotation marks omitted)); *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011) ("Section 2422(b) essentially requires proof that the defendant attempted to communicate with the minor, and through that communication, transform the minor into his victim.").

Accordingly, where an adult intermediary is involved, the defendant's interaction with the intermediary must be aimed at transforming or overcoming the child's will to violate § 2422(b). See *United States v. Nitschke*, 843 F. Supp. 2d 4, 13 (D.D.C. 2011) (dismissing indictment under § 2422(b) where the defendant "never sought Detective

Palchak’s help in procuring the fictitious minor,” “did not ask Palchak to pass along any communication whatsoever to the minor,” and “did not make any promises to the minor through Palchak”). The “substantial step” required to prove an attempt under § 2422(b) must therefore strongly corroborate the defendant’s intent to engage in conduct that is designed to persuade, induce, entice, or coerce the minor by way of the intermediary. In [*United States v. McMillan*], 744 F.3d 1033 (7th Cir. 2014)], for instance, the Seventh Circuit found that the defendant had taken a substantial step when he offered to send a picture of his penis to the girl’s father so that he could show it to the girl, asked to talk to her directly, and asked the girl’s father if he had talked to her about their plans. 744 F.3d at 1037. *See also Dworken*, 855 F.2d [12,] 17 [(1st Cir. 1988)] (“If the substantial steps are themselves the sole proof of the criminal intent, then those steps unequivocally must evidence such an intent; that is, it must be clear that there was a criminal design and that the intent was *not* to commit some non-criminal act.”) (emphasis in original).

Hite, 769 F.3d at 1164 (footnote and some citations

omitted).

However, in the opinion below, the Eleventh Circuit Court of Appeals rejected the interpretation of § 2422(b) adopted by the District of Columbia Court of Appeals in *Hite*:

Cramer also asks us to endorse the United States Court of Appeals for the District of Columbia Circuit's interpretation of § 2422(b) that communications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable only if "the defendant's interaction with the intermediary is aimed at transforming or overcoming the minor's will in favor of engaging in illegal sexual activity." See *United States v. Hite*, 769 F.3d 1154, 1160 (D.C. Cir. 2014). But this court has already rejected that interpretation of § 2422(b). See *Murrell*, 368 F.3d at 1287.

In *Murrell*, we considered the meaning of the term "induce" for purposes of § 2422 when deciding whether a defendant could be convicted for inducing a minor to engage in illegal sex acts by communicating only through an adult intermediary. See 368 F.3d at 1287. Our court acknowledged "induce" could mean

“to lead or move by influence or persuasion; to prevail upon,’ or alternatively, ‘to stimulate the occurrence of; cause.” *Id.* (alterations accepted) (quoting *The Am. Heritage Dictionary of the English Language* 671 (William Morris ed., 1st ed. 1981)). We endorsed the latter definition because the former would essentially render the term “persuade” superfluous. *See id.* Therefore, our binding precedent forecloses a reading of the statute that would make interactions with an adult intermediary punishable only if such interactions were aimed at transforming or overcoming the minor’s will in favor of sexual activity.

(A-14-16) (footnote omitted).

Notably, if the District of Columbia Circuit’s interpretation of § 2422(b) is applied to the Petitioner’s case, the Petitioner would be entitled to relief. The record in this case is clear that the Petitioner’s ultimate interaction with the adult intermediary was *not* aimed at transforming or overcoming the minor’s will in favor of engaging in illegal sexual activity.

By granting the petition in the instant case, the Court will have the opportunity to resolve this circuit split and clarify the proper interpretation/application of § 2422(b) to cases that involve adult intermediaries. This issue is important, as numerous states around the country are currently engaging in internet sting operations that involve the use of “adult intermediaries” (i.e., law enforcement officers posing as the parent of a fictitious minor).

Accordingly, the Petitioner requests the Court to grant his petition for a writ of certiorari.

I. CONCLUSION

The Petitioner requests the Court to grant his
petition for writ of certiorari.

Respectfully Submitted,

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