

No.

In the Supreme Court of the United States

**Noel Macapagal, Petitioner**

**v.**

**United States of America, Respondent**

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

**Appendix  
to Petition for Writ of Certiorari**

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56 F.4th 742

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Noel MACAPAGAL, Defendant-Appellant.

No. 21-10262

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Argued and Submitted October

13, 2022 Honolulu, Hawaii

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Filed December 28, 2022

### Synopsis

**Background:** Defendant was convicted in the United States District Court for the District of Hawai‘i, Leslie E. Kobayashi, J., of attempted enticement of a child by means of interstate commerce. Defendant appealed.

**Holdings:** The Court of Appeals, Schroeder, Circuit Judge, held that:

on issue of first impression, so long as government proves defendant's intent was to obtain sex with a minor, it does not matter, for purposes of attempted enticement, that communications occurred only between defendant and an adult intermediary;

evidence that defendant carried children's gift bags and sex toys when he arrived at anticipated rendezvous with agent, who was posing as mother of minor girls, was admissible;

evidence was sufficient to support defendant's conviction;

agents' testimony explaining sexual terms and acronyms used in their communications with defendant was admissible;

special condition of supervised release limiting defendant's possession and use of computers was overbroad; but

district court did not plainly err in imposing special condition of supervised release forbidding defendant from accessing the internet without approval of his probation officer.

Affirmed in part, vacated and remanded in part.

**Procedural Posture(s):** Appellate Review; Sentencing or Penalty Phase Motion or Objection; Trial or Guilt Phase Motion or Objection.

**\*744** Appeal from the United States District Court for the District of Hawaii, Leslie E. Kobayashi, District Judge, Presiding, D.C. Nos. 1:19-cr-00080-LEK-1, 1:19-cr-00080-LEK

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Rebecca A. Perlmutter (argued), Assistant United States Attorney; Marion Percell; Clare E. Connors, United States Attorney; United States Attorney's Office, Honolulu, Hawaii; for Plaintiff-Appellee.

Before: Mary M. Schroeder, Johnnie B. Rawlinson, and Daniel A. Bress, Circuit Judges.

### OPINION

SCHROEDER, Circuit Judge:

Noel Macapagal appeals his conviction and sentence for attempted enticement of a child by means of interstate commerce in violation of 18 U.S.C. § 2422(b). The indictment arose from a sting operation in which a federal agent, using internet and telephone communications, posed as a mother who wanted Macapagal to help her three young daughters “find their womanhood.” The challenges to the conviction principally concern the use of an adult intermediary and the lack of any direct communication with a person believed to be a child. We affirm the conviction, because we agree with all the other circuits that have considered similar challenges, and have concluded that the requisite intent to entice a minor is not defeated by use of an adult intermediary. We remand for resentencing, because we hold in line with our circuit law that one of Macapagal's special conditions of supervised release regarding computers is overbroad in its current form.

### Background

As part of a 2019 FBI investigation into the use of the internet to obtain sex with minors in Hawaii, an agent responded to Macapagal's profile on a dating website for adults. The agent posed as "Kay," the mother of three minor daughters, and confirmed Macapagal's interest in "taboo ff," an abbreviation for "family fun" or sex with minors in a family. As the conversations continued by telephone, Kay explained her daughters were aged 6, 9, and 11, and she wanted them to learn about sex in a safe environment. Macapagal proceeded to volunteer to help her endeavor, which he termed a "wonderful thing." He described his gentle and patient qualities, and agreed to use condoms and refrain from anal intercourse. Through text messages the two exchanged photographs, including one of Macapagal's nude torso, that he asked to be shared with at least one of the girls. They also discussed the girls' preferences and favorite colors, and \*745 arranged for the planned meeting where Macapagal would provide gift bags with presents for each girl. The record is replete with communications from Macapagal to Kay in which Macapagal explained how he could make Kay's children be relaxed and comfortable with him. Macapagal showed up for the meeting with gift bags, condoms, and vibrators, and he was immediately arrested.

At his jury trial, Macapagal testified that he never intended to participate in sexual activity with the children, but rather believed he was engaging in fantasy and roleplay. The jury apparently did not find him credible. He was convicted and sentenced to 121 months imprisonment and 10 years supervised release that included a special condition barring all computer possession and use without prior approval. He appeals both the conviction and sentence.

### Analysis

In appealing the conviction, Macapagal challenges the use of an adult intermediary for his communications and contends the statute required the government to prove direct communication with someone he believed to be a minor. He also claims the government improperly argued the jury should convict him on the basis of his attempted personal meeting with the children rather than through instrumentalities of interstate commerce as required by § 2422(b). Neither contention is valid.

This court in a published opinion has not previously addressed the argument that the statute requires direct communication with the supposed minor rather than with an intermediary, but most of our sister circuits have considered and rejected it. See *United States v. Vinton*, 946 F.3d 847, 853 (6th Cir. 2020); *United States v. Caudill*, 709 F.3d 444, 446 (5th Cir. 2013); *United States v. Berk*, 652 F.3d 132, 140 (1st Cir. 2011); *United States v. Douglas*, 626 F.3d 161, 164–65 (2d Cir. 2010) (per curiam); *United States v. Nestor*, 574 F.3d 159, 160–62 (3d Cir. 2009); *United States v. Spurlock*, 495 F.3d 1011, 1013–14 (8th Cir. 2007); *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004). No circuit has agreed with Macapagal's position. We take this opportunity to stress that so long as the government proves the defendant's intent was to obtain sex with a minor, it does not matter that the phone or internet communications occurred only between the defendant and an adult intermediary. As several courts have noted, the efficacy of § 2422(b) would be eviscerated if a potential defendant could avoid prosecution by employing an adult as an intermediary. See *Murrell*, 368 F.3d at 1287. The court in *Spurlock* observed that it makes sense to prosecute defendants for communications they made through an intermediary that was posing as a parent. *Spurlock*, 495 F.3d at 1014 ("We do not believe the statute exempts sexual predators who attempt to harm a child by exploiting the child's natural impulse to trust and obey her parents"); see also *Douglas*, 626 F.3d at 165 ("Potential victims of enticement may be too young to use the Internet or otherwise communicate directly with strangers without their parents' supervision").

The principal authority Macapagal cites to support his position is Judge Brown's dissenting opinion in *United States v. Laureys*, 653 F.3d 27, 38–39 (D.C. Cir. 2011) (Brown, C.J., dissenting in part). The dissent expressed the view that the statute was intended to penalize only online communications with children. *Id.* No other opinion however, dissenting or otherwise, has taken such a narrow view. As the majority opinion in *Laureys* pointed out, "every circuit to consider the issue has concluded a defendant can violate § 2422(b) by communicating with an adult

\*746 intermediary rather than a child or someone believed to be a child.” *Id.* at 33.

Macapagal similarly maintains that the district court erred when it instructed the jury that “[t]he government is not required to prove that the defendant communicated directly with a person he believed to be a minor.” His challenge fails for the same reasons we have discussed. The jury instruction accurately states the law.

At trial, the government presented evidence of Macapagal arriving at the anticipated rendezvous with children's gift bags and sex toys. On appeal, Macapagal takes aim at the government's reliance on that evidence, contending that the government was improperly attempting to convince the jury to convict on the basis of personal communication rather than communications through a means of interstate commerce. The record reflects, however, that the government's use of the evidence was appropriate. At trial, Macapagal testified that he never intended his internet and phone communications to lead to any actual sexual encounter; he was merely engaging in a fantasy and he never believed there were real children. It is thus clear from the record that the government relied on Macapagal's elaborate preparations in anticipation of an in-person encounter in order to refute the contention he lacked the requisite criminal intent.

More important, the evidence was a crucial part of the government's case. Because Macapagal was charged with the crime of attempt, the government was required to show both an intent to commit the substantive offense of enticement and a substantial step toward its commission. *See* *United States v. Goetzke*, 494 F.3d 1231, 1234-35 (9th Cir. 2007) (per curiam) (citing *United States v. Meek*, 366 F.3d 705, 720 (9th Cir. 2004)). To constitute a substantial step, a defendant's “actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances.” *United States v. McCarron*, 30 F.4th 1157, 1162 (9th Cir. 2022) (quoting *Goetzke*, 494 F.3d at 1237). We have previously considered what might constitute a substantial step with respect to the crime of attempted enticement of a minor. In *Meek*, we held that the defendant had taken a substantial step toward the commission of the crime, citing his “extensive sexual dialog, transmission of a sexually-suggestive photograph, repeated sexual references as to what Meek would do when he met the boy, and his travel to meet the

minor at a local school.” 366 F.3d at 720. We reached the same result in *Goetzke*, where we concluded that a rational trier of fact could find that Goetzke took a substantial step when he “mailed letters to W that flattered him, described the sex acts that Goetzke wanted to perform on him, and encouraged him to return to Montana.” 494 F.3d at 1236; *see also United States v. Roman*, 795 F.3d 511, 518 (6th Cir. 2015) (finding a substantial step when Roman purchased a flower and the child's favorite Butterfinger candy to help “break the ice” and to obtain her assent to engage in sexual activity with him). Macapagal's travel to the anticipated meeting site bearing gifts both established that substantial step and refuted his fantasy defense.

Macapagal relatedly claims that the government presented an invalid legal theory to the jury by arguing that Macapagal could be convicted of violating § 2422(b) based only, or primarily, on his in-person activities at the house. But the government repeatedly emphasized in both its arguments to the jury and in its presentation of evidence that Macapagal had engaged in online activities designed to entice minors through the use of an intermediary. Although \*747 Macapagal points to isolated statements that the government made at trial, considering the record as a whole, the government did not convey an improper theory to the jury or claim that Macapagal's online activities were inessential or irrelevant. And Macapagal's argument that he merely used means of interstate commerce to arrange a meeting fails to account for the full nature of his discussions with Kay, which were designed to entice children to engage in sexual activities with him.

Macapagal also challenges the sufficiency of the evidence, but the evidence was more than sufficient to support the jury's verdict. Macapagal described to Kay his desire to engage in sexual activity with her daughters and provided her with suggestions on how to make that happen. He asked her to tell the daughters what to expect and to share photos. He made plans to meet Kay at her rental house, where he would engage in sexual activity with the three daughters, and he even arrived with personalized gifts for each of the daughters, presumably to gain their trust before the sexual encounter. Macapagal's challenge to the sufficiency of the evidence is plainly without merit.

He challenges as well the jury instruction on the irrelevance of the minor's intent. The district court, however, correctly instructed the jury that “[a] minor's willingness to engage

in sexual activity ... is irrelevant to the elements of Title 18, United States Code, Section 2422(b).” This instruction accurately stated the law. In *United States v. Dhingra*, 371 F.3d 557, 567 (9th Cir. 2004), we explained that the plain language of the statute makes clear that the relevant inquiry is the conduct of the defendant, not the minor. The instruction properly focused on Macapagal's intent.

The district court, over Macapagal's objection, permitted agents' testimony explaining sexual terms and acronyms used in the communications with Macapagal. There was no abuse of discretion. The agents had personal knowledge of the communications as they were acting as Kay, and the explanation was helpful because they were able to explain what was meant by terms jurors were unlikely to know. Thus, the agents' testimony could help the jury correctly discern the context of communications relevant to determining Macapagal's guilt.

At sentencing, the district court imposed a special condition of supervised release that stated: “You must not possess and/or use computers (as defined in 18 U.S.C. § 1030(e)(1)) or other electronic communications or data storage devices or media, without the prior approval of the probation officer.” Macapagal challenges the condition as vague and overbroad.

The statute governing computer fraud crimes, 18 U.S.C. § 1030(e)(1) defines “computer” as:

an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a

portable hand held calculator, or other similar device.

18 U.S.C. § 1030(e)(1). We recently considered a similar challenge in *United States v. Wells*, 29 F.4th 580, 590 (9th Cir. 2022), where we found that the special condition requiring prior approval for possession or use of a computer, also as defined by § 1030(e)(1), to be unconstitutionally vague, and remanded for the district court to narrow the special condition. We highlighted \*748 the numerous items which would seemingly fall within the ambit of the condition, but which a reasonable person might be unaware: refrigerators with internet connectivity, Fitbit watches, and even cars manufactured after 2008. *Id.* at 589. We said that “a limiting instruction would clearly indicate ... whether a device is barred or not.” *Id.* at 590. Guided by *Wells*, we conclude that the special condition limiting Macapagal's possession and use of computers is overbroad. Finally, Macapagal also challenges as vague and overbroad a special condition which forbids him from accessing the internet except for reasons approved in advance by his probation officer. Macapagal did not object to this condition at trial, so our review is for plain error. *Wells*, 29 F.4th at 592. Under this heightened standard, we cannot say that the district court plainly erred in imposing the special condition limiting Macapagal's internet access. The condition is sufficiently specific and related to Macapagal's criminal activity and the need for deterrence. Accordingly, we affirm the conviction but remand the sentence for the district court to narrow the special condition on computer possession and use.

**AFFIRMED in part; VACATED and REMANDED in part.**

#### All Citations

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1 All right. So I believe that concludes the preliminary  
2 instructions, so we are now going to be turning to the opening  
3 statements.

4 And, Mr. Wallenstein, will you be giving opening  
5 statement?

6 MR. WALLENSTEIN: Yes, Your Honor.

7 THE COURT: All right. You may begin.

8 MR. WALLENSTEIN: Thank you.

9 May it please the Court, ladies and gentlemen of the  
10 jury, this case is about a grown man who was given an  
11 opportunity to have sex with three young girls and decided to  
12 take that opportunity.

13 In March of 2019, this man, the defendant, Noel  
14 Macapagal, he crossed the line. He showed up at a house  
15 intending to persuade three young girls, age 6, 9, and 11, to  
16 have sex with him. That's what he's charged with doing and  
17 that's what the evidence will show he did.

18 This all started when the defendant responded to an email  
19 message from a mother offering a sexual encounter with her  
20 three young daughters. In that first email contact, the mother  
21 wrote that she was looking for someone to help her daughters  
22 find their womanhood. The defendant responded that he knew  
23 what the mother was proposing and that he was very much  
24 qualified to help her out.

25 After that, the defendant and the mother spoke on the

1 phone and texted each other for about a day-and-a-half. The  
2 defendant used the name Calvin and the mother used the name  
3 Kay.

4 You're going to hear their two phone calls, you're going  
5 to see their email exchange, you're going to see their text  
6 messages. You're going to hear the mother ask the defendant if  
7 he has any age restrictions, and you're going to hear him  
8 respond, "Negative."

9 You're going to hear the defendant ask the mother if this  
10 is going to be the girls' first time. You're going to see the  
11 defendant write that in Asia it's a very common practice.  
12 You're going to hear the defendant ask the mother, "How are you  
13 okay with this? Let me ask you personally as a mother."

14 You're also going to hear him talk about his own prior  
15 sexual experience with a 14-year-old girl and you're going to  
16 hear him describe that experience as forced. You're going to  
17 hear him say, "I don't think she was ready."

18 Now, you'll also hear that the defendant is a massage  
19 therapist and that he wants to massage the mother and then  
20 eventually massage the girls as well.

21 But you're also going to hear and see him say that he  
22 wants to do more than that. You're going to hear the defendant  
23 talk about crossing the line. You're going to hear him think  
24 through out loud whether to cross that line or not. You're  
25 even going to hear him express concern that he's being recorded



1 and that he's scared he might be caught.

2 And after all that, you're going to hear and see this  
3 defendant make the decision in realtime to cross that line.  
4 You're going to hear him decide to take the opportunity that  
5 was presented to him. And once he does that, you're going to  
6 hear him tell the mother that he thinks this is a wonderful  
7 thing and that he's honored to help her.

8 In the end, the defendant arranges to meet at the house  
9 where the mother and the children are staying. He texts with  
10 the mother as he travels there all the way up until he's right  
11 outside. Under his arm he has a milk crate and inside the milk  
12 crate are three gift baskets with flowered hair pins, chocolate  
13 bunny rabbits, candy, glitter nail polish, and children's toys.  
14 But when the door is open and he walks inside, he's not greeted  
15 by a mother and her daughters; he's arrested by the FBI.

16 The defendant wasn't actually talking to a mother and  
17 there weren't actually three young daughters at the house. The  
18 defendant was actually communicating with two undercover FBI  
19 agents, one online in emails and messages and the other on the  
20 phone. This is all part of a law enforcement operation to  
21 catch people who show up to sexually exploit children.

22 Ladies and gentlemen, this case is simple and  
23 straightforward. The facts are not complicated. The defendant  
24 knew exactly what he was doing. He was told multiple times  
25 that this was about the daughters; he knew they were aged 6, 9,

1 and 11, he even knew their names. He was given an opportunity  
2 and he took it. He drove to meet them, he showed up with gift  
3 baskets for them, and he went into that house fully intending  
4 to persuade those girls to have sex with him. And he used the  
5 internet and his cell phone to arrange it all. That's what  
6 he's charged with and that's what the evidence is going to show  
7 he did.

8           During this trial, you're going to hear from the two law  
9 enforcement agents who posed as the mother, again, one through  
10 emails and text messages and the other on the phone. You will  
11 hear that under the law agents are allowed to use false  
12 identities and pose undercover. You will also hear from  
13 another law enforcement agent who searched the defendant's car.

14           And at the end of this case, Judge Kobayashi's going to  
15 instruct you on the law and it's very important that you follow  
16 her instructions carefully.

17           After you hear all that evidence and after you hear the  
18 judge's instructions, my able colleague, Assistant United  
19 States Attorney Morgan Early, is going to come back up here and  
20 ask you to return the only verdict consistent with the evidence  
21 in this case, and that's a verdict of guilty. Thank you.

22           THE COURT: Mr. Mizono, are you ready to proceed  
23 with your opening statement?

24           MR. MIZONO: Ms. Rancourt is going to be doing the  
25 opening statement.

1           THE COURT: Mr. Mizono, does the defense have any  
2 objections to the jury instructions as read?

3           MR. MIZONO: No, Your Honor.

4           THE COURT: So, ladies and gentlemen, to assist you  
5 in performing your duties, the attorneys will provide closing  
6 arguments to you. What they say is not evidence and you are  
7 not bound by their interpretation or recollection of the  
8 evidence. The actual evidence which you must consider in  
9 deliberations come from the witnesses' testimony and exhibits  
10 which are in evidence.

11          You are responsible to rely on your collective  
12 recollection of the evidence in reaching a decision in this  
13 case.

14          All right. Government's closing argument.

15          MS. EARLY: Yes, Your Honor.

16          THE COURT: All right. Okay. We have a moment.  
17 We're going to turn the screens to the jurors for their  
18 convenience.

19          All right. Can everybody see the two -- one or the other  
20 of the flat screen TVs? If you cannot or your view is blocked,  
21 please raise your hand. All right.

22          Ms. Early, you may begin.

23          MS. EARLY: Yes, Your Honor. Thank you. I do want  
24 to make sure the way I have my mask and the microphone is  
25 working. I'm going to try not to hit it during my

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1 presentation.

2           Good afternoon, ladies and gentlemen. I'm going to be  
3 addressing you for approximately the next 45 minutes or so, and  
4 I want to address the evidence in the record.

5           You heard directly from the defendant when he testified  
6 yesterday and today, and he told you a story. And he also told  
7 a story on the day that he was arrested to the FBI agents that  
8 interviewed him.

9           But it's the facts in the case that prove what really  
10 happened and the crime that he committed. So I'm going to  
11 review the evidence in this case and the facts that that  
12 evidence confirms.

13           Mr. Macapagal was planning to show up at the door with  
14 gifts for the children that they would like, things in their  
15 favorite colors, even matching their interests, like soccer.  
16 He plans to massage the mom first in order to get the girls  
17 comfortable with him because, "Seeing you be okay with me  
18 touching you will help instill more comfort in the special  
19 touches."

20           He was crafting this plan in order to persuade, induce,  
21 and entice the girls into performing sexual acts with him.

22           The facts are simple. The only confusing evidence in  
23 this case is the defendant's own statements, the stories that  
24 he told. And the reason those stories are confusing is because  
25 he meant for them to confuse the reality of what he did and

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1    what he intended.

2           So let's go ahead and examine what you just heard in your  
3    jury instructions. You heard about four elements and I'm going  
4    to go through those four elements briefly.

5           The first is the defendant knowingly attempted to  
6    persuade, induce, or entice an individual under the age of 18  
7    to engage in unlawful sexual activity for which the defendant  
8    could be charged with an offense under Hawaii Revised Statutes  
9    707-730(1)(b), as in "boy." There's a lot to unpack in that  
10   element and we're going to go through those piece by piece.

11          The second element that the government must prove beyond  
12   a reasonable doubt is that the defendant used a means or  
13   facility of interstate or foreign commerce, that is, the  
14   internet or cellular phone, to do so.

15          The third is that the defendant believed the individual  
16   was under the age of 18.

17          The fourth, defendant did something that was a  
18   substantial step toward committing the crime and that strongly  
19   corroborated the defendant's intent to commit the crime. You  
20   do not need to agree unanimously as to which particular act or  
21   actions constituted a substantial step toward the commission of  
22   the crime.

23          And finally, the fifth element, the government must prove  
24   beyond a reasonable doubt that the defendant was not entrapped.  
25   And you heard the entrapment instruction. It is long, but we

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1 are going to go through it.

2 Let's start with the first element. There're several  
3 pieces here. We have to prove it was the defendant; we have to  
4 prove that he knowingly attempted to persuade, induce, or  
5 entice an individual under the age of 18 to engage in sexual  
6 activity that was illegal under state law. In other words, his  
7 violation of federal law incorporates state law, and he  
8 violated both with the actions that he took.

9 You know we have the -- the defendant was arrested on the  
10 right day and the right time, and he's the one that engaged in  
11 the communications because the parties stipulated to his  
12 identity and you heard that during trial. The photo that you  
13 have as Exhibit 9 is a picture of the defendant sitting right  
14 here, Mr. Macapagal, with a milk crate in his left hand. And  
15 you saw the items that were inventoried in that mile crate, and  
16 we are going to talk about those.

17 Knowingly is also defined in your jury instructions. It  
18 means the act was done voluntarily and intentionally and not  
19 because of mistake or accident.

20 There was no mistake or accident here. He wasn't  
21 wandering around looking for a different house and accidentally  
22 stumbling upon the house where he was arrested. He wasn't  
23 accidentally transmitting text messages in the back pocket of his  
24 jeans. He knew exactly the actions that he was taking and he  
25 did them knowingly.

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1           I want to turn to the state -- state statute that you  
2   have described in your jury instructions. You're instructed  
3   that the person -- the state statute is violated if the person  
4   knowingly engages in sexual penetration with another person who  
5   is less than 14 years old.

6           Let's talk first about how the defendant knew that the  
7   girls he was showing up to have sex with were under the age of  
8   14. He first learned their ages in text conversations with  
9   Special Agent Chen. This is page 11 of Exhibit 3.

10          He is told they are 6, 9, and 11, and that Kay was raised  
11   in "close-knit family and want my girls to learn the way I  
12   did," and his reply -- "in a mature safe nurturing  
13   environment."

14          And he replies, "I want you to understand how honored I  
15   am to be conversing with you."

16          Kay says, "From a caring experienced man."

17          And the defendant says, "I just shed a tear."

18          He knows exactly what they are talking about, and in his  
19   mind he thinks that that experience is beautiful.

20   Mr. Macapagal actually really believes in gentle sexual  
21   experiences with children. So when he finds out the age of  
22   these girls, it does not deter him; it makes him more  
23   interested.

24          He explained later in the second undercover phone call  
25   that you have in evidence as Exhibit 8, he explains to Kay,

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1 "I'll give you my best experience. My best experience was with  
2 an amazing person. This was in California. It's wonderful  
3 when you have -- I hate to say it, but it's something -- that's  
4 why I shed a tear when you talk about it. It was -- it was a  
5 family setting. I didn't think such things existed. I mean, I  
6 wish I had it. I wish I had that growing up."

7 Again, he uses the term "growing up." He's talking about  
8 his own childhood. He understands that this discussion is  
9 about sex with children.

10 He then is told more detail about the girls. He's told  
11 very specific names and their interests. He learns that Sarah  
12 is 11, she's brown -- brown, curly hair and is athletic. And  
13 he responds to that with some of his coaching experience.

14 When discussing what the girls' favorite things are, he  
15 learns that Jenny's 9 and Mia's 6.

16 And he knew this arrangement was to have sex with those  
17 girls. The undercover agents clarify multiple times in the  
18 text conversations and in the phone calls, "You understand this  
19 arrangement is for my girls, not me?" That's Kay speaking.  
20 She doesn't say it once, she doesn't say it twice; she says it  
21 many times.

22 The other part of the state law is that he has to intend  
23 to sexually penetrate the minors, and you have a jury  
24 instruction that tells you that sexual penetration under state  
25 law includes the sex acts that are relevant in this case. It

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1 includes vaginal intercourse or any intrusion of any part of a  
2 person's body or of any object into the genital opening with  
3 any penetration, however slight, for example, penetration with  
4 a vibrator, however slight, and oral sex whether or not actual  
5 penetration has occurred during the act of oral sex. And oral  
6 sex encompasses both oral sex given on a female, or received by  
7 a male, Mr. Macapagal.

8         So where does the evidence prove that he intended to --  
9 he intended sexual acts that constitute sexual penetration  
10 under Hawaii state law? We know that he was planning to bring  
11 them gifts. And one of the things that the undercover agents  
12 specifically noted is that Sarah, the 11-year-old, is allergic  
13 to red dye. That seems like a random detail. But you heard  
14 testimony explaining that if he showed up with condoms with no  
15 red dye, it would corroborate his intent to sexually penetrate  
16 that minor girl.

17         But the other reason this evidence is important, look at  
18 his response. When the undercover says, "You can only have sex  
19 with my daughter if you have a condom with no red dye, my  
20 11-year-old daughter," his response is, "Gotcha." Not, "What  
21 do you mean? What are you talking about? This is a  
22 misunderstanding. Oh, I'm not going to sexually penetrate your  
23 child." Instead, he says, "Gotcha."

24         And that's not the only time in the conversation that  
25 that comes up. Again, later, it's mentioned again, right

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1 before he arrives at the door. She says, "Did you bring  
2 condoms with no red dye?"

3 And he says, "Yes, dear."

4 And you have that in your evidence.

5 We know also that he loves oral sex. During the course  
6 of the conversation in a second phone call with the undercover  
7 agent, which is the call when he opens up more about what he  
8 wants to do, he opens up more about talking explicitly. And  
9 the reason he opens up more in the second call is because the  
10 agent has passed his test. And he tells you exactly the moment  
11 that he decided, yep, this is a real woman with real children  
12 and not an agent that's going to arrest me. He tells you that  
13 that moment was when she used the Roberts Hawaii ruse.

14 In this phone call, Kay asks, "What else would you want  
15 to do?"

16 And the defendant says, "I can tell you that I have  
17 no -- I have no limits." And the defendant's response is,  
18 "Okay. I blissfully enjoy oral. I blissfully enjoy giving  
19 oral. Well, I would love to have -- you know, I blissfully  
20 enjoy oral." He repeats that multiple times. "I don't expect  
21 to receive -- I don't expect to receive at all, not at all."

22 At this point in the conversation they're talking about  
23 oral sex. Then he continues to say, "It's not at all that, you  
24 know, and if you want me to do more, if they feel like they  
25 want to do more -- I have no -- I have no bounds, you know. I

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1 have no bounds."

2           What he means by "more" is something beyond oral sex. If  
3 he only intended oral sex, he's still guilty of the crime, and  
4 he intended even more than that. He showed up with vibrators  
5 for these children.

6           We also know that he was planning to sexually penetrate  
7 them from this part of the second call when they're talking  
8 more explicitly because he now believes this is a real woman  
9 with children and not a law enforcement agent going to arrest  
10 him. Kay says to him as they're going through her rules, when  
11 she's discussing the rule of no pain, "Uhm, and then, uhm,  
12 condoms and lube in case, because they're a little bit small,  
13 and if they are ready, you know, then I want them to be able to  
14 experience fully."

15           The defendant offers unprompted, "I'm not that big."

16           Kay says, "Okay. How big are you?"

17           And the defendant says, "I'm not that big, so that's,  
18 uhm, 5, 6?"

19           I submit to you that he's talking about inches and he's  
20 talking about his penis size and he's bragging to the mother  
21 that he's not going to hurt her children when he sexually  
22 penetrates them.

23           This fact is important for another reason which is that  
24 this type of a statement would never be used to try to seduce  
25 an adult woman in a fantasy role play relationship. There is a

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1 very specific reason he is telling her that he has a small  
2 penis. It's because he's intending to have sex with her  
3 children and he wants to convince her he's not going to hurt  
4 them.

5 Then later on, another discussion of the red dye for  
6 Sarah, and here's his response, "Yes, dear."

7 They talk about toys. The defendant says, "What type of  
8 toys do they like?"

9 The agent says, "Your choice. They have a little  
10 experience already. Obviously nothing too big."

11 And he says, "Gotcha. Do you drink wine?" And they talk  
12 about wine.

13 Then he brings exactly that. He brings three small  
14 vibrators in the girls' favorite colors: pink and purple.  
15 This shows you that he is intending to engage in sexual acts  
16 with these kids that constitutes sexual penetration under  
17 Hawaii law, which you find in your instructions.

18 So what else do we have to prove in element one? We also  
19 have to prove that he intended to persuade, induce, or entice  
20 these children, and you have ample evidence that that is  
21 exactly what he intended to do. I'm going to go through all  
22 four of these groups of evidence, but they break down in this  
23 way: He arrived with bags specifically designed for the  
24 children. Think about why he did that. Why did he bring those  
25 gift bags with gifts in the favorite colors of the children and

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1 things relating to their interests?

2 He also describes in detail his plans to introduce the  
3 children to sex acts. He discusses with Kay how he will be  
4 introduced as a special friend, and he comes up with the idea  
5 of Coach Calvin.

6 And finally, there's ample evidence to show that he  
7 intended to have sex with the girls not -- as he wanted the  
8 FBI agents to believe and as he wants you to believe -- not  
9 Kay. He wanted to have sex with the children.

10 So let's look at the evidence that proves that, starting  
11 with the gift bags. This is very intuitive. You've seen  
12 Exhibit 11, you've seen the items that were in those bags.  
13 They are straight out of the discussions. He asks about what  
14 is Sarah's favorite scent because he's decided he's going to  
15 start with this massage in order to ease the children into  
16 sexual activity to persuade them into these sex acts. He then  
17 brings coconut scented oil and a coconut scented candle. He  
18 asks what the other girls are into: "Flower hair pins?  
19 Hawaiian candy? Cool, what are they into?" Unprompted, he's  
20 leading the conversation.

21 He also explains in his postarrest interview to the FBI  
22 agent, he explains why he brought these items that you see on  
23 the screen: the coconut candle and the coconut body gel. He's  
24 explaining to them, "She" -- meaning Kay -- "she said that,  
25 uhm, one of the girls likes the scents of coconut so I thought

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1 that that would be the, you know, the thing that comfort  
2 factor. But it's not about that really, it's about Kay."

3 He was very careful to always reemphasize "all about Kay,  
4 it's all about Kay." But he actually said something there that  
5 helps you see what he was really thinking. He says, "That  
6 scent of coconuts gift that I brought with me for the oldest  
7 girl, Sarah, the 11-year-old, I thought that would bring that  
8 comfort factor." That's an essential piece of evidence under  
9 element 1 because he meant that gift to comfort this child, to  
10 persuade this child that he's not dangerous, he's a special  
11 friend, to ease them into these sexual acts that he was going  
12 to engage in with them.

13 He's used this word before elsewhere in the evidence. In  
14 the text chat with the agent, in this exchange where they're  
15 discussing details and he starts to introduce this idea that  
16 he's going to perform acts on the mom, give her a massage  
17 because, again, "It's 100 percent for them, but seeing you be  
18 okay with me touching you might instill more comfort in the  
19 special touches," again, the word "comfort" transmitted in  
20 interstate commerce in a text message. He is saying to the  
21 undercover agent, who he believes is an adult mother, "I'm  
22 going to comfort your girls. This is how I'm going to seduce  
23 them."

24 Again, he asks the girls' favorite colors and he is told,  
25 "Pink and purple." And he asked that because he's planning to

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1 go to a bunch of stores and buy them a bunch of items as gifts.  
2 And then he buys the items for the girls in their favorite  
3 colors. You saw purple nail polish. You saw pink nail polish.  
4 You saw other glitter nail polish, and you saw the three  
5 vibrators he brought in his car, small vibrators as was  
6 discussed with Kay, and they happen to be pink and purple.

7 The next batch of evidence that helps to prove that his  
8 intent was to persuade, induce, or entice the children into sex  
9 acts is this idea of introducing himself as a special friend.  
10 And he's talking with the mom about this plan of how he's going  
11 to be introduced. He comes up with the idea of Coach Calvin.  
12 And we see this in the text exchange.

13 Kay says, "There's no need for role play. I will talk to  
14 the girls when I get back so they know that a special friend is  
15 coming over. The girls get super excited and have been asking  
16 for this for a while now."

17 His response to that is, "Thank God, I'm not a fan of  
18 role play," which, by the way, completely destroys the story  
19 that he tried to tell you which is that he thought this was all  
20 a role play. The one time in the text exchange that role play  
21 is mentioned is here. And what he says about it, "Thank God,  
22 I'm not a fan of role play."

23 Also, "Special friend rather than daddy is good." Why  
24 does he want to be called special friend? Because a friend is  
25 less dangerous. It's easy to persuade children into sexual

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1 acts if you're less dangerous.

2 And again, this idea of Coach Calvin, this is something  
3 that the defendant came up with on his own, again, this idea of  
4 this harmless adult being introduced by the mother to her  
5 children, who is not going to hurt them, who is going to ease  
6 them into his special touches.

7 He also offers the idea of showering together. Why? He  
8 tells you, "We could shower together, break the ice that way,  
9 could be fun." What is he talking about "break the ice"? He's  
10 talking about with the children. He's talking about How do I  
11 cross the line into these sex acts with children? How do I  
12 persuade them and induce them into this being okay? How do I  
13 talk to the mother about how we're going to arrange this  
14 agreement and these sexual acts? And he's coming up with ideas  
15 to break the ice.

16 You also have ample evidence about his plans for the  
17 introduction of the sex acts on the children, and here is where  
18 he starts the idea of the massage. And this exchange happens  
19 again in the second phone call when they're talking more  
20 explicitly because he's now convinced this is not a law  
21 enforcement agent and he starts opening up more: "Here's  
22 how -- I would rather give you an amazing massage, I mean we're  
23 talking Thai Lao technique and everything, so everything's  
24 covered up."

25 Kay again emphasizes, "But this isn't about me."

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1           He says, "No -- I know! I know, but I'd love the girls  
2 to watch! And I would love the girls to practice on each  
3 other, or, if you want, for me to massage them, you know, and  
4 that's -- that's the line, and once you cross that line, I need  
5 to have your faith in me, to allow me to -- you know -- but it  
6 doesn't just have your -- it has to have their faith, you know?  
7 And that's the thing where if he can touch mom, you know, then,  
8 you know, he can maybe touch me too."

9           He's talking about the children watching him touch mom so  
10 that they will be more comfortable when he touches them.

11           You also heard from Mr. Macapagal how he plans to break  
12 the ice with the girls in person. He would perform oral on  
13 them. He says, "I would not expect any -- to receive any," and  
14 he emphasizes this, "I would give your daughters oral." Again,  
15 we've reviewed that constitutes sexual penetration.

16           He has suggested group activity. He states, "I think a  
17 group activity would be best to ease them into being with me.  
18 A massage for mommy and daddy is available for them as well."

19           And again, you've seen this text before, "It's  
20 100 percent for them, but seeing you be okay with me touching  
21 you might instill more comfort in the special touches."

22           And finally, ladies and gentlemen, the other piece of  
23 element 1 that is really important to pay attention to is how  
24 does the government prove that he intended to have sex with  
25 minors, not the mother? So let's turn to that evidence.

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1 There's multiple groups of evidence that proves that he  
2 intended to have sex with the children, not the mother.

3 The first batch is his fear of law enforcement, his  
4 repeated, clear fear of law enforcement which he mentions  
5 multiple times, and we will look at all the times that he  
6 mentioned it. If he was engaged in a fantasy role play with an  
7 consenting adult woman, he has no reason to fear law  
8 enforcement. There's nothing illegal about fantasy role play  
9 with a consenting adult. And he knows that; he's told you  
10 that.

11 So why was he so afraid of law enforcement? Why did he  
12 say that his number one fear was arrest, and had this whole  
13 conversation with Kay that, "I finally believe you that you're  
14 not a cop because of the whole Roberts Hawaii thing. That's  
15 the most amazing ruse ever," or something to that effect?

16 He also references their conversation multiple times as  
17 "a sensitive or unusual subject," which indicates that this is  
18 not adult consensual sex. There's nothing sensual -- sensitive  
19 or unusual about two adults having sex. They're talking about  
20 children and he knows that.

21 He then also asks specific sexual questions about the  
22 girls, and we're going to look at those. He asked if it's  
23 their first time. He asked if they know how to pleasure  
24 themselves. He asked, "Are they aware of themselves?" And yet  
25 his story is emphatically to you, "Sex with kids is oodgy, it's

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1   horrific, it's gross. Who could get off on that? I don't get  
2   off on that. I have no interest in any of that, no interest in  
3   having sex with children." Emphatically, repeatedly you heard  
4   that from him.

5           So in his version of these events, why would he be  
6   engaged in a fantasy role play talking about taking little  
7   girls' virginity? Why would he be engaged in a fantasy role  
8   play about whether they know how to please themselves and what  
9   experiences they've had sexually? Someone engages in fantasy  
10   role play about things that get them off. That's why you have  
11   a fantasy in a role play and it's all around the person's  
12   sexual interest.

13           He wants you to believe that he was engaged in a lengthy  
14   fantasy role play with explicit sexual mentions of young girls  
15   and also is not sexually interested in children, thinks it's  
16   horrific, thinks it's gross, and thinks people that do things  
17   like that should be punished, as he testified to you.

18           And finally, there's certain references that he makes to  
19   family, to children. We're going to look at those because they  
20   also disprove his story.

21           So let's start with the fear of law enforcement because  
22   his fear of law enforcement does not make sense unless he is  
23   planning to have sex with the girls. You saw this part of the  
24   exchange with the undercover officer when he's asked, "How  
25   young have you been with?"

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1           He answers, "So I've been D many a times from role play  
2 casual to a few relationships where it was a big part of our  
3 norm. Rather not say. Numbers are very...hmm...limiting?  
4 Maybe...indicting?" He knows what an indictment is. He  
5 understands the idea that you can be charged with a crime for  
6 having sex with children or trying to have sex with children.  
7 That's what he's referring to.

8           This is a fantasy role play, ladies and gentlemen. Why  
9 not just give a number? If his testimony to you was true and  
10 his story was true, why wouldn't he just make up a number? He  
11 asked you to believe that everything else in here that's bad  
12 for him, that is clear evidence of his intent, don't believe  
13 that; that was part of the role play, right? The 14-year-old  
14 girl that he describes having a forced sexual encounter with,  
15 that was part of the role play. So why this comment? Why this  
16 message that's on your screen? If he was in a role play, why  
17 not make up something that he felt was hot about bragging about  
18 how many young girls he's abused? It's because he's being  
19 careful and he's actually showing who he really is: "I can't  
20 even tell you because it could be indicting."

21           He also goes to great lengths to explain a comment on his  
22 use of precautions in his early chats with the undercover,  
23 right? "Again, apology for tag team communication yesterday,  
24 combination of healthy suspicious precaution given the nature  
25 of our initial dialog." He means we were kind of talking about

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1 having sex with kids and so I'm taking some precautions, you  
2 totally understand. He mentions it again later. He mentions,  
3 "The calls from random work phones last night...sorry. Again,  
4 my belief system isn't bound by...well...norms." He didn't use  
5 his cell phone to call the agent the first time. The phone  
6 number in the first call and the phone number in the second  
7 call are different phone numbers. He used the landline  
8 specifically because he knew, Ooh, this could be indicting.

9 He again later in the conversation, "You understand that  
10 healthy suspicion on my part." And he even says, "I am not  
11 comfortable saying or stating anything on here. You do  
12 understand." This is in his conversations with Special Agent  
13 Chen in Exhibit 3. And you'll notice when you look carefully  
14 at the evidence during your deliberations, you will notice that  
15 it is not until the second call that he really decides this is  
16 a real woman: I don't need to worry about law enforcement any  
17 more. I'm gonna go ahead and explain the sexual things I want  
18 to do. I'm gonna drive to stores and buy the things in order  
19 to do it. I'm gonna explain to her what it's gonna look like  
20 and how I'm gonna convince the kids to have sex with me, and  
21 I'm gonna show up and I'm gonna do it. And that's exactly what  
22 the evidence shows you.

23 He explicitly says during that second call before they  
24 get into the discussion about explicit sex act, he says, "My  
25 biggest concern, yeah, of course, is the police."

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1           And during the chats with the undercover agent, you hear  
2   him say, "You are not a cop or some TV show that's going make  
3   me regret opening up to you, right?" Defendant testified to  
4   you yesterday he's familiar -- sorry, I'm going to try not to  
5   hit that -- he's familiar with *To Catch a Predator* show, right?  
6   He understands the real risk of law enforcement, and that is  
7   why he is careful all the way up until the point in time that  
8   he decides he really believes it, he really believes her, and  
9   that's during the second phone call.

10          The other thing he says that's interesting in that second  
11   phone call is he says, "So right now, there's still a huge  
12   corner in my mind thinking, this is going to be submitted for  
13   evidence. Should I cross the line, not just talking about it.  
14   So I'm scared -- that's my biggest apprehension."

15          What's really interesting here, ladies and gentlemen,  
16   that his concerns actually mirror your jury instructions. He's  
17   aware of the fact that he has to cross the line from just talk  
18   into action. He's aware of that. He knows about it. He's  
19   watched the shows, he's abused kids before, and he knows  
20   exactly how to try to do it.

21          And this, ladies and gentlemen, is the moment in the  
22   second phone call when he makes the decision This is not an  
23   agent. I have nothing to worry about. This is a real woman  
24   with real children and I'm really going to get this opportunity  
25   and I'm not letting it slip by. He tells her, "The moment you

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1 said Roberts Hawaii tour bus, I'm like 'She's -- she can't be a  
2 cop, or if not, this is the most amazing ruse I've ever seen!  
3 You know?"

4 And at that point in time, that was when they started  
5 talking more explicitly. That was when he decided there's real  
6 girls there. I'm gonna ask about their favorite colors. I'm  
7 gonna talk to her about toys. I'm gonna tell her about oral  
8 and we're gonna come up with this plan to persuade the kids to  
9 have sex with me and engage in these acts with me. It's during  
10 that call. It's in this moment. He tells you where that  
11 moment happened.

12 So again, why is the evidence relating to his fear of law  
13 enforcement important, all that evidence that we just looked  
14 at? It proves that the defendant's story is just made up. He  
15 had no reason to have all those fears about being arrested if  
16 this was consensual adult role play.

17 Let's look at the references he makes to sensitive and  
18 unusual subjects. You saw that in the initial email exchange.  
19 This is the second message that he sends, remember? The agent  
20 says, "Taboo FF?"

21 He replies, "Please tell me more."

22 The agent explains that, "This is about my daughters."  
23 He uses the word "daughters." He uses the word "womanhood."

24 And this is what the defendant said, "I do know what  
25 you're proposing. It is also very unusual to discuss on a

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1 forum such as this."

2           The defendant told you in his testimony that Doublelist  
3 has all kinds of adult relationships. Nothing illegal about  
4 adult relationships. So if he did not in that moment  
5 understand they were talking about sex with kids, why would he  
6 call it unusual to chat like that on Doublelist? He knows  
7 they're talking about something illegal.

8           And then he also references it in the second phone call.  
9 It's a very sensitive subject, obviously, "It's a very  
10 sensitive subject." Skip that one for now.

11           The third category of evidence that proves that he  
12 intended to have sex with minors and not the mother is these  
13 specific sexual questions that he has about the girls. They're  
14 very specific and very explicit from a man who claims that he  
15 can't stand the idea of sex with children and it's horrific and  
16 it's crazy. Look at what he wrote. He says to her, "But your  
17 girls, have they -- have they been exposed at all or is this  
18 going to be their first time?"

19           He says, "I just want to make sure there's -- there's  
20 some degree of experience."

21           He asks, "Are they aware of themselves?" And he offers  
22 his take on things; here's my take on things, "Are they aware  
23 of themselves? Are they able to pleasure themselves?" He's  
24 talking about 6, 9 and 11-year-old girls.

25           Kay says, "Yes," to his question, "Are they able to

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1 pleasure themselves?"

2 And the defendant says, "Okay. So that's the most  
3 amazing important thing 'cause if they have that, then they  
4 know what feels right and what doesn't feel right."

5 You've seen the slide. He also talks a lot about oral.  
6 He says, "I would love to -- I blissfully enjoy oral, you know.  
7 I don't expect to receive, I don't expect to receive it, not at  
8 all."

9 And you have the fact that he offers up the size of his  
10 penis. For someone who has no interest in sexual relations  
11 with children, as he claims, he certainly has a good  
12 imagination about very explicit details down to the fact that  
13 his penis size will make it less painful for the child.

14 Let's look at also some comments that he makes about  
15 family growing up and children. There's this moment also in  
16 the second call, he says, "I'll give you my best experience,"  
17 and you saw this slide before. He's telling the agent, "I shed  
18 a tear when you talk about it. It was -- it was a family  
19 setting. I didn't think such things existed. I mean, I wish I  
20 had it, I wish I had that growing up." Again, this proves he  
21 knows they are talking about sex with children.

22 And he even goes so far as to say he's an advocate. He's  
23 an advocate for this world view that he has that this can be a  
24 great positive experience for children. He says, "It's not  
25 hurting anybody, 'cuz there's no way in God's earth, and even

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1 in the heavens or in hell I would hurt, anyone, on that level.  
2 I'm such an advocate for this that it sounds hypocritical you  
3 know, for the layman to hear what we're talking about."

4 He's saying, "My belief system is not bound by the norms,  
5 right, and I'm such an advocate for this," meaning sexual  
6 experiences -- delicate sexual experiences with children.  
7 Because look at the end of what he says there, "It sounds  
8 hypocritical, you know, for the layman to hear what we're  
9 talking about." The reason it's hypocritical -- he's  
10 explaining to Kay the reason it's hypocritical is because he's  
11 talking about not harming children and talking about sexually  
12 abusing them at the same time. That's what he means by  
13 "hypocritical to the layperson." I submit to you the layperson  
14 follows the law because the law prohibits you from having  
15 sexual relations with children.

16 Let's move to the second element. The second, third, and  
17 fourth elements are much quicker presentations.

18 You have a jury instruction, No. 15, that the internet  
19 and cellular phone are facilities of interstate commerce. The  
20 defendant used his cell phone and text messages, he also used  
21 email and Doublelist, the internet, all of which constitute  
22 means and facilities of interstate commerce. He was  
23 transmitting these messages all using means of interstate  
24 commerce. So there's no real dispute on the second element.

25 The third element, that the defendant believed the

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1 individual was under age of 18, we've already reviewed that.  
2 We've already reviewed all the evidence of how he knew that the  
3 ages of these girls was 6, 9 and 11. He was told multiple  
4 times. And this is not a case where he could say it was a  
5 mistake of age and I thought they were 18 and they looked 18,  
6 right?

7         The fourth element, the defendant did something that was  
8 a substantial step toward committing the crime that strongly  
9 corroborated the defendant's intent to commit the crime. You  
10 do not need to agree unanimously as to which particular act or  
11 actions constituted a substantial step toward the commission of  
12 a crime.

13         Mr. Macapagal went to multiple stores: Longs, Walmart,  
14 and Sensually Yours, which is the sex toy store where he got  
15 the vibrators. He took all the time to go around and buy these  
16 gifts for the children in their favorite color and favorite  
17 scent, right? He then asked for the address, drives to the  
18 address, at some point unpacks the vibrators in his car, throws  
19 the packaging in the back seat, puts the vibrators into a bag,  
20 the Sony purple bag that you saw in evidence, puts the wine for  
21 Kay, a bunch of condoms, a little thing of lube, a change of  
22 clothes, some snacks, and puts them in the front seat of the  
23 car.

24         Then he takes the milk crate with the three gift bags for  
25 the children that you have in Exhibit 11, he walks up to the

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1 door with his cell phone, and he's texting. And you heard him  
2 testify he was even annoyed at how long it took someone to come  
3 to the door. Remember that? It took so long for someone to  
4 come to the door. He's waiting there. He wants this to  
5 happen. He believes it's a woman. He believes there are real  
6 children.

7 That was his substantial step. And when your  
8 instructions say that but for an intervening force or something  
9 interrupting the process of the crime, the crime would have  
10 happened, the thing that interrupted Mr. Macapagal was the  
11 agents, the arrest, the discovery that there were no real kids,  
12 there was no real Kay, it was all undercover. That was the  
13 intervening event that stopped the crime from happening because  
14 if there had been kids there and there was Kay there, he would  
15 have completed that crime.

16 And these are photographs of what you have in Exhibit 12  
17 and 13 that I referred to.

18 In his postarrest statement the defendant says the  
19 following: "And um, she led me to believe some, frankly  
20 interesting situations."

21 And the agent said, "Okay. Like what?"

22 The defendant said, "She wanted me to have, um, touch her  
23 children."

24 And the agent says, "Okay."

25 And he says, "And it was, you know, very extreme. But

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1 you know, I kind of want to hook up with Mom. You know -- "

2 And the agent says, "Mhm."

3 And he says, "And she kept on and I understand, you know,  
4 the process of what's going on right. Um, I was prepared to  
5 and I'm not saying the thought didn't cross my mind, but, um, I  
6 bought the kids stuff to match things she said but I really  
7 wanted to hook up with Kay."

8 The defendant admitted in his testimony that even though  
9 that's difficult to hear, what he says is, "I was prepared to  
10 and I'm not saying the thought didn't cross my mind." He  
11 accidentally admits a very important fact because he admits that  
12 he knew they were real children. In his mind there were real  
13 children. That's the version of his reality in his postarrest  
14 statement.

15 He's coming up with this story it's for the mom, of  
16 course it's for the mom, but he accidentally says here, "Oh,  
17 yeah, I was thinking about -- the thought had crossed my mind  
18 with the kids."

19 I also want to note that the defendant even delayed the  
20 meet time in order to give himself more time to buy the kids  
21 gift baskets. He says in this text messages when they're  
22 leading up to the time that they're going to meet, he says, "I  
23 want to grab a few more things for them. Let the girls know  
24 I'll be there closer to 7:30."

25 He's voluntarily pushing the meet time to give himself

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1 more time to go buy the items that he's then going to use in  
2 this sexual encounter. He has plenty of time and space.

3 Think about what he's doing. The agents intended to give  
4 him these periods of time and space where he could really think  
5 about if this was something he really wanted to do. And here  
6 is a perfect example of the defendant saying I'm not done  
7 preparing for the crime yet. I need to go buy a couple more  
8 things before I show up at your door to sexually abuse your  
9 daughters.

10 And finally, ladies and gentlemen, the defendant was not  
11 entrapped. You did not hear anything in opening statement from  
12 the defense about this. You didn't hear a lot about it on  
13 cross. But I am going to review it because it's the  
14 government's burden to prove that he was not entrapped.

15 So to do that, the government must prove one of two  
16 options: Either the defendant was predisposed to commit the  
17 crime before being contacted by government agents, or, the  
18 defendant was not induced by the government agents to commit  
19 the crime.

20 The word "or" is very important there because the law  
21 would be very different if that word were "and." It's one  
22 option or the other. If we prove one of these two things to be  
23 true, then he was not entrapped.

24 First let's look at predisposition. You're given five  
25 factors in your jury instructions:

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1           No. 1, whether the defendant demonstrated reluctance to  
2     commit the offense;

3           No. 2, the defendant's character and reputation;

4           No. 3, whether the government agents initially suggested  
5     the criminal activity;

6           No. 4, whether the defendant engaged in criminal activity  
7     for profit; and,

8           No. 5, the nature of the government's inducement or  
9     persuasion.

10          Here's an important phrase within your jury instruction  
11     No. 21: When a person, independent of and before government  
12     contact, is predisposed to commit the crime, it is not  
13     entrapment if government agents merely provide an opportunity  
14     to commit the crime.

15          "Opportunity" is a very interesting word in this case  
16     because the defendant himself actually used that word multiple  
17     times during his testimony, and he also used that word in his  
18     first call with the undercover officer. You heard him testify  
19     yesterday talking about how on Doublelist everything's an  
20     opportunity. If someone replies to your Doublelist, that's an  
21     opportunity, right? And he describes this encounter with the  
22     agent as an opportunity.

23          In his first call with Kay, she says, "No, no" -- he  
24     asked her what she's doing; she says, "No, no, just watching  
25     some TV."

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1           He says, "Oh, perfect perfect. I still got, uh, several  
2 hours to go here, but I had to make sure I touched bases with  
3 you before the opportunity slipped."

4           He's describing it himself as an opportunity. The agents  
5 gave him an opportunity to commit the crime. They did not  
6 entrap him into committing that crime.

7           So going through the factors one by one: Whether the --  
8 whether the defendant demonstrated reluctance to commit the  
9 offense, the defendant did not demonstrate reluctance to commit  
10 this offense. The only time he even sounds reluctant is when  
11 he's talking about his fear of law enforcement.

12           He is not wavering about the morality of the crime, and  
13 is it okay to abuse children? I don't really know. He's not  
14 doing that. He's not reluctant. He's calling her, he's  
15 texting her.

16           He testified to you yesterday relating to a very  
17 important block of text. It was these texts. It's the point  
18 in this where they're talking about how he's going to persuade,  
19 induce, entice the children. And he says, "That sounds great.  
20 So don't start with you? I do prefer that just to ease them  
21 into me. But Mommy knows best. Again, it's 100 percent for  
22 them, but seeing you be ok with me touching you, might instill  
23 more confidence in the special touches." Right?

24           You heard him testify yesterday that what was going  
25 through his head during this exchange is that Kay wasn't

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1   texting him back. He sends the first message at 2:50, second  
2   message at 2:51, third message at 2:55. All of that, by the  
3   way, is within a 5-minute time frame.

4           But he testified like, "Why isn't she responding to me?  
5   I was so aggravated. Why wasn't she responding to me? And so  
6   I was saying other things because she wasn't responding to me."  
7   That's what he told you, right? Who was leading the  
8   conversation here? It is the defendant. He's determined that  
9   this is not an undercover agent and he's talking about how he's  
10   going to persuade, induce, and entice the children.

11          You also have the initial email exchange where he's again  
12   told, "Are you into taboo FF?"

13          "Please tell me more."

14          And the agent says, "If you have to ask, this isn't for  
15   you." The agent is saying Walk away if this is not what you  
16   want, if you don't know what this is.

17          And that's not the only time the agent gives him the  
18   opportunity to walk away. There are many places in the  
19   conversations and texts where the defendant could have walked  
20   away. The defendant would have faced no consequence for  
21   walking away. If the defendant stopped communicating or didn't  
22   show up at the door, the evidence would be very different. But  
23   he did. He continued the conversation. He got on the phone,  
24   he stayed on text, and he showed up at the door.

25          You can also look in the email at the time stamps. The

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1 agent says, "If ur the right guy for this I want to take this  
2 off the internet." That's at 2:13 P.M.

3 2:35 P.M. he says, "Totally agree. Have you done this  
4 b4?"

5 2:53 P.M. "Tried calling. Call me back if u can. Will  
6 be here for a few but then need to go soon." He gives the  
7 number.

8 3:01 P.M. "Sorry I missed you. I'll try calling again in  
9 a few. I need to pretend to work for a bit rt now." He is in.  
10 He is in. He's not wavering. He's not reluctant. He's  
11 committed and he's interested.

12 Second, defendant's character and reputation. And I am  
13 running short on time so I'm going to start moving faster.

14 First of all, you know about his character, his prior  
15 sexual experience with children. We've already reviewed his  
16 fear of law enforcement, the precautions that he used, and  
17 there are multiple references to the fact they are aware that  
18 they are discussing a crime.

19 He talks about a 14-year-old girl. He talks about a  
20 forced sexual experience with a 14-year-old girl. Ladies and  
21 gentlemen, that's predisposition. He's done this before. In  
22 fact, he's done it so many times that he can't say how many  
23 times because it could be indicting.

24 He also has this world view, and this goes to his  
25 character. He has a world view that it's not hurting anybody:

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1 "I'm such an advocate for this. I know that sounds  
2 hypocritical." It sounds hypocritical to have sex with  
3 children and say that you don't want to hurt anybody, but  
4 that's what he believes.

5 Again, you already saw this slide, his reference to his  
6 prior experiences being indicting and he tells you, "My belief  
7 system isn't bound by norms."

8 This third factor is the one factor that weighs in favor  
9 of the defense of five factors in a balancing test. And the  
10 defense wants you to stare at this one factor and let it change  
11 the view of all the evidence. They want you to focus on who  
12 started the conversation, right? You heard a lot of evidence  
13 on who started the conversation. The agent did. The agent  
14 reached out to him, right? They want you to stare at that part  
15 of the evidence 'cause he had not committed a crime yet. The  
16 evidence is good for them there, earlier on. It's good for  
17 them. The government agent initially suggested it. All the  
18 other factors, you know, all the other evidence once you get  
19 past that point in time, are very clearly not entrapment.

20 The fourth factor, whether the defendant engaged in the  
21 criminal activity for profit, you heard him testify today,  
22 "No." That doesn't apply here. This is not a situation where  
23 someone was offered \$10,000 to commit a crime and that's the  
24 real reason they did commit the crime. He was offered no  
25 financial incentive. The only thing he had to get out of it

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1 was the benefit of the crime itself which was sex with  
2 children. There's nothing different that was motivating him.

3 And finally the nature of the government's inducement or  
4 persuasion. Remember, if the agents offer an opportunity to  
5 commit a crime, that alone is not entrapment.

6 The word "inducement" is then expounded upon, right?  
7 You're looking at what did the government agents do? What was  
8 the nature of what they did? And the inducement prong tells  
9 you that you can consider any government conduct creating a  
10 substantial risk that an otherwise innocent person would commit  
11 an offense -- a substantial risk that an otherwise innocent  
12 person would commit an offense. However, remember, your  
13 instruction 10 explains that undercover agents in order to  
14 apprehend persons engaged in criminal activities, provided they  
15 merely afford opportunities or facilities for the commission of  
16 the offense, are -- I mistyped that. I apologize. I'm going  
17 to find that in the instructions and I'll bring that before  
18 you.

19 Agents are allowed to lie and use stealth and stratagem.  
20 They're allowed to use fake identities. There's nothing wrong  
21 about doing that. It's in your jury instructions that that is  
22 allowed.

23 So in other words, the instructions give you these  
24 factors: persuasion, fraudulent representations, threats,  
25 coercive tactics, harassment, promises of reward, and pleas

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1 based on need, sympathy, or friendship.

2           You heard the defendant testify today there were no pleas  
3 based on need, sympathy, or friendship, no promises of reward,  
4 there was no harassment, there were no coercive tactics, there  
5 were no threats.

6           The only things you see in this case are fraudulent  
7 representations made by an undercover agent in the course of  
8 vetting out the crime, which your instructions tell you is  
9 allowed. There's nothing about any fraudulent representations  
10 in this case that created a substantial risk that an otherwise  
11 innocent person would commit an offense.

12           And persuasion, that's the other type of conduct that you  
13 can consider. Did the government do anything to try to  
14 persuade him that created substantial risk that an otherwise  
15 innocent person would commit an offense? No. The defendant is  
16 driving this bus.

17           Finally, I want to touch on two jury instructions that  
18 you have that are very important for this case. Jury  
19 instruction 16: The government is not required to prove that  
20 the defendant communicated directly with a person he believed  
21 to be a minor. The first element is satisfied where the  
22 defendant communicated with an adult intermediary or adult  
23 guardian of a minor as long as the defendant acted with the  
24 intent to persuade, induce, or entice a minor. He did not have  
25 to communicate directly with the children to commit this crime.

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1 He committed this crime in his communications with their  
2 mother.

3 And again, jury instructions 15 and 17, which you just  
4 heard, an actual minor victim is not required for an attempt  
5 conviction, which is exactly as this case is charged. And a  
6 minor's willingness to engage in sexual activity or stated  
7 consent to sexual activity is irrelevant to the elements of  
8 both the federal law and the state law. The reason that that's  
9 important is because it is the defendant's mind that matters.  
10 It's his intent, what he intended to do. Even if he knocked on  
11 that door, entered, and the girls were willing to consent to  
12 his sexual touches, that is not a defense.

13 Ladies and gentlemen, briefly, in his mind, Mr. Macapagal  
14 did not show up at the house intending to force himself on  
15 these girls or even cause them pain. In his mind, he genuinely  
16 believed in a world view that is beyond the norms, that is  
17 common in Asia. He's an advocate for that world view.

18 And he opens up to the undercover officers and he  
19 explains his theories on making love, on long orgasms, on  
20 blissful sex, oral sex. He genuinely believes that he can be  
21 delicate and patient and give these girls a good sexual  
22 encounter. And he's not deterred by the fact that Mia is 6,  
23 Jenny is 9, and Sarah is 11. He tells the mother, "I'm so  
24 excited because this sounds like a wonderful thing you're doing  
25 and I'm honored to help."

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1           Unfortunately for Mr. Macapagal, his conduct was illegal  
2   for all the reasons that were stated here and based on all the  
3   evidence you have in the record, and we ask that you return a  
4   verdict of guilty. Thank you.

5           THE COURT: All right. So given the timing, so,  
6   Mr. Mizono, you may begin your closing 'cause we're running out  
7   of time.

8           MR. MIZONO: Okay.

9           THE COURT: I'll give you a moment to set up.

10          MR. MIZONO: Please. Thank you.

11          Test.

12          THE COURT: All right. Please.

13          MR. MIZONO: May it please the Court. Good  
14   afternoon, ladies and gentlemen of the jury.

15          At the beginning of this case, Ms. Rancourt -- sorry --  
16   Ms. Rancourt told you some things about the things that you  
17   would hear and see in this case that might disgust you, that  
18   you would hear some things without hearing from the other side,  
19   Mr. Macapagal's side, that would sound horrific and criminal.

20          And if you felt that way during portions of this trial,  
21   especially prior to hearing from the defense, that doesn't mean  
22   you're a bad person. In fact, it's in our human nature to want  
23   to protect our children and the most vulnerable in our society.

24          So when the FBI and the U.S. Attorney's Office run  
25   Operation Keiki Shield trying to protect our children, that's

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1           And even if you think Mr. Macapagal was, in fact, talking  
2 about having sex with children, nothing was persuasive,  
3 inducing, or enticing about it. Having general discussions  
4 about talking -- having general discussions with an undercover  
5 agent about engaging in sex later on with a minor, those aren't  
6 those three verbs, a general intent to do that. No, these are  
7 very specific verbs.

8           And as for the other elements, we're not going to insult  
9 your intelligence. Yeah, Mr. Macapagal used the cell phone and  
10 the internet to communicate; that's undisputed. He never  
11 believed that the individuals were real, even though Agent Chen  
12 texted 6, 9, and 11. But Mr. Macapagal never believed that.  
13 So even if the government convinces you beyond a reasonable  
14 doubt that that's what Mr. Macapagal was thinking in his  
15 head -- I guess they're mind readers -- you still go to the  
16 first element: persuade, induce, or entice.

17           And the substantial step, Ms. Early talked about  
18 travelling, this statute criminalizes very specific criminal  
19 activity. It criminalizes online communication. Travel is not  
20 required. So anything about showing up or coming with gifts,  
21 or vibrators, or lube, or condoms, not a substantial step. All  
22 of the substantial steps to persuade, induce, or entice has to  
23 be done online.

24           MS. EARLY: Objection, Your Honor. Misstating the  
25 law.

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1 MR. MIZONO: No, it's not.

2 THE COURT: That's sustained.

3 So you want me to give a curative instruction with regard  
4 to that?

5 MS. EARLY: I would appreciate that, Your Honor,  
6 maybe at the end or now, whatever Your Honor prefers.

7 THE COURT: All right. So you're to disregard that  
8 last statement by Mr. Mizono.

9 MR. MIZONO: We still don't believe that what  
10 Mr. Macapagal did constituted substantial step to commit this  
11 offense. So again -- and then there's the entrapment issue.

12 So again, we know that this is not an easy case. We know  
13 that the communications and the texts, the phone calls were not  
14 fun to read, to listen to. Ms. Rancourt told you at the  
15 beginning of the case, we told you that this wouldn't be an  
16 easy case. But after reviewing the evidence, there's three  
17 ways that you can find Mr. Macapagal not guilty, and I won't  
18 repeat them again because I just went through them for about an  
19 hour with you folks. But after reviewing all the evidence, and  
20 knowing that DDLG set up this entire scenario moving forward,  
21 the only thing you can do in this case is to vote not guilty.

22 THE COURT: All right. Ms. Early, you have  
23 10 minutes for your rebuttal. Why don't you give him a few  
24 minutes, though, to --

25 MS. EARLY: Thank you.

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1           THE COURT: -- thank you -- and give you a few  
2 minutes to set up.

3           MS. EARLY: Ladies and gentlemen, I want to first  
4 emphasize that it's very important to understand what the  
5 defense is arguing. One of their arguments relates to the  
6 elements persuade, induce, entice, and the other relates to  
7 entrapment. That is the core of their defense are those two  
8 things.

9           As the defense pointed out, I didn't mention DDLG and  
10 taboo FF, and the reason is this: That is a perfect example of  
11 the defense telling you don't look at all the evidence, just  
12 look at the beginning, just look at the beginning. Right?  
13 Even if you accept the defendant's representation that he  
14 didn't understand what taboo FF meant and he had this idea that  
15 DDLG did not involve real children, even if you believe that at  
16 the beginning of the conversation, at the very start, by the  
17 end of the conversation, the 35 pages of text messages, the two  
18 undercover phone calls, he absolutely knew what the opportunity  
19 was. He absolutely knew exactly what this arrangement  
20 involved. And that was what he wanted to happen. He wanted to  
21 follow through on that because that's what he's looking for.  
22 He wanted to seize the opportunity.

23           I want to talk a little about persuade, induce, entice.  
24 The defendant -- it's important to note that the substantial  
25 step does not have to happen online. His substantial step was

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1 in person. Imagine that a -- this adult female walks up to a  
2 kid in a park and says, "Hi, little kid, do you want to come to  
3 7-Eleven with me?" Okay? There may be an argument over  
4 whether that person persuaded, induced, or enticed that child.  
5 But if the same person shows up at the park with the kid's  
6 favorite color toy and holds it out and says, "Hi, little kid,  
7 come to 7-Eleven with me," that person has attempted to  
8 persuade, induce, or entice that child to go to 7-Eleven.  
9 That's an analogy, obviously.

10 What he was intending to do was persuade, induce, entice  
11 the children into performing sexual acts with him, and the way  
12 he accomplished that crime was by going online, and in his text  
13 messages and in his emails communicating with somebody that he  
14 believed was a mother who had control over these children and  
15 who was willing to help arrange this dynamic.

16 And they come up with what his name is going to be:  
17 special friend, Coach Calvin they talk about, right? They talk  
18 about the gifts that he was going to bring for the kids. And  
19 he, his words -- he talks about his "special touches" and how  
20 he's going to "Ease them into being with me." Those are his  
21 words in communications on interstate commerce, and that's why  
22 he is charged with an attempt to commit this crime.

23 The other important thing to note is you have to have a  
24 substantial step, and we embrace that fully. If the defendant  
25 had not traveled to the store, purchased all the items, asked

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1 for the address, traveled to the door, brought items to the  
2 door, rang the doorbell while texting, "Are you here? I'm  
3 here" -- if he hadn't done all that, he wouldn't have committed  
4 a substantial step.

5 In other words, it's not his chats alone online that  
6 makes him guilty. It's the fact that he was going to commit  
7 that crime, and that's what the evidence shows you.

8 I want to briefly touch upon the testimony that you heard  
9 from Lisa today. I didn't mention that either in my first  
10 statement to you. Lisa is an example of an adult consensual  
11 relationship with Mr. Macapagal. What's interesting is that  
12 you have to ask yourself the question as you look at the  
13 evidence: If you believe Mr. Macapagal -- which you should not  
14 for reasons I'll get into -- but if you believe his version of  
15 what happened, he was engaged in a fantasy role play. He was  
16 very scared about getting arrested, so already that doesn't  
17 make sense. Why would you be scared of getting arrested if you  
18 were in an adult role play, right? He was very scared of  
19 getting arrested. He explicitly states in the second phone  
20 call, "I'm thinking about whether to cross that line," right?  
21 When they're having a discussion, he's thinking out loud about  
22 whether she's law enforcement. Why would this adult man,  
23 knowing that he could get arrested for his chats and the things  
24 he's been talking about doing to children, knowing he could get  
25 arrested, fearing he could be arrested, why would he go through

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1 with it if the carrot at the end of the day is sex with an  
2 adult woman? He can get sex with an adult woman. He has  
3 Diane, his longtime girlfriend, at home, and he had Lisa.

4 And what you learned from Lisa is that they were in  
5 contact in March of 2019. She says their last email was March  
6 2nd. This offense happened between March 22nd and March 24th.  
7 And when we asked her, "How would you have felt if the  
8 defendant reached out to go on a date." She said that he was  
9 the one that ended contact, remember? And she said, "If he had  
10 contacted me, I probably would have hung out with him."

11 So he's trying to get -- he's trying to convince you that  
12 he was so desperate for adult sex that he went through this  
13 entire fantasy, took all these steps, spent \$80 on sex toys,  
14 and showed up at the door of a place where he knew he could get  
15 arrested, all for adult sex. That does not add up and that's  
16 what we learned from Lisa.

17 You also have a tremendous amount of inconsistencies that  
18 would take far too long for me to go through from the  
19 defendant. And as you heard from the defense, their closing  
20 argument relies very heavily on you believing what  
21 Mr. Macapagal says.

22 But again, the evidence that doesn't make sense is his  
23 statements, both his testimony to you in court and his  
24 statements that are in his postarrest interview in evidence,  
25 and I encourage you to listen to that very carefully and review

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1 it again during your deliberations and think about what he  
2 testified to.

3 In his postarrest statement he is very clear that he  
4 thought there were real children. He brought the coconut  
5 scented things for Sarah. He refers to the children as real.  
6 He never once mentions, "Oh, I have this fantasy with an adult  
7 woman. There are no real children. I would never do." He  
8 doesn't say, "I didn't think the children were real," which if  
9 that was true would be the most important truth in that  
10 postarrest interview. That would be the most important thing  
11 for him to say, and he didn't say it. He only said that to you  
12 here on the stand and he did not have an answer as to why -- if  
13 he didn't believe the kids were real, why didn't you say that  
14 to the FBI?

15 And you also have earlier inconsistencies. You saw the  
16 clip today when he was in his postarrest interview and the  
17 agents asked him, "Did you bring condoms, lube?"

18 And he denies it early on in the postarrest interview.

19 And then later it's only when the agent comes back and  
20 says, "What about your vehicle? Anything that might be  
21 interesting in your vehicle?"

22 He says, "No."

23 And they push a little more, "Any condoms?"

24 Then, "Oh, yeah, there's condoms in my car."

25 And then they drilled down on him, and I encourage you to

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1 watch it again. They drilled down on him, "Okay. Well,  
2 anything else? What else? Is there anything else?"

3 And it's only once they ask him if they can search his  
4 car that then he says, "I will -- go ahead. You can -- you can  
5 search it. Please search it."

6 Why does this matter? It shows you he wants you to  
7 believe that certain things were lies when it's convenient. He  
8 doesn't want you to believe the things that were criminal.  
9 Don't believe the things that were criminal. Only believe  
10 these other things, even though you have him lying in your  
11 evidence time and time again.

12 If you think about what you heard from the defendant on  
13 the stand and you compare it to the postarrest interview that's  
14 in evidence, you will find all of those inconsistencies. He  
15 has not given you one plausible way to explain all the chats,  
16 all the messages, all the evidence in a coherent way. And  
17 that's because the truth is he committed a crime that he is  
18 charged with and he's guilty of that offense and all the  
19 elements from that.

20 The defense closing also focussed very heavily on one of  
21 the five factors on predisposition. And again, you have five  
22 factors to balance relating to predisposition. And the third  
23 factor is who initiated the contact, right? And that is the  
24 one factor that is in their favor. All four of the others  
25 support the conclusion that he was predisposed to commit that

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1 crime.

2 In addition to that, he was not induced. He was not  
3 induced. And if you read your instructions very carefully,  
4 there was nothing that the government agents did that would  
5 create a substantial risk that an otherwise innocent person  
6 would commit the crime. And when you look at the factors in  
7 your jury instructions about what could be inducement, the  
8 types of things -- coercion, harassment, promises of reward,  
9 like, money benefit -- you don't have any of that in this case.

10 You do have agents lawfully using false identities. You  
11 do have agents lying about their names, and you have an  
12 instruction that they're allowed to do that. Those are the  
13 only fraudulent representations were parts of the undercovers'  
14 stories, and they were allowed to come up with those stories  
15 and those identities.

16 THE COURT: You have one more minute.

17 MS. EARLY: One more minute, okay.

18 Ladies and gentlemen, you heard in the defendant's  
19 testimony yesterday the defendant told you, "I very much so  
20 understand how these texts could be interpreted in a very  
21 different way" than the story he was telling you.

22 And then he was asked, you know, "By law enforcement?"  
23 Could they misinterpret it?

24 And he said, "By law enforcement, by anybody else who  
25 doesn't understand the full breadth of the context of our

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1 conversation, yes."

2           You, ladies and gentlemen, have the full breadth of the  
3 context of his communications with the undercover. You have  
4 all the evidence. And all you have to do is review it during  
5 your deliberations, put the pieces together, remember what you  
6 heard from Mr. Macapagal when he testified, and you'll see that  
7 every single element is proven beyond a reasonable doubt, and  
8 we ask that you find him guilty of the crime charged.

9           Thank you for your attention.

10           THE COURT: All right. Ladies and gentlemen, to  
11 assist you in performing your duties, you'll be provided with a  
12 verdict form. You'll also have with you electronically the  
13 exhibits admitted into evidence. You'll each get the binder of  
14 the written instructions.

15           Your first task will be to select one of your members as  
16 a foreperson. That person will preside over your deliberation  
17 and be your spokesperson in court.

18           Take as much time as you need to deliberate on this case.  
19 Do not indicate on any note that you write how you stand  
20 numerically on the question of a verdict. And when you have  
21 reached a verdict that is agreed on by all of you, your  
22 foreperson will fill out and sign the verdict form and inform  
23 the bailiff that a verdict has been reached.

24           You will be able to order lunch each day and choose what  
25 time you wish to break for lunch and what time you wish to

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