19-7775

№ 19A220

SUPREME COURT OF THE UNITED STATES

Rande Brian Isabella,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Rande Brian Isablella
Bureau of Prisons Register No.60896-018
Petitioner, pro se
Federal Correctional Institution Loretto
Post Office Box 1000
Cresson, Pennsylvania 16630

ORIGINAL

QUESTIONS PRESENTED

I. Whether if was prejudicial error for the Tenth Circuit Court of Appeals to depart from the accepted and usual course of judicial proceedings by disregarding review of essential elements at 18 U.S.C.§2251(a), in conflict with Supreme Court doctrine under Jackson v Virginia, 443 U.S. 307 (1979); and to rely solely on "circumstantial evidence of a substantial step" pointed toward "sexting" behavior, but not pointed toward the charged offense?

II. The Supreme Court is needed to settle a recognized conflict between the Circuit Courts of Appeals concerning criminal liability and procedures at 18 U.S.C.§2422(b) and to define a term.

III The Tenth Circuit decision below conflicts with a recent state supreme court decision on the important question: whether evidence of the behavioral theory of "grooming" requires a foundational showing of scientific validity to be admissible and relevant to a jury? The Supreme Court is needed to settle the conflict and to decide, in light of Oregon v Henley, 363 Or 284 (2018), whether the federal court abdicated its gatekeeping function under Daubert v Merrell Dow, 509 U.S. 579 (1993), and Kumho Tire Co. v Carmichael, 119 S Ct 1167 (1999), by allowing a fact witness' erroneous definition to materially influence the jury?

No. 19A220

LIST OF PARTIES

Rande Isabella,

Appellant / Petitioner, Pro Se,

vs.

United States of America,

Appellee / Respondent.

RELATED CASES

United States v Isabella, 1:14-cr-00207-CMA-01

U.S. District Court for the District of Colorado

Judgment entered on May 24, 2017.

United States v Isabella, 17-1197

U.S. Court of Appeals for the Tenth Circuit

Judgment entered on March 12, 2019.

Petition for Rehearing / Rehearing En Banc denied June 4, 2019

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United States v Isabella, 918 F.3d 835 (10th Cir. 2019)

JURISDICTIONAL STATEMENT

Petitioner / Appellant, pro se, (hereinafter referred to as "Mr. Isabella"), prays that a writ of certiorari issue to review the judgment below. Pursuant to 18 U.S.C.§3231, the District Court entered judgment on May 24, 2017 without opinion: guilty Counts 1 & 2; not guilty Counts 3 & 4. On March 12, 2019, the Tenth Circuit Court of Appeals affirmed the Judgment with jurisdiction at 28 U.S.C.§1291. Appendix A. Pursuant to Fed. R. App. P. 35(f), Mr. Isabella, pro se, filed a Petition for Rehearing / Rehearing En Banc. Appendix F. Order denying rehearing was entered on June 4, 2019. App'x. B. The Honorable Justice Sotomayor, granted an application extending time to file a petition for writ of certiorari to November 1, 2019. Appendix C. It was timely received. See Cover Page. A sixty-day period for corrections was granted. App'x C, P.2. And the petition was timely submitted via Supreme Court Rule 29.2 (prison mailbox rule) on Friday, January 10, 2020, and postmarked on the 60th day (Monday, January 13, 2020), per Rule 30.1. The Supreme Court has jurisdiction to review this case at 28 U.S.C.§1254.

STATUTORY PROVISIONS

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STATEMENT OF THE FACTS

As shifting winds can set the saltiest sailor to drift, so can a series of unanticipated changes - an amended indictment, recanted testimony, a new theory of offense, statutory re-interpretation, a categorical approach, and circumstantial steps - frustrate the most stalwart and resolute legal defense. Whether by blurring the lines, moving the goalposts or using differing weights, the effect is the same: **unfair advantage.**

On May 20, 2014, a Federal Grand Jury was presented with testimony by Homeland Security Investigations (H.S.I.) Special Agent Jeffrey Williams: "On or about November 20, 2013, the parents of D.C., also known as S.F., came in to see us about images that they had discovered on the cellphone of their 14-year-old daughter." Appendix L, P.1, L.16-19; (cites to the record shall be in the format: Appendix, Page, Line). "[A]pproximately fifty-six (56) child pornographic images were found on the phone depicting at least three (3) separate children." Appendix K, P.2, ¶37-38.

> "Investigators ultimately determined that certain images found on S.F.'s phone were sent embedded in a series of text messages to Mr. Isabella by S.F. and that two of the images depicted a faceless female wearing only bra and panties and a faceless female, nude from her neck to her knees with her knees tightly closed. Pre-trial, the Government acknowledged that the bra and panties image was not child pornography. Regarding the nude "torso pic," the Government argued it was child pornography. Initial Brief (Appendix O, P.3, L.15-P.4, L.3. (internal cites are embedded as footnotes).

H.S.I. agents conducted a search of Mr. Isabella's Ohio home and cars, seizing 3 of his computers, an iPhone and 6 digital storage devices on February 14, 2014; then scoured his online media presence with search warrants and subpoenas for Facebook, Sprint, Google, Yahoo, Time Warner, etc. App'x K, P. 3-5. On June 14, 2014 H.S.I. arrested Mr. Isabella, while working in St. Augustine, FL, seizing a 4th computer and iPhone with his consent. Id, P.6.

"The Government's theory of the case presented to the Grand Jury... was that

a plethora of **sexually explicit images** of minor S.F. contained on Mr. Isabella's electronic media were produced at the behest of Mr. Isabella. But as the case proceeded to trial, other than a single photograph, the Government conceded that there were **no sexually explicit images** of S.F. found on any of Mr. Isabella's electronic media, such that there was no collection of child pornography typically found of a child pornographer." App'x. O, P.2. "During trial... a forensic computer expert [established] that the single purported sexually explicit image relied upon by the Government was not produced at the request of Mr. Isabella but instead was produced in connection with a series of photographs that S.F. took with her then boyfriend. As a result of that expert's analysis, the Government conceded the lack of evidence to support the Section 2251 offense and dropped that portion of Count Two that asserted the completed crime of production of child pornography." Id. L.1-8. Digital Forensics of Mr. Isabella's numerous computers and electronic media concluded:

> "Of the thousands of images, none were found that I believe would **meet the federal definition of child pornography.** There were many images which contained partial nudity of females which were obviously adult. Many of these appeared to be photo shoots of various models. None of them were **pornographic nor hinted at younger models.**" .... "Of the videos contained on the media, none were found to contain[] content which would meet the definition of child pornography []. Most of the videos were of scenic, travel or home videos of family and friends." .... "In addition, I noted a **lack of .. legal images of children...** which could support an interest in younger persons." Appendix I, P. 1, ¶3-6.

"The final blow to the Government's theory of the case was S.F.'s explosive testimony at trial that she repeatedly lied about Mr. Isabella to law enforcement, and most significantly, that Mr. Isabella 'did not entice her.'" Appendix O, p.3 L.9-11. Direct-examination of S.F.:

> Q: Why did you tell law enforcement that he first told you he was 17?
> A: Because I was scared.
> Q: What were you scared of?
> A: That I was going to get in trouble. Appendix M, P.1, L.17-21;

Q: Why did you lie about what name he gave you...?
A: Because I figured if I made it seem like I was catfished, people would have left me alone. Id. P.2, L.2-5;
Q: In terms of the threat that he was going to hurt your little sister, was that part true?
A: No, it was not.
Q: ...did he ever threaten to hurt you or hurt your sister?
A: No, he never threatened me at all.
Q: Why did you tell law enforcement that he was going to hurt your sister?
A: Because I -- because I thought I was going to get in trouble. I thought everybody was going to -- I don't know. I thought I was in trouble. Id. P.2, L.22-P.3, L.7.

With the case now hinging solely on enticement, and with no sexually explicit conduct in evidence, the Government's original theory of offense unraveled.

Q: What wasn't true?
A: That he lied about his name. That he was making me do it. Everything that I did and I said was all by my own choice. He never made me do anything." Id. P.2, L. 16-21.

One year prior to trial S.F. began recanting, fully recanting 3 months prior to trial; yet this exculpatory evidence - negating guilt - was withheld from the Grand Jury (see Napue v Illinois) and from Mr. Isabella (see Brady v Maryland), to gain a strategic trial advantage. Id. P.4, L.13-15; P.5, L.24-P.6, L.7. Asked "what evidence concerning pornography on Mr. Isabella's computer do you intend to introduce," the Prosecutor conceded "[w]e don't have the intention of admitting any pornography..." Id. P.7., L.19-25.

"[T]here was no evidence of a specific request by Mr. Isabella that S.F. take a sexually explicit picture of herself, such as - take a picture of your vagina, take a picture while masturbating, etc. that is typically found in a production of child pornography case. There were however, lots of specific requests by Mr. Isabella that S.F. take a picture of her face." Appendix O, P.6, L.3-P.7, L.5. With no "sexually explicit" images or requests in the record, the Government's narrative of "sexting," became a new theory of offense, "grooming" a minor's mental state, as revealed at summation. Id. P. 27, L.10-P.28, L.8.

"He participated in a consistent series of actions **through his grooming** of her, through his **complimenting** her, **praising** her, et cetera, to get her to

comply with his request." App'x M, P.14, L.15-P.15, L.3. "When he **directs sexualized conversations** .... that is all part of that enticement, and that is all part of his attempts to receive child pornography." Id P.17, L13-17.

Mr. Isabella and S.F. made initial contact through the international social networking community, "Minus," then communicated by email, chat services, cellphone and text messages between September and November, 2013. App'x O, P.5. "Although there were references to meeting, Mr. Isabella and S.F. never made any plans to, nor did they meet." Id.; App'x M, P.18, L.5-10. "According to Dr. Mark Mills, a nationally recognized psychiatrist, Mr. Isabella is not a pedophile. Mr. Isabella regularly engaged in age appropriate dating as [a] member of several adult dating sites, including Plenty of Fish and OK Cupid. Appendix O, P.8, L.7-P.9, L.2. "Mr. Isabella has no criminal history and no prior contact with law enforcement involving child exploitation;" an Assistant Professor at various universities; a political / market research consultant; a father of 4; and grandfather of 8; his wife, family, friends and students remain supportive. Id. P.9; App'x N, P.8-10; also see District Court Doc. 246, 246-2, 264-1. Dr. Mills' Psychiatric Evaluation concluded:

> First, there is good evidence from both Mr. Isabella's history and his psychological testing that he suffers from [Autism Spectral Disorder] and has done so since childhood. Second, that diagnosis is reflected in the way (by being online) Mr. Isabella chose to engage women. He is a man who has difficulty with eye-contact and one can imagine (as he confirms) that he would not do well with the singles bar scene. Third, visiting online adult sites is uncertain even when the visiting adults have to represent (as they do) that they have reached the age of majority. Mr. Isabella's chats and emails were explicit and even grossly inappropriate but they were completely legal had the so-called victims been 18 or more years old. They were not, but how was he to know? Again, he missed the clues, at least in part because of his ASD. His inability in this regard does not make him dangerous as noted in [these] psychological test results. Thus, it may be appropriate to convict Mr. Isabella of obtuseness and obliviousness but those should not be, given his psychiatric condition, cause for incarceration." See App'x N. P.4-9.

Mr. Isabella was sentenced to 18 years imprisonment; plus 20 years of supervised release as a "violent sex offender" and "child pornographer;" SORNA and Walsh Act restrictions; and periodic polygraph and plethysmograph testing to

determine whether he becomes aroused by pornographic images of children.

SUMMARY OF THE ARGUMENT

The decision below reflects an extraordinary departure from the usual course of judicial review and stare decisis by the Tenth Circuit Court of Appeals: (1) by disregarding the specific elemental requirements at §2251(a) in a sufficiency challenge; (2) by naming overt acts, not directly pointed toward the crime charged, as the "substantial step"; (3) by interpreting criminal liability at 18 U.S.C.§2422(b) in conflict with the jury's election, the controlling case and the circuit's own rule; (4) by contributing to the ambiguity caused by criminal liability being under conflict; and (5) by so lowering the violative threshold as to unconstitutionally sweep "sexting" behavior into both the production of child pornography (§2251) and the coercion and enticement (§2422) statutes.

In light of the recent state supreme court decision in conflict with the federal circuit decision below reaching an opposite conclusion on the identical matter, the Supreme Court is also needed to resolve the conflict. As social customs adapt to advanced methods of interaction, the lines established more than two decades ago have blurred and are no longer adequate in guiding prosecutorial bounds or judicial procedure. The Supreme Court is needed to settle these matters of extraordinary public importance, by addressing the conflicts concerning criminal liability and procedure. The Court also needs to define paramters concerning the concepts of "grooming," "a minor's assent," and "sexting," with regards to whether §2251(a) and §2422(b) should be so enlarged as to sweep these concepts into their purview.

I. **In an Extraordinary Departure the Tenth Circuit Court of Appeals Has Disregarded Review of Elements at 18 U.S.C.§2251(a) Required Under Jackson v Virginia 443 U.S. 307 (1979); and Has Found a "Circumstantial" Step Pointed Toward "Sexting," in Conflict With Attempt Doctrine of a "Substantial" Step Pointed Toward the Charged Offense.**

Conclusion

It was unfair for the Government to shift and proceed without sufficient evidence to prove specific elements at 18 U.S.C.§2251(a). then ask the Panel to "not cite the elements." It was unfair for the Panel to disregard well-settled attempt doctrine in finding "**circumstantial** evidence of the **substantial** step." It was unfair for the District Court to broaden the bases to include "any effect," when Congress expressly proscribed the jurisdictional element at §2251(a). It was unfair under a single transaction. for Mr. Isabella to suffer the onus of three federal convictions, each relying on the **same elements** of §2251(a) without an appellate review of those challenged elements.

Congress proscribed the Child Exploitation statute clearly and narrowly, with specific requirements: (1) the use of a minor engaging in "sexually explicit conduct" at 18 U.S.C.§2256(2); (2) specific intent to "produce" actual "child pornography" at §2256(8); and (3) scienter expressly hooking those two elements to interstate commerce. 18 U.S.C.§2251(a); Appendix D, P.1-2. By relying on the "totality" of conduct, the Tenth Circuit Court of Appeals has made a "subjective determination," denying Mr. Isabella protection afforded by **elemental** requirements, and has so departed from the accepted and usual course of appellate review as to call upon an exercise of the Supreme Court's supervisory powers.

Introduction

The growing behavior of "sexting" has been swept into the child exploitation statute, setting a dangerous precedent under United States v

Isabella, 918 F.3d. 835 (10th Cir. 2019). As illustrated by the scenario below, this precedent is a matter of public importance.

- A minor joins an "adult only" social networking/dating site by checking the box, "I am 18 years old." As she interacts, requests for erotic or nude images floods her inbox. If she sends even "mere nudity," under Isabella, each inquirer is subject to prosecution for "producing child pornography," facing a 15-year mandatory minimum. Since §2251(a) carries no scienter of age, a mistake-of-age defense is not availabe.

All is not lost. Safeguards protect defendants from wrongful conviction. The Supreme Court is now needed to ensure such safeguards are not circumvented.

A. Elemental Review As a Defendant's Safeguard

The principles of defendant rights were established by the Supreme Court under In re Winship, 397 US 364 (1970) and Jackson v Virginia, 443 US 307 (1979).

> "The Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Jackson v Virginia (quoting In re Winship). "The constitutional hook in Jackson was in In re Winship [], in which we held that due process requires proof of each element of a criminal offense beyond a reasonable doubt." Dretke v Haley, 541 US 386, 158 L Ed 2d 659, 124 S Ct 1847 (2004).

When challenging sufficiency of evidence on appeal, the safeguards under these tandem decisions carry due process through to appellate review.

> "The reviewing court considers only the **'legal'** question 'whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Musacchio v United States, 57 US __, 136 S Ct 709 (2015) (quoting Jackson v Virginia) (emphasis in original).

An appellant, therefore, holds a right to equal protection from a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged. Vachon v New Hamphsire, 414 US 478 (1974). It is the trial judge's responsibility to first determine if "the Government's case was so

lacking that it should not have even been submitted to the jury." Burks v United States, 437 US 1, 16 (1978). For such conviction to rise to the level of a "denial of justice, there must have been absent one of the elements deemed essential to due process." US Ex Rel. Bilokumsky v Tod, 263 US 149 (1923). In an attempt, "[t]he element which is lacking is some overt act which **points directly to the object offense.**" United States v Monholland, 607 F.2d 1311, 1320 (10th Cir. 1979). The reviewing body assesses the jury's logic, testing whether inferences are sufficiently undergirded by factual bases consistent with the legal conclusion. In other words, factual sufficiency is relative to the requirements at law -- and for that we look to **elements.**

B. **The Government Asked the Panel to Disregard Citing Elements**

Count Two was charged by **elements** at 18 U.S.C.§2251(a) & (e). App'x E. 1-5. The jury was required to find **every element** beyond a reasonable doubt. Appendix G, P.7. With no evidence offered to prove the specific elements at §2251(a), the Government re-focused their theory of offense to Mr. Isabella's words and thoughts alone. App'x M, P.8, L.12-21. Using snippets from three-months of emails and chats with minor S.F., a narrative was drafted regarding the **potential** for a future sexual abuse, rather than some criminal step taken. Accordingly, what surety does a defendant have from shifting theories of offense?

The federal system of justice relies on codified statutes divided into necessary components. At trial, these "elements" become the bones, upon which **relevant facts** are hung until sufficient weight is subjectively found by rational triers-of-fact. Should the jury's findings be challenged on appeal, it is those "elements" which must be objectively revisited to ensure that those relevant facts corrolate and that the jury's inferences were logical, reasonable, and met a minimum threshold for substance as a matter of law. To exclude even a single

element from appellate review affects due process of law. Jackson v Virgina.

> "The role of an appellate court in judging the sufficiency of the evidence is fundamentally different from the role of the jury in finding the facts and determining guilt. ...a court reviewing for sufficiency is **not permitted to 'make its own subjective determination** of guilt or innocence.'" United States v Cardales-Luna, 632 F.3d 734 (1st Cir. 2011)(quoting Jackson v Virginia at 319 n. 13.)

Lacking evidence to prove Count Two, the Government **improperly declared** to the jury that chat evidence probative of §2422(b), could conflate and satisfy each of the specific elemental requirements at §2251(a), a wrong standard of law.

> "In terms of Count 2 of the Indictment, attempted production of child pornography" .... "**it is the very same evidence** as element 2 of Count 1 of the indictment. In terms of the second and third elements of Count 2 .... **evidence that proves those two elements is, likewise, evidence that we discussed.**" Appendix M, P.11, L.6-P.12, L.1.

Under accepted and usual §2422(b) procedure, Count One would have required reversal for three reasons. First, the jury's election of production as the underlying offense at "Element Three" (Count One) caused §2251(a) elements to be essential to both counts. App'x G. P.1-5. Second, the Seventh Circuit controlling case under Mannava, 565 F.3d 412, holds that the underlying offense is an "element" of §2422(b). Third, the Tenth Circuit's own rule at §2422(b) plainly states, "the predicate sexual activity contemplated by §2422 is an **element** of the offense, **not a means.** United States v Robinzine, 80 F.3d at 253 n.1 (7th Cir. 1996)." App'x G, P.6.

At Oral Arguments, the appellate prosecutor flipped the script to the Panel, arguing: "[t]he underlying offense is **means**, they're **not elements.**" App'x. H, P.11 at time=20:12. Recognizing that without proof of §2251(a), neither conviction could withstand the crucible of appellate review, the Government abandoned trial evidence and pleaded to the Panel to depart.

> "If we're going to actually make the underlying offense the elements, which is what the Seventh Circuit did do in [United States v Mannava, 565 F.3d 412 (7th Cir. 2009)], then we're gonna have **a difficult time.** But the

> Sixth Circuit in [United States v Hart, 635 F.3d 850 (6th Cir. 2011)] takes a **different approach** and the Eleventh Circuit in [United States v Jockisch, 857 F.3d 1122 (11th Cir. 2017)] takes **different approaches.** If you're gonna say that the underlying offense is somehow an element now, then the government is going to have to **allege that in the indictment.**" (Asst. U.S. Atty. Grewell at oral arguments), Appendix H, P.12, at 21:00 - 21:30. See Indictment at App'x E, P.1-5; Order denying Bill of Particulars; and Motion objecting to not being informed "nature and cause," at App'x. R.

The "difficult time" is a full reversal on insufficiency. The "different approach" is a categorical approach. But Hart and Jockisch, both outliers, are not authority for re-classifying the underlying offense as "means." The jury's election at "Element Three," the controlling case and the circuit's own rule agree. The third component of §2422(b) is an "element of the offense, not a means." Thus, the specific elements at §2251(a) are required under both counts. [1], [2] (notes at section end); App'x G, P.1-6.

Having challenged that "**Evidence Was Insufficient As a Matter of Law,**" Mr. Isabella expected the Panel to review elements at §2251(a). But the Government re-directed the Panel from a Jackson v Virginia review, stating:

> "[United States v]Lee,[603 F.3d 904 (11th Cir. 2010)] **didn't cite the elements,** or the Jockisch opinion, but if you relate it to Hart, you can find it via **that route.**" App'x H, P.17, 31:55-32:18.

The Panel Opinion "didn't cite the elements" at 18 U.S.C.§2251(a), stating:

> "because the evidence supporting both counts is identical, our sufficiency of the evidence analysis is the same for Counts 1 and 2. The **parties agree.** See Aplee. Br. at 24 (stating 'the analysis of the evidence supporting the two attempt counts is essentially the same'); Aplt. Br. at 16 (analyzing attempt convictions without distinguishing between them)." Appendix A, P.25.

But the record shows no such agreement was made. In the Petition for Rehearing, Mr. Isabella pointed out the Initial Brief's "clear and immediate distinguishing of essential differences..." between the counts. Appendix F, P.1.

> "Similarly, to be convicted of violating the attempt offense vis a vis Section 2251, Mr. Isabella must have (a) enticed a minor **to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct** and (b) engaged in conduct amounting to a **substantial step towards its commission.** (Init. Br. p. 16)." Id.

Whether by re-classifying elements as "means" or by disregarding elemental review, the Government's burden of proof was relieved. This cannot be harmless, since it denies due process protection by review of "legal" sufficiency of "every element" "beyond a reasonable doubt." Jackson v Virginia, 443 U.S. 307. "The government shifted gears and sought to proceed." United States v Farr, 536 F.3d 1174 (10th Cir. 2008) (reversed on a "different" theory of offense).

Justice Sutherland's classic admonishment in Berger v United States, 295 US at 88 (1932), reminds U.S. Attorneys their interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done .... [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Where elemental requirements were markedly different, the **same evidence** was relied upon in a **single transaction** with a **single minor** to convict Mr. Isabella of three crimes - all under a **single mens rea** and **actus reus**: "production of child pornography under federal law." App'x G, P.1-6. Elements at §2251(a) required review.

Count 1 • Coercion & Enticement (completed); [3], [4]
• Coercion & Enticement (attempted);
Count 2 • Production of Child Pornography (attempted).

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1. Mr. Isabella objected to "multiplicity" by pre-trial and post-conviction motions (denied); then raised double jeopardy on direct appeal. App'x. O, P.28-33. 2. In accordance with the jury's election of §2251(a) at "Element Three", elements of §2251(a) subsume, making §2251(a) the greater included of §2422(b). While §2422(b) requires §2251(a) to complete it, the Panel Opinion only addressed whether §2251(a) was the "lesser included." App'x A, p. 55-56; Pet. for Reh. at App'x F., P.15 (denied). 3. Because completed production was dropped and 18 U.S.C.§2427 does not provide for "attempt," verdict form options "1B" and "2B" at Appendix G, P.1-2 are invalid. App'x. D, P.6. 4. The Initial Brief also argued that, since no "sexual activity" had been "completed" or "engaged in," the verdict at Count One (completed) is inconsistent. App'x O, P.13-16.

Elements at 18 U.S.C.§2251(a) Are Unique, Specific and Expressly Proscribed

1. Liability at 18 U.S.C.§2251(a) Requires a Violation at §2256(2)

"It is the lascivious exhibition of the genitals or pubic area of any person" definition that the Government suggests would be the appropriate definition to consider." Appendix M, P.13, L.16-18.

> "The language of the statute makes it clear that the depictions must consist of more than merely nudity; otherwise, inclusion of the term 'lascivious' would be meaningless." United States v Villard, 885 F.2d 117, 125 (3rd Cir. 1989). "The statute, §2251, pointedly does not criminalize the purposeful taking of a photo, or sexual activity that is photographed; it criminalizes engaging in sex for the purpose of taking a photo." United States v Torres, 894 F.3d 319 (D.C. 2017) (Williams dissenting).

In this speech only case, the reviewing body must objectively determine, as a matter of law, whether Mr. Isabella knew that his online chats and texts with minor S.F. would necessarily result in a new production of "child pornography." But the District Court did not rule, nor did a "unanimous jury" decide, that any photograph - existing or anticipated - was or would necessarily include any "sexually explicit conduct" at §2256(2). Richardson v United States, 526 U.S. 813 (1999). See United States v Steen, 634 F.3d 822 (5th Cir. 2011) (§2251(a) reversed on insufficiency of evidence of "lascivious exhibition").

> "In assessing conduct under §2251(a), we ask two questions: did the production involve the use of a minor engaging in sexually explicit conduct, and was the visual depiction a depiction of such conduct?" Id. "Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused" .... "to qualify under §2251, the images must show a minor being used to engage in sexually explicit conduct." Id. (Higginbotham concurring).

In deciding attempt liability, the Panel Opinion relied heavily upon United States v Lee 603 F.3d 904 (11th Cir. 2010), where Lee's "twenty-three actions" were "**taken as a whole.**" App'x A, P.23-27. But Lee's words carried an automatic expectation that the resulting photograph would necessarily include the "lascivious exhibition" of genitalia, by **unequivocally directing the action**: "opened legs" "doggie style" and "cheeks held open." Id. at 904. By speech alone, Lee's unequivocal solicitation satisfied the substantial step element,

irrespective of the "**totality**" of his conduct. Clearly distinguishable, Mr. Isabella gave no direction which would cause a "lascivious exhibition."

The Tenth Circuit faced this identical question in United States v Wales, 127 Fed. App'x 432 (10th Cir. 2005) (unpublished), deciding that Wales' words, "take pictures of your [genitalia] ... of you [masturbating]" . . . "**unequivocally** mark[ed his] acts as criminal." Id. With no such "unequivocal" solicitation, Mr. Isabella's §2251(a) conviction requires reversal under stare decisis.

As "§2251(a) has a specific intent element," the Fourth Circuit decided that engaging in sex acts with a minor, "and taking" a sexually explicit photo was not "for the purpose of producing" child pornography, and reversed a §2251(a) conviction on insufficiency. United States v Palomino-Coronado, 805 F.3d 127, 132 (4th Cir. 2015). The Second Circuit also reversed §2251(a), deciding that influencing a minor "to send her pornographic self-portraits" might violate §2252, but not the charged offense, because "§2251(a) applies only to **production**" of child pornography. United States v Broxmeyer, 616 F.3d 126 (2nd Cir. 2010).

The Panel identified two "requests" for photos. App'x. A, P.27. From his home in Ohio, and in response to receiving the "torso pic," Mr. Isabella asked the Colorado stranger to "send" a "somewhat naughty pic that **includes a face.**" Id. While the "torso pic" depicted legs "tightly closed," Mr. Isabella's request re-frames the image upward and away from the pubic region, in order to "include a face." App'x N, P.3; Id. The second "request," "Pic now!! hahaha," occurred as the online persona, S.F., mentioned a shower. As one might expect, the resulting image of a fully fogged mirror was deemed humorous by both parties. App'x M, P.19, L.13-P.20.L.4. Over three-months of communications, no request related to a "lascivious exhibition" of genitalia. If a discussion does not describe, nor an image depict, "sexually explicit conduct," then §2256(2) is not violated, i.e. "mere nudity." Miller v California, 413 US 15, 24, 93 S Ct 2607 (1973).

It is uncontroverted that Mr. Isabella sought more information about S.F., including her age, well after they first connected. The jury had to infer "belief of age" which remains in dispute. The jury then had to infer that Mr. Isabella's "requests" were of such substantiability as to automatically and necessarily influence a knowing expectation (via the internet) of a new image of S.F. engaging in the "lascivious exhibition of the genitals." Broxmeyer; Wales. The jury had to further infer that such conduct was engaged in, "for the purpose" of "producing, directing, manufacturing, publishing, issuing, or advertising" at §2256(3) a "visual depiction" of that same conduct. App'x D, P.3-4; Palomino-Coronado; Steen.

The only "purpose" identified by the Panel was "help with erections," which cannot satisfy the specific intent element. App'x A, P.28. And since S.F. had not contemplated, nor was asked to produce child pornography, facts could not support inferences. Without sufficient factual undergirding, the reasonable juror must resort to conjecture, impermissibly stretching facts from inference to inference.

> "The chance of error or speculation increases in proportion to the width of the gap between underlying fact and ultimate conclusion where the gap is bridged by a succession of inferences, each based on the preceding one." United States v Shahane, 517 F.2d 1173, 1178 (8th Cir. 1975).

2. The Express Jurisdictional Element at 18 U.S.C.§2251(a) Was Missing Proof at Trial and Was Omitted From an Objective Review for "Legal" Sufficiency

Quite unlike §2422(b), section §2251(a) contains an expressly proscribed jurisdictional element which requires scienter and a nexus to a violation at §2256(2). The element was twice omitted from the Panel's own enumerated list of elements. App'x A, P.14; P. 52. Had the Panel addressed this element, the missing nexus to "child pornography" would have been obvious and the outcome different. "Missing one of the elements deemed essential to due process," Mr. Isabella was denied justice. US Ex Rel. Bilokumsky v Tod, 263 US 149.

Congress intentionally narrowed the scope of criminal liability using three hooks to actual "child pornography," as analyzed in United States v Smith, 402 F.3d at 1315-23 (11th Cir. 2005). "Section 2251(a)'s jurisdictional requirement...contains three jurisidictional hooks. each of which is prefaced by the word 'if.'" United States v Lively, 2017 US App. LEXIS 19 (6th Cir. 2017). "When construing a statute, we should give effect, if possible, to every clause and word." Chickasaw Nation v United States, 534 U.S. 84 (2001). The scienter at 18 U.S.C.§2251(a) requires a person "knows or has reason to know" ... "**if**:"

(1) "child pornography" was transmitted via interstate commerce, etc...;
(2) "child pornography" would be transmitted...; or
(3) "child pornography" had actually been produced using materials affecting interstate commerce. including by computer. Appendix D, P.1.

The Panel was not free to "subjectively determine" scienter of knowledge that "child pornography" was or would be produced and transferred. "[T]rue false is the determination whether a particular formulation reflects a belief that material ...is child pornography." United States v Williams, 553 US at 306 (2008).

> "The defendant must believe that the picture contains certain material, and **that material in fact** (and not merely in his estimation) **must meet the statutory definition.**" United States v Williams, 553 US at 301; "the Eleventh Circuit [] thought that the statute (§2256(2)(A)) could apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious,' (clause (v) of the definition of 'sexually explicit conduct' is 'lascivious exhibition of the genitals or pubic area of any person.' §2256(2)(A) (2000 ed., Supp. V).) That is not so." Id.

3. The Express Requirements of the Jurisdictional Element at §2251(a) Were Circumvented By an Unconstitutional Instruction

Elemental protection afforded by this narrowly crafted jurisdictional requirement was circumvented by the District Court's instruction to the jury: "[i]f **you decide that there was any effect on interstate commerce, then that is enough to satisfy the element.**" Jury Instruction #30 at App'x. G, P.8 The ambiguity of the unconstitutional phrase, "any effect," militates against Congress' intentionally

narrow elemental requirement, causing prejudice.

> "In the face of [the erroneous instruction]... we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given [in the instruction] to ignore that vital difference" between the crime charged and the evidence submitted. Kotteakos v United States, 328 U.S. 769 (1946).

Plain Error

This error both relieved the Government's burden and "imped[ed Mr. Isabella's] efforts to mount an effective defense." Hamling v United States, 418 U.S. 87 (1974). But for the error, a reasonable jury would not have found evidence sufficient to satisfy "every element" at §2251(a). Had the Panel tested the jury's reasonableness concerning §2251(a) elements, the error would have been obvious and the outcome different. Broadening the bases affect the outcome and the fairness and integrity of the proceedings. It cannot be harmless.

> "The Supreme Court may take notice of 'plain error,' if such errors are obvious or if they otherwise effect fairness, integrity, or public reputation of judicial proceedings." Sibler v United States, 370 U.S. 717 (1962).

Plain-error is claimed under the Supreme Court's decision in Rosales-Mireles v United States, US___376 (2018); which found unpreserved errors affecting due process are not barred and need not "shock the conscience" in order to satisfy the fourth prong under United States v Olano, 507 U.S. 725 (1993).

The Panel's Decision Naming Five Overt Acts To Be Sufficient "Circumstantial Evidence of a Substantial Step" Conflicts With Established Attempt Doctrine...

Courts have adopted a uniform standard for requisite elements of attempt:

> "(1) an intent to engage in criminal conduct; and (2) conduct constituting a 'substantial step' towards the commission of the substantive offense which strongly corroborates the defendant's criminal intent." American Law Institute's (ALI) Model Penal Code (M.P.C.) Section 5.01.

In this case, the "substantive offense" is "engaging in sexually explicit conduct for the purpose of producing visual depictions of such [sexually explicit]

conduct;" 18 U.S.C.§2251(a); actual "child pornography" at §2256(8).

> "The courts examine the overt act to determine whether it is **closely connected** with the crime which is the object of the attempt. Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it, **especially when made at a distance** from the place where the substantive offense is to be committed, for there must be some act moving directly toward the commission of the offense after the preparations are made." United States v Monholland, 607 F.2d 1318.

Relying solely on emails, chats and text messages, the jury decided there was sufficient intent to "produce child pornography" with S.F. But the Supreme Court decided that "[t]he mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct." United States v Resendiz-Ponce, 549 US 102 (2007). The Panel concluded that the jury could find "sufficient circumstantial evidence of a substantial step." App'x A, P.28. But where the definition of "circum" means "around" or "about" and the prefix "sub" means "under;" "circumstantial" evidence is dependent, whereas "substantial" evidence is essential. Webster's Ninth New Collegiate Dictionary (1991). So no matter how many circumstantial or roundabout steps are taken, they cannot be the "substantial step" unless they "**point directly to the object offense.**" Monholland. The five acts named are:

(1) "exchange of nude pictures;"
(2) "sexualization of communications;"
(3) "requests for photos;"
(4) "encouragement of more explicit photos;" and
(5) "their three-month relationship." Appendix A, P. 28.

The relevant inquiry is: (a) do these acts comprise "an appreciable fragment" of producing child pornography; (b) does the action "progress[] to a point where it will be consummated unless interrupted;" and (c) are such acts performed with intent "in furtherance of the criminal scheme?" Monholland at 1318. The Panel's finding conflicts with the "substantial step" requirement and accepted attempt doctrine. See ALI M.P.C. §5.01(1)(c) (1985).

A Step Pointed Toward "Sexting" With a Minor Is Not a Step Pointed Toward Engaging In "Sexually Explicit Conduct" To Produce "Child Pornography."

If Mr. Isabella did not intend these five overt acts to "entice" or "use" S.F. "to engage in sexually explicit conduct for the purpose of producing" "child pornography," then what was the point of his activity with her?

> "'Sexting' is the practice of sending or posting **sexually suggestive text messages and images**, including **nude or semi-nude photographs**, via cellular phones or over the internet." Miller v Mitchell, 598 F.3d 143 (3rd Cir. 2010).

Commonly called the "new first base," tens of millions of Americans of nearly all age groups have "sexted" using their cellphones and computers. See Terri Day, "The New Digital Dating Behavior - Sexting," 33 Hastings Comm. & Ent. L.J. 69 (2010). A form of entertainment, "sexting" yields immediate gratification, distinguishable from the objective of "grooming" a future sexual abuse. Birkhold, Mathew H. Freud on the Court: Reinterpreting Sexting and Child Pornography Law, 23 Fordham Intell. Prop. Media & Ent. L.J. 903 at n.25 (2013); ("[o]ne recent survey found that about one in five teenagers reported having engaged in sexting"). Like the strings of chat snippets, which permeate the instant case, Judge Jacobs, dissenting in United States v Broxmeyer, 699 F.3d 265 (2nd Cir. 2012), found "graphic accounts ... of misconduct that (however egregious) forms no basis for either of the convictions;" noting "the offense of conviction for which [Broxmeyer] was sentenced to **thirty years imprisonment consisted in whole of sexting.**" Id.

Albeit despicable with a minor, non-obscene "sexting" is protected speech, while obscene "sexting" is federally proscribed:

> 47 U.S.C.§223(d)(1) prohibits "**obscene communications with a minor**; Chart A;"
>
> 47 U.S.C.§223(a)1)(B) prohibits **obscene messages, requests**, proposals, images or child pornography with a minor; App'x D, P.7-8.

When it was first recognized that none of the photos found on S.F.'s cellphone had any attribution to Mr. Isabella; and when she fully recanted her stories of threats

and coercion; the Government was free to dismiss production and to pursue "sexting" with a minor charges, punishable by a fine or up to 2 years imprisonment.

As the behavior of "sexting" grows to encompass a wide range of technologies, a court, and indeed a jury, cannot be expected to weigh the expanding lexicon of terminology and evolving social activities, against the nuance that is protected speech. The Supreme Court is needed to provide guidance.

> "Although some jurors may have familiarity with internet messaging, it is unlikely the average juror is familiar with role-playing activity ... in the specific context of sexually oriented conversation in cyberspace. Many prospective jurors at [defendant's] trial acknowledged they had never visited a chat-room, and professed no understanding of what occurs there." United States v Joseph, 542 F.3d (2nd Cir. 2008).

"Sexting" is easily misunderstood. S.F.'s use of present tense seems an unmistakable "visual fantasy," as she initiates role-playing with Mr. Isabella:

"dream of you kissing me
then kissing ur body
touching u
and slowly unzipping your pants
then sliding my hand
now you c[o]me up with what you want"
Appendix M, P.21, L.17-P.22, L.3.

And yet, it was this role play that led the District Court to authoritatively determine that "sexual intercourse with a minor under Colorado law" was electable as the underlying criminal offense in the completed theory at §2422(b). App'x G, P.1 at 1B. With no travel or solicitation, the state of Colorado lacked jurisdiction to charge such offense. The option served no valid legal purpose, yet was highly prejudicial at the most critical phase of these proceedings: **the verdict.**

The Panel did not identify a single "overt act pointed directly to the commission of the crime charged:" "engaging in sexually explicit conduct for the purpose of producing" "child pornography." Monholland, 607 F.2d at 1318; 18

U.S.C.§2251(a). Thus, without addressing elements, the Court of Appeals has subjectively decided that **"circumstantial** evidence of a **substantial** step" is sufficient for a jury to convict Mr. Isabella of attempts at both §2251(a) and §2422(b). App'x A, P.28

In Monholland, the Tenth Circuit decided that evidence of "**mere abstract talk**," such as asking "what the price of a box of dynamite would be" with intent to commit murder, "could not show a substantial step towards completion of the crime." Id. The court found in United States v Irving, 665 F.3d at 1204 (10th Cir. 2011), that "Irving took a **concrete step** that was necessary to the consummation of the scheme and strongly corroborative of [his] criminal intent, when he arranged for Mr. Collins to be bonded out of jail." The chat records show that Mr. Isabella and S.F. neither discussed nor contemplated, any "sexually explicit" images; neither did Mr. Isabella take any "concrete step" "necessary to" consummating the crime.

> "If the activity had proceeded to a further length, that is, if a tangible act which constituted proximate and tangible evidence of a real effort had emerged, the government's [charge] would be more tenable." Monholland at 1317.

Clarifying attempt doctrine and requirements for the "substantial step," the Supreme Court decided that "[n]one of the three overt acts allegedly performed by the alien - walking into an inspection area, presenting a misleading identification card, or lying to an inspector - was essential to the finding of guilt in the case at hand." Resendiz-Ponce, 549 U.S. 102. Similarly, "none of the [five] overt acts" performed by Mr. Isabella - the "exchange of nude pictures," "requests for pictures," "encouragement of further explicit" ("include a face"), "pictures," "sexualized communications," or a "three-month relationship" - "was essential to the finding of guilt in the case at hand." Id.; App'x. A, P.28.

If the public is to be protected from wrongful prosecution, the Courts need the Supreme Court's guidance in distinguishing actual sex from virtual sex, and "mere abstract talk" about sex from predatory coercion to engage in sexual acts.

In United States v Taylor, 640 F.3d 264 (7th Cir. 2011), the Seventh Circuit distinguished between predatory coercion of a minor to engage in "sexual acts" and "sexting" and virtual sexual activity. As these hold decidedly different objectives, the court reversed the §2422(b) conviction. Judge Manion noted "the prosecutor could have charged Taylor with at least two federal [sexting] offenses. 18 U.S.C. §1470... 47 U.S.C. §223(d)(1)..." Id.; Chart A. Also see Judge Posner's substantial step analysis in United States v Gladish, 536 F.3d 646 (7th Cir. 2008) (§2422(b) reversed on insufficiency of mere abstract talk). "Under our current laws, with the advent and prevalence of 'sexting' and virtual sexual behavior, many, many citizens are engaging in behavior that could make them felons. See Jordan J. Szymialis, Sexting: A Response To Prosecuting Those Growing Up with a Growing Trend, 44 Ind. L. Rev. 301 (2010)." Id. Because "sexting" alone was found sufficient to convict Mr. Isabella of both §2422(b) and §2251(a), the Supreme Court is needed to resolve this important conflict. "It is not enough to let the courts figure it out and to try to see if old definitions fit this new and troubling behavior." Id.

WHEREFORE, Mr. Isabella was denied protection from wrongful conviction under the Due Process Clause, as served by the Supreme Court's requirement that "every element" be reviewed for "legal" sufficiency "beyond a reasonable doubt" under Jackson v Virginia; and by attempt doctrine which requires the "substantial step" move "directly toward the commission of" the charged offense. Monholland, 607 F.2d 1318. The aggregated unfairness identified herein rises to the level of a denial of justice. The Panel has so departed - against the force of stare decisis - as to call upon an exercise of the Supreme Court's supervisory power. Accordingly, Mr. Isabella humbly requests the Honorable Court to summarily reverse the lower court's decision; or, in the alternative, to grant, vacate and remand for a new direct appeal with instruction under Jackson v Virginia.

II. **The Supreme Court Is Needed To Settle Inter and Intra-Circuit Conflicts On Interpretations and Procedures at 18 U.S.C.§2422(b)**

Circuit courts have long recognized that they are split on interpretations of intent at 18 U.S.C.§2422(b), on the definition of "sexual activity," and on procedures at the third element. "These cases span a broad range of procedural postures and fact patterns, and the Supreme Court has not seen fit to question the federal circuit's interpretation of §2422(b)." United States v Schell, 72 M.J. 339 (C.A.A.F. 2013). **The Supreme Court is needed:**

(1) **to decide the extent to which intent runs through the statute;**

> "like numerous other circuits, we have **recognized a distinction** between the intent to persuade or attempt to persuade a minor to engage in a sex act and the intent to actually commit the criminal act itself." United States v Hofus, 598 F.3d 1171 (9th Cir. 2010);

(2) **to define the statutory term "sexual activity";**

> "Whether §2246's definition of 'sexual act' also applies to 'sexual activity' in §2422(b) has **split** certain of our sister circuits." United States v Pierce, 70 M.J. 391 (C.A.A.F. 2011); "[w]e note that our sister circuits that have considered this issue are **split**." United States v Paulsen, 591 Fed App'x 910 (11th Cir. 2015);

(3) **to guide procedure at the third element, concerning the degree to which sexual activity is chargeable and listed on the indictment;**

> "The indictment charged him with having engaged in sexual activity chargeable as criminal offenses under Indiana law." United States v Mannava, 565 F.3d 412 (7th Cir. 2009); "[b]ecause 18 U.S.C. §2422(b) criminalizes persuasion and the attempt to persuade, the government is **not required** to prove that the defendant completed or attempted to complete any specific chargeable offense." United States v Hart, 635 F.3d 850 (6th Cir. 2011);

(4) **to determine whether engaging in any chargeable sexual activity is an element or means;**

> "We note that there is some **disagreement among our sister circuits** as to whether the underlying sex crimes with which a defendant could be charged are themselves an element..." United States v Vickers, 2017 U.S. App. LEXIS 12 (2nd Cir. 2017); "elements of the [state offense] ... must therefore be elements of [§2422(b)]." Mannava; "the listed Kentucky criminal offenses are not elements of the federal offense .... only the means of satisfying an element." United States v Jockisch, 857 F.3d 1122 (11th Cir. 2017); "at least three Circuits have reached the **opposite conclusion** from the Fourth Circuit," United States v Hite, 950 F.Supp. 2d 27 (D.C. Cir. 2013).

A. Conflicting Interpretations Have Unconstitutionally Enlarged §2422(b) Into Three Different Crimes

Disagreement among and within circuit courts has enlarged criminal liability beyond what Congress had proscribed. This has caused §2422(b) to be vague and ambiguous as applied. "While it is indeed interesting to consider whether §2422(b) is a **corrupting** statute, a **luring** statute, or a **'minor's assent'** statute, ultimately, the plain language of the statute must be given effect." United States v Schell, 71 M.J. 585 (C.C.A. 2012). The point of departure primarily concerns the statutory component underlined in the plain language below:

> "Whoever, using the mail or any facility or means of interstate or foreign commerce .... knowingly coerces, entices, induces, or persuades any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life." 18 U.S.C.§2422(b)

Does §2422(b) prohibit:

(1) the **luring** out of a minor by coercing, inducing, enticing or persuading them for the purpose of engaging with the minor in prostitution or other criminal "sexual act";

(2) the **corrupting** of a minor by coercing, inducing, enticing or persuading the minor to engage in prostitution or any sexual activity which violates a state or federal law; or

(3) persuading a **minor's assent** by the "means" of any sexual activity, regardless of any intent to actually engage in such activity, for the purpose of altering a minor's "mental state."

1. As a Luring Statute: The Narrow Approach

When §2422(b) is interpreted as a "**luring statute,**" a person is criminally liable for coercing, inducing, enticing or persuading a minor to engage in either prostitution or some other criminal sexual activity with "any person." Under the

Mannava decision, elements of the underlying offense subsume and become elements of §2422(b). "To obtain a conviction under §2422(b), the Government must also prove that the additional elements of Va. Code Ann. § 18.2-370 ...were satisfied." United States v Kaye, 243 Fed App'x 763 (4th Cir. 2007). The Seventh Circuit under Mannava has long guided procedure, deciding,

> "[t]he liability created by 18 U.S.C.§2422(b) depends on the defendant's having violated another statute, and **the elements of the offense under that other statute must therefore be elements of the federal offense** in order to preserve the requirement of jury unanimity." Mannava, 565=F.3d 412.

As a luring statute, the underlying "sexual activity": (a) must be "included in the indictment, Russell v United States, 369 U.S. 749 (1962); (b) "is an element" of the substantive offense, Mannava; (c) requires "jury unanimity," Richardson v United States, 526 U.S. 813, 817, 119 S. Ct. 1707 (1999); (d) is synonymous with "sexual act," Taylor; and (e) requires review for "legal" sufficiency of "every element" "beyond a reasonable doubt, Jackson v Virginia, 443 U.S. 307 (1979).

> "As a general matter, **conduct that is innocuous, ambiguous, or merely flirtatious is not criminal and thus not subject to prosecution under §2422(b).**" United States v Fugit, 703 F.3d 248 (4th Cir. 2012) (emphasis added). "Rocha was free to argue that **sexting alone** didn't violate section 2422(b)." United States v Rocha, 665 Fed App'x 628 (9th Cir. 2016).

2. As a Corrupting Statute: The Common Approach

The majority of circuit courts hold that, to violate the federal crime of §2422(b), a person must have intent to induce a minor to engage in prostitution or other "sexual activity," regardless of any intent to engage with the minor. The "sexual activity" must be chargeable. "Federal criminal law can properly incorporate the criminal law of the state in which the offenses occurred." United States v Dhingra, 371 F.3d 557, 565 (9th Cir. 2004). Since "application of §2422(b) is limited to the jurisdiction and venue restrictions of state and federal law," an attempt requires a step **toward commission** of that underlying

crime, "to situations in which an individual could actually be prosecuted." Id. Thus, federal jurisdiction is established at §2422(b) by the hook of the underlying state or federal chargeable offense.

As a corrupting statute, there is certain imprecision or disagreement in the requirements, concerning - **whether the underlying "sexual activity"**: (a) must be listed on the indictment; (b) requires elemental proof; (c) requires jury unanimity; (d) "can be charged;" and (e) "would be" chargeable had the act been completed. Attempts at §2422(b) universally require that the defendant "had the intent to commit the underlying crime and that he took a substantial step toward its completion," despite widespread dicta to the contrary. United States v Gagliardi, 506 F.3d 140 (2nd Cir. 2007). All cases found under the completed theory require the "engaged in" element be satisfied. "Christy could not have committed the underlying state crime and thus could not be guilty of the federal crime of coercion and enticement." United States v Christy, 683 Fed App'x 710 (10th Cir. 2017). It should be noted this is an opposite legal conclusion to the decision below in the same circuit (rehearing denied). The Common Approach rejects physical contact requirements of the Narrow Approach. Common Approach cases often cite "minor's assent" dicta, yet require an intent or attempt to entice to engage in the subject illegal sexual activity. The Second, Third, Fifth, Eighth, Ninth, Tenth and D.C. Circuit Courts have found varying degrees of both commonality and distinction, regarding criminal liability.

3. As a "Minor's Assent" Statute: The Broad Approach

The Sixth Circuit in Hart expressly rejected the Seventh Circuit decision in Mannava, holding "the elements of the underlying state offenses are not elements of the federal offense under §2422(b)" United States v Hackworth, 483 Fed App'x 972 (6th Cir. 2012). Following Hart, the Eleventh Circuit decided "the

Government must show that Lee (1) intended to cause assent on the part of the minor, and (2) took a substantial step toward causing assent, not toward causing actual sexual contact." United States v Lee, 603 F.3d 904 (11th Cir. 2010) at 914.

The critical distinction is that, under the Broad Approach, the third element is not addressed and may be truncated from requirements. Under a "minor's assent" interpretation: (a) liability attaches when one intends to persuade or attempts to persuade a "minor's assent" to any sexual activity... Lee; (b) the jury "need not be unanimous," Jockisch; (c) the third element is satisfied on "evidence that the defendant would have violated the state statute if he had completed the sex act." United States v Wilkerson, 702 Fed App'x at 851 (11th Cir. 2017); and (d) engaging in criminal sexual activity is "only the means," and so does not require proof at trial or review for sufficiency. Jockisch.

B. **The Seventh Circuit Precedent Under Mannava Is Unsettled By the Eleventh Circuit and the Decision Below, Which Hold Opposite Legal Conclusions**

The Eleventh Circuit had previously required an intent to engage, described as:

> "using a facility of interstate commerce in an attempt to sexually abuse children." United States v Hornaday, 392 F.3d F.3d 1306 (11th Cir. 2004); "Government was required to prove the defendant intended to induce a minor to engage in sexual activity." United States v Muentes, 316 Fed. App'x 921 (11th Cir. 2004); "caus[ing] the minor to engage in sexual activity with him." United States v Murrell, 368 F.3d 1287 (11th Cir. 2004).

Panels deciding Lee and Jockisch unsettle interpretations of criminal liability:

> "The court upheld a §2422(b) conviction applying the 'minor's assent' interpretation in a case where the jury actually convicted on the instruction that the government must prove 'that the defendant intended to engage in some form of unlawful sexual activity.'" United States v Schell,

71 M.J. at 574 (C.C.A. 2012) (quoting Lee at 914, 920).

Judge Martin stated in a dissenting opinion in Lee, that "[b]y affirming on the basis that Mr. Lee took a substantial step toward 'causing assent,' we uphold his conviction on grounds different from those the jury was instructed that it must find." Id. at 919. A law journal article, Encouraging a More Appealing Approach to §2422(b), 40 Seton Hall L. Rev. 691, 704 (2010), seems to have spawned dictum encouraging a broader approach. Compare dicta in United States v Faust, 795 F.3d 1254 (10th Cir. 2015) at n.6, with United States v Berg, 640 F.3d 239 (7th Cir. 2011) at 252. Two Eleventh Circuit decisions have expressly rejected the Mannava decision, encouraging a broader approach.

> "Our precedent and the precedents of many of our sister circuits hold that section §2422(b) prohibits attempts to cause minors to **agree** to engage in illegal sexual conduct, not attempts to engage in illegal sexual conduct with minors." Lee; "[t]his interpretation of the statute has garnered broad support among our sister circuits." Jockisch at n.9.

Where the Jockisch majority articulated a "minor's assent" standard, excluding the jury unanimity requirement, Judge Jordan, in a dissenting opinion, stated "I agree with, and cannot improve upon, the Seventh Circuit's position on this issue in Mannava." Id. at 1135.

Further entrenching the conflict, the Eleventh Circuit changed the language of their jury instructions to "to cause assent on the part of the minor" not that defendant "acted with the specific intent to engage in unlawful sex." Vol. S3 - Ch. 64 Eleventh Circuit Pattern Jury Instruction, ¶92.3. Intra-circuit conflict has subsequently developed, with some courts flatly rejecting the change, and instead requiring the Government to prove:

> "that Lebowitz **intended to engage in** criminal sexual activity with [a minor]," United States v Lebowitz, 676 F.3d 1000 (11th Cir. 2012); "that Ruiz acted with a specific intent to persuade, induce, entice, or coerce a minor **to engage in** unlawful sex." United States v Ruiz, 701 Fed App'x 871 (11th Cir. 2017); also see United States v Stahlman, 2019 U.S. App. LEXIS 53 (11th Cir. 2019) (making no mention of "causing assent"); and United States v Daniels, 685 F.3d 1237 (11th Cir. 2012) (requiring proof that the

defendant "engaged in" prostitution).

C. Circuit Disagreement Interpreting §2422(b) Exemplifies Vagueness and Ambiguity As Applied

The consequences of conflicting interpretations of a statute is that it leaves the public to guess at what conduct is prohibited. Under the Mannava precedent, a person violates 18 U.S.C.§2422(b) when they entice or induce a minor into engaging in prostitution or another illegal sexual act with them; where that sex act becomes an element of §2422(b). But under Isabella, a person need only engage in chats or text messages with a minor, about sexual activity, without attempting to travel, meet or solicit sex with the stranger, since the activity is only a "means" for "altering the mindset" of a minor. Because both persons are subject to the jeopardy of life imprisonment for their actions, the statute is vague and ambiguous as applied. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." United States v Santos, 553 U.S. 507, 514, 128 S. Ct. 2020 (2008).

To apply a "minor's assent" interpretation of §2422(b), with no intent to engage element is "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operat[ing] precisely like an ex post facto law," which the Constitution forbids. Marks v United States, 430 US 188, 51 L Ed 2d, 97 S Ct 990 (1977). Where "to engage in sexual activity for which any person can be charged with a criminal offense" is an "element" under Mannava but "only the means of committing an element" under Jockisch, and where achieving a "minor's assent" supplants intent to entice to engage, such change "violates the Due Process Clause of the Fifth Amendment - much as retroactive application of a new statute to penalize conduct innocent when performed would violate the Constitution's ban on ex post facto laws." Marks at 191. "The principle on which the Clause is based-the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties-is fundamental to our concept of constitutional liberty. Id. at 193. See United States v Harriss, 347 US 612, 617, 98 L ed 989, 74 S Ct 808 (1954).

A "minor's assent" language supplants the elements proscribed by Congress. Nothing in the statutory language or legislative history points to Congressional intent that the onus of criminal liability should fall on the minor's response, rather than the actions of the accused. Congress considered and rejected the idea of sweeping in predatory contact with a minor into §2422(b). The "so called

'contact amendment' to §2422(b)" would have established "a fine and up to 5 years in prison for anyone who ...attempts to **contact** [a minor] ...for purposes of engaging in criminal sexual activity. H.R. Rep. No. 105-557, at 687." Schell at 71 M.J. 580.

> "The Senate rejected this amendment. To paraphrase a Senator, this amendment would move the law **too close to creating a thought crime.** In other words, Congress understood §2422(b) as requiring more than merely engaging in sexually explicit conversation that engendered, encouraged, or incited the thought of assent to possible sex. Nor does it make criminal, 'cybersex.'" Id at 580-81.

A thought crime conviction requires a jury to extrapolate a defendant's thoughts to predict his action; his "potential" being the culpable unit of offense. Such presumption amounts to conjecture and is impermissible stacking of inference upon inference. The Panel used a similar logic, by relying on the "totality" of Mr. Isabella's sexualized chat and text messaging. A conviction at §2422(b) cannot be premised on thought, potential, desire or the jury's concern that a future sexual activity is a possibility.

D. The Decision Below Unconstitutionally Enlarges §2422(b), Sweeping In Conduct Not Proscribed By Congress

Section §2422(b) criminalizes intentional use of the internet to solicit sexual acts with minors or to induce them into prostitution. Substantial steps toward commission of the engagement with a minor have universally included setting up a meeting, traveling to that location, or unequivocally solicitating illegal sex with a minor. The Tenth Circuit has held that a previous panel decision "is stare decisis on the issue of sufficiency of the evidence to support this conviction." United States v Gillis, 942 F.2d 707, 711 (10th Cir. 1991). In a departure from stare decisis on cases of §2422(b), the Tenth Circuit has unconstitutionally enlarged §2422(b) to include conduct indicative of "sexting" with a minor, but not probative of coercion and enticement of a minor to engage in "Element Three," which the jury named

"production of child pornography under federal law."

No Tenth Circuit case of §2422(b) was found to disregard requirements under the third element or was decided purely on enticing a "minor's assent," without intent to entice to engage in the subject sexual activity with a minor.

"Engaging in" the underlying sexual activity completes the offense. United States v Munro, 394 F.3d 869 (10th Cir. 2005) ("Munro never actually engaged in sexual activity with a minor, therefore the prosecution charged him with attempt"). "The fact that Defendant unmistakably proposed sex was not, by itself, a sufficient substantial step, given that he and the girl were strangers .... Defendant's statements were equally consistent with an intent to obtain sexual satisfaction vicariously." United States v Gladish, 536 F.3d 646 (7th Cir. 2008). Can "intent to obtain sexual satisfaction vicariously" be criminal "sexual activity" at §2422(b)?

> "The court has presented a thorough comparative analysis of federal law and precedent to conclude that **'sexual activity'** and **'sexual act' mean the same thing** - under either label, any such act that does not involve physical contact between two people is excluded." United States v Taylor, 640 F.3d 255 (7th Cir. 2011) (Manion concurring).

Where decisions under Lee and Jockisch broaden interpretation, the decision under Isabella breaks the force of stare decisis to provide the first on-point case law to the widely disseminated "achieving a mental state" and "minor's assent" dictum.

Conclusion

To settle the conflict among and within circuit courts, the Supreme Court is needed: (1) to determine parameters for interpreting intent at §2422(b); (2) to define the statutory term "sexual activity;" (3) to decide whether the necessary component, "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense," is an "element" under Seventh Circuit

precedent, or "means" under Eleventh Circuit precedent; and (4) to guide procedures concerning the underlying chargeable offense. Where shifting interpretations has caused the statute to become unconstitutionally vague and ambiguous as applied, the Supreme Court is needed to restore uniformity of decisions among and within circuit courts, to ensure that the statute at 18 U.S.C.§2422(b) is constitutional in its reach, unambiguous in its criminal liability, and clear in procedural requirements.

III. The Federal Decision Below Conflicts With a Recent State Supreme Court Decision On the Important Question: Whether Evidence of the Behavioral Theory of "Grooming" Requires a "Foundational Showing of Scientific Validity" To Be Admissible and Relevant To the Jury

With the advent of the internet and smartphones, millions of Americans are engaging in the behavior known as "sexting." Miller v Mitchell. These sexualized chats and exchanges which occur in "sexting" sessions are being used by law enforcement as evidence in cases of child exploitation, child pornography and child sexual abuse. The behavioral science known as "grooming" a minor for a future sexual encounter has become a point of contention in cases of child exploitation, pornography and sexual abuse. In the decision below, a federal court has permitted lay fact witness testimony to influence the jury in a material way, without first determining if the theory presented is valid or reliable. But a recent decision by the Oregon Supreme Court has reached an opposite conclusion on the identical matter.

In State v Henley, SC S064494 (7/19/18), the court decided that, like the theory of polygraph testing, the theory of "grooming" is "scientific." Appendix J, P.1-41. Without a showing of validity or reliability, the court ruled that such lay testimony should not have reached the jury, and overturned the lower court's decision. In direct conflict on an identical matter, a federal court of appeals

and a state supreme court are in conflict over a matter important to many cases, especially in light of the growth of the internet and "sexting" behavior. The Supreme Court is needed to settle the matter by deciding whether evidence of the theory of "grooming" should require a determination pursuant to Fed. R. Crim. Evid. Rule 702, as guided under Daubert v Merrell Dow, 509 U.S. 579, 125 L. Ed 2d, 113 S Ct 2783 (1993). Appendix D, P.9.

> "Without specific findings or discussion on the record, it is impossible on appeal to determine whether the district court 'carefully and meticulously reviewed the proffered scientific evidence' or simply made an off-the-cuff decision to admit the expert testimony." Goebel v Denver & Rio Grande Western Railroad Company, 215 F.2d 1083 (10th Cir. 2000) at 1088 (internal quotations omitted); "Kumho and Daubert make it clear that the court must, on the record, make some kind of reliability determination." United States v Velarde, 214 F.3d 1204 (10th Cir. 2000) (emphasis in the original).

A. The District Court Abdicated Its Gatekeeping Responsibility and Permitted a Fact Witness to Influence the Jury With a Materially Erroneous Definition For Theory of "Grooming"

At trial, H.S.I. Special Agent Michael Thomas, a fact witness under Rule 701, was asked an open ended question about "grooming." Mr. Isabella objected on grounds of "relevance," reminding the court that "this is his statement...just a question and answer I think would be appropriate." Id. Appendix A, P.46. Overruled, the fact witness responded by providing the only definition the jury heard on the behavioral science theory of "grooming:" "a technique ...to try to morph individuals' opinions and behaviors to the person who is doing the grooming, desires," as the Panel Opinion analyzes in the opinion below. Appendix A, P.46-49; United States v Isabella, 918 F.3d at 844 (10th Cir. 2019). Asked "why" again and the fact witness reiterated his self-crafted definition, saying "trying to morph their behavior through - morphing them of [sic] their behavior." Id. This triple repitition of the words "morphing" and "behavior," as authoritatively delivered by the Government agent, cemented this definition into the minds of

jurors.

With the relevance objection made and preserved (at sentencing), Mr. Isabella timely raised the issue, "Improper Admission of Grooming Testimony" on direct appeal, claiming "the technique of grooming was simply not relevant to his testimony." Appendix O, P.28. Acknowledging that Mr. Isabella claimed the error when he "objected to the 'relevance' of grooming testimony," the Panel Opinion then reached an opposite conclusion, stating that "we hold that Mr. Isabella waived his argument regarding Special Agent Thomas's grooming testimony," because "Mr. Isabella did not object to Special Agent Thomas's qualifications as an expert" - the flip-side to the relevancy objection. Appendix A, P. 48; Appendix O, P.35.

Admitted under Rule 701, not 702, the agent's opinion on what "grooming" meant to him was **irrelevant**. Rule 701, 702; Appendix. D. P. 7-8. There was no need to also make the opposite objection to "expert" qualifications, since the agent was only admitted as a fact witness with no notice of any "expert" testimony. It was, therefore, remarkable that the Panel disregarded the objection made, preserved and raised on appeal, deciding Mr. Isabella "waived his argument and we do not address it." Id. at 845. Nevertheless, "grooming" evidence influenced the jury.

"Courts have used the term to describe a variety of behaviors that appear calculated **to prepare** a child for a future sexual encounter." United States v Mudd, 681 Fed. App'x 425 (6th Cir. 2018). By presenting a "scientific sounding" definition of "grooming," the Government, through the witness, effectively circumvented Daubert requirements. Since his lay definition of the scientific theory could not be helpful to the jury, Mr. Isabella's objection on grounds of "relevancy" was the appropriate objection. The Supreme Court agrees, stating that the Rule 702 requirement "goes primarily to **relevance** by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility." Daubert.

> "In Daubert the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in Kumho [Tire Co. v Carmichael, 143 L.Ed. 2d 238, 119 S. Ct. 1167 (1999)] clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science." 3J, Weinstein & Berger, "Weinstein's Evidence," §706[01] at 706-07 (1985).

The erroneous definition should not have reached the jury. Daubert. Had the Panel addressed the claimed error in the Initial Brief, it would have been clear that the District Court abdicated its gatekeeping responsibility under Kumho Tire.

B. The Oregon Supreme Court Recently Decided That "Grooming" Testimony Requires a "Foundational Showing of Scientific Validity"

Shortly after the Initial Brief was entered, the Oregon Supreme Court rendered a decision indistinguishable from the instant federal case. In State v Henley, Or. S.C. S064494 (7/19/18) Appendix J, the Oregon Supreme Court ruled that the lay witness's testimony on the subject of "grooming" was scientific evidence requiring a foundation of validity and reliability and that the trial court erred by admitting the lay witness testimony. Id. The state's highest court concluded that the trial court had erred by abandoning the gatekeeper function and permitting lay testimony regarding "grooming" to influence the jury. Id. Agreeing with the Daubert decision, the Oregon Supreme Court decided that "grooming" testimony was not relevant to the jury, because "scientific knowledge cannot assist the trier of fact if it is not 'scientifically valid.'" Id. at 295; Appendix J. P.10. "At trial, over defendant's objection, the trial court permitted a forensic investigator to testify about 'grooming' of the victim for sexual abuse." Id. at P. 1. (286).

The lay witness provided the jury with the definition of the term relied upon at deliberations. Id. at 14-15; (299-300). "Proposed testimony must be supported by appropriate validation - i.e., 'good grounds,' based on what is known. Daubert, 509 U.S. 590" Id. In State v O'Key, 321 Or 285, at 291, 899 P.2d 663 (1995),

quoting Christopher Mueller & Baird C. Kirkpatrick, Modern Evidence §7.8 990 (1995), it states that "evidence is 'scientific' if it is likely to be perceived by jurors as grounded in science: 'evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power. The function of the court is to ensure that persuasive appeal is legitimate.'" Id. Coming from a government agent, testimony may sound scientific enough to assume the character and persuasive power of expert testimony. Id.

On appeal, Henley claimed that the trial court improperly admitted the "grooming testimony," but the Court of Appeals disagreed, deciding that the testimony "did not purport to draw its convincing force from principles of science." Henley at 290, 294; App'x J, P.5; P.9. The Oregon Supreme Court overturned the lower court's decision, likening the "phenomenon of grooming" to the impermissibility of polygraph tests and the horizontal gaze nystagmus (HGN). Id. at 294-298; P.9-13.

> "Because of the lack of scientific evidence in support of polygraph validity, polygraph results are inadmissible as evidence in criminal prosecutions. . ." Hester v City of Milledgeville, 598 F. Supp. 1456 (M.D. Ga. 1984); also see United States v Scheffer, 523 U.S. 303 (1998).

The Oregon Supreme Court concluded that "the testimony was scientific evidence .... [t]he trial court erred in permitting [the investigator] to define the phenomenon of grooming .... without first requiring the state to establish its scientific validity." State v Henley at 304; App'x J, P.19.

C. The Preparatory Nature in the Definition of "Grooming" Used By the Panel, Would Have Precluded the Jury From Finding the Substantial Step.

The Court of Appeals' assessment of the jury's reasonableness was by different grounds, relying on a different definition of "grooming:"

> "deliberate actions taken by a [person] to expose a child to sexual material; the **ultimate goal** of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions **in order to prepare** the child for sexual activity." Isabella at 833; Sana Loue, Legal and Epidemiological Aspects of Child Maltreatement, 19 J. Legal Med. 479 (1998).

Since **the "substantial step" must be "more than mere preparation,"** the "grooming" evidence would not have withstood the crucible of deliberations, had the jury been provided a correct definition. United States v Munro, 394 F.3d 896 (10th Cir. 2005). An expert witness noticed in behavioral sciences would have had an ethical obligation to reveal the preparatory nature of the theory of "grooming," whereas the agent's definition lacked this key aspect.

More accurately applied, the Eighth Circuit recognized that the "molestation of E.S. was part and parcel of the 'grooming process' that led to the offense .... [and] enabled Steinmetz to photograph the victim" in violation of §2251(a). United States v Steinmetz, 900 F.3df 595 (8th Cir. 2018). More harmful than helpful, Special Agent Thomas' "morphing" definition also precluded the jury from seeking aid in defining "grooming." A common dictionary defines "to groom" as "to get into readiness for some specific objective." Webster's Third New International Dictionary (2002). The Tenth Circuit had previously recognized that "to prepare" and "to groom" are synonyms: describing "how sex offenders **prepare** their victims." United States v Batton, 602 F.3d 1191 (10th Cir. 2010).

No federal case was found associating the terms, "morphing," "altering," or "conforming," with the concept of "grooming." However, the term "morphing" was defined by the Supreme Court of the United States to be the "alteration of innocent pictures of real children so that the children appear engaged in sexual activity." Ashcroft v Free Speech Coalition, 535 U.S. 234 (2002) at 242. Both the Government and the H.S.I. agent knew, or had reason to know the Supreme Court

definition of "morphing" as it relates to production of child pornography, yet misled the jury into believing that "grooming" only meant "morphing." This was not harmless, since the jury was assured at summation that evidence of "grooming" alone could satisfy the element. App'x M, P.14, L.24-P.15, L.3. The Government's conflating of "grooming" with "morphing;" plus "sexting" with "engaging in sexual activity;" misled or confused the jury. Id; P.17,L13-17; P.10,L.6-8. Over Daubert/Kumho, the District Court permitted the jury to be misinformed on an issue material to the finding of an element.

A similarly trained F.B.I. agent, testifying in a case of §2422(b), scientifically identified "six **grooming** techniques used by predators: (1) targeting; (2) gaining access; (3) isolation; (4) need fulfillment; (5) desensitization; and (6) establishing control and setting up a meeting." United States v Syed, 2019 U.S. Dist. LEXIS 132890 (S.D. Ga. 2018). The record in the instant case shows: no evidence of predatory "targeting;" no personal access or contact; no solicitation of sexual acts; no use of child pornography to "desensitize;" and no travel preparations or "setting up a meeting." Armed with the F.B.I. "grooming" description, the jury would not have been able to reconcile the substantial step requirements by "grooming" evidence alone.

While a dominant factor in such cases, "'grooming' is not an element of child enticement under §2422(b)," nor is it mentioned in statutory law. United States v Fox, 600 Fed App'x 414 (6th Cir. 2015). In United States v Howard, 766 F.3d 422 (5th Cir. 2014), the Fifth Circuit analyzed "grooming" as the substantial step across the circuits, deciding that only "**grooming plus other acts pointed toward commission of the offense could satisfy an attempt.**" Id.

D. **Since the Government Relied Solely On "Grooming" Evidence for the Substantial Step, Admission of the Agent's Testimony Was Not Harmless.**

Based on Special Agent Thomas' recollection of an unpreserved interview of

Mr. Isabella, (Appendix M, P.16 L.10-23), the District Court authoritatively determined that Mr. Isabella had made an inculpatory statement regarding "grooming." App'x G, P.9. Despite the statement under dispute, the District Court issued a Voluntariness of Statement instruction, without the non-discretionary hearing to determine "accuracy, reliability and voluntariness," pursuant to 18 U.S.C.§3501 and Jackson v Denno, 378 U.S. 368 (1964). Without such determination, it was prejudicial abuse of discretion to elevate the evidence into a "statement" of guilt. See plain error claim above.

> "Where the evidence is of very slight (if any) probative value, it is abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." Old Chief v United States, 519 U.S. at 180 (1997). "Erroneous admission of evidence is harmless only if other competent evidence is sufficiently strong to permit the conclusion that the improper evidence had no effect on the decision." Lillie v United States, 953 F.2d at 1192 (10th Cir. 1992).

Since the Government relied solely on this "grooming" evidence to prove the substantial step, it could not be harmless. To fit the "grooming" narrative, the agent's testimony was changed from "morph" to "conform" and "comply."

> "Special Agent Michael Thomas told you grooming is a technique used in sex exploitation cases to get the victim's behavior to conform to the defendant's requests. The defendant, through I love you, I am thinking of you, through I miss you, it is clear. It is also clear through the princesses, the angels and the babygirls, he is trying to persuade, induce, or entice SF to do what he wants, whether that is to take a sexually-explicit picture of herself or to engage in criminal sexual activity, including sexual intercourse or oral sex." App'x M, P.8, L.12-21.
>
> "In terms of his **substantial step** .... he participated in a consistent series of actions through his complimenting her, praising her, et cetera, to get her to comply with his request. So, therefore, this particular **element** has also been proved beyond a reasonable doubt." Id. P.14, L.19-P.15, L.3.

The verbs, to "morph," "alter," "conform," and "comply" are not equal to the statutory verbs to "coerce," "induce," "entice," or "persuade," required at both §2422(b) and §2251(a). Not coincidentally, "to morph" does correlate with the Government's theory of "altering a mental state" to achieve a "minor's assent." Neither "grooming," nor "sexting" evidence alone can satisfy the attempt element.

Summary

Having made no determination of validity or reliability under Daubert, as required under Kumho, the District Court erred in Isabella the same as the trial court was found to have erred in Henley. The fact witness's authoritative definition of the scientific theory of "grooming" should not have been permitted to influence the jury. A state supreme court has reached an opposite conclusion from the federal decision below on an indistinguishable material point: "grooming" evidence is scientific 702 and, like polygraph, requires a showing of validity and reliability to be admissible and relevant to the jury.

The Supreme Court is needed to settle the matter and to decide, in light of Henley, whether it was error for the District Court to permit a fact witness to materially influence the jury absent such determination; and whether it was further error for the Panel to rely on different grounds - a different definition - than the jury? The Court is also needed to decide whether the defense objection to "relevance" of the fact witness' testimony, defining the concept of "grooming," preserved Mr. Isabella's right to raise that issue on appeal.

Conclusion

Accordingly, Mr. Isabella humbly prays this Honorable Court, apart from aforementioned remedies, will **grant** this Petition, **vacate** judgment and **remand for new trial**, with instruction under Daubert. Authority for proposed remedies herein is provided under Bryan v United States, 338 U.S. 552 (1950) and Burks v United States, 437 U.S. 1 (1978).

Respectfully submitted,

Rande Isabella
Appellant/Petitioner, pro se
F.C.I. Loretto, PA (Prisoner ID#: 60896-018)