PETITION APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	**Case No.**
vs.	)	**8:20-CR-00292-VMC-CPT**
	)	
	)	
JORDAN JYSAE PULIDO,	)	
	)	
Defendant.	)	

MOTION HEARING
(Held via Zoom Videoconference.)
BEFORE THE HONORABLE VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES SENIOR JUDGE

MARCH 12, 2021
1:33 P.M.
TAMPA, FLORIDA

Proceedings recorded by mechanical stenography, transcript produced using computer-aided transcription.

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P R O C E E D I N G S

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THE COURT: Good afternoon. We're here for oral argument in the United States versus Jordan Jysae Pulido. I don't know if I pronounced that correctly.

Mr. Landes, does that sound about right?

MS. LANDES: I think that's right, Your Honor, although I should ask.

THE COURT: Okay. Jysae, I think.

It's case 20 Criminal 292, and I'll begin by having counsel state their appearances.

Who do we have for the Government?

MS. THELWELL: Good afternoon, Your Honor. Lisa Thelwell on behalf of the United States.

THE COURT: All right, Ms. Thelwell.

And for the defense?

MS. LANDES: Good afternoon, Your Honor. Sam Landes for Jordan Pulido.

THE COURT: Okay. Thank you very much.

So, Mr. Landes, this is a case that I remember when it was filed, and they're not the typical allegations that you see in some of these cases that we see, it's a little bit different, but I think I'm more familiar with the case now than what I was when it was first indicted. I've had an opportunity to study it a little bit more.

I know from our hearing yesterday that there are a couple of matters pending, one is in front of the magistrate judge, the motion to suppress, but the motion to dismiss is pending in front of me, so I thought that the easiest way of handling this would be to have oral argument, that way if I had any questions I could take it up with you and have the opportunity to have a further discussion. So I'm going to be beginning with that.

It's your motion to dismiss, so I'm going to begin by having you make oral argument and then I'll let Ms. Thelwell present her oral argument, and since it's your motion, I'll give you the opportunity for quick rebuttal. I mean, you're both very talented writers, so I think you both have done a really good job of laying everything out, so I think I have a general understanding of what occurred here and what the issues are, but I'll go ahead and hear from you, Mr. Landes.

MS. LANDES: Thank you, Your Honor.

Your Honor, the motion moves to dismiss the indictment in its entirety, but the reasons are various and separate and unrelated, so I'll just take it down the line, Count One through Four, beginning with Count One.

Count One alleges a violation of Section 2422(b), and the question presented to the Court is what is the unit of prosecution for that offense, that offense we commonly call child enticement, and so the duplicity argument that we've made almost just turns on that. It's duplicitous if there's more than one unit of prosecution alleged in the count in the indictment, and that's what we think we have here.

In answering that question, what is the unit of prosecution for an enticement charge, I think the most helpful case is *Murrell* that we've cited, and that's because of what *Murrell* tells us, is that the offense is completed when the minor is persuaded and not at any other time. It doesn't have to -- the sex act doesn't have to occur, there doesn't have to be travel, it simply is when the state of mind of the minor is changed.

THE COURT: So let me ask you something. In *Murrell,* didn't the Eleventh Circuit affirm enticement convictions where the defendants had communicated with undercover agents for several weeks?

MS. LANDES: It did, Your Honor, and I think the distinction there is that *Murrell* is an attempt case, so the elements of attempt are different from what we have here, which is completed enticement. In an attempt case all the Government has to prove is a substantial step, and so that substantial step could take place over a long period of time.

THE COURT: Well, but let's talk about the *Lee* case, for instance. In the *Lee* case the Eleventh Circuit affirmed a conviction of enticement of a minor after the defendant had communicated with undercover agent for approximately six months. I mean, hasn't the Eleventh Circuit treated this as a continuing offense?

MS. LANDES: I don't think the Eleventh Circuit has answered the question, Your Honor. Duplicity motions, frankly, are rarely raised, and none of the cases that I've reviewed or that I've seen cited by the Government are cases about duplicity and enticement, so when those convictions went up on review and the appellant raised some other issue, certainly we can look at the indictment, we can look at the case background and see a broad period of time was alleged, but if that issue was not placed before the Eleventh Circuit then the Eleventh Circuit did not resolve it, and so we don't -- and, frankly, Judge, I'm not aware of any Court resolving this issue. I think it's a fairly novel issue for this Court.

THE COURT: But how about in other -- sorry. How about in other jurisdictions? For instance, don't we have the Fifth and the Tenth Circuit holding that enticement is a continuing offense?

MS. LANDES: We do, Your Honor, and that's what the Government has relied upon. The cases are *Rounds* and *Byrne*. The difference there is that venue is different. Those are venue cases, not where duplicity was raised but where the issue of the correct location for the prosecution was raised.

Venue is different because a continuing offense for venue purposes isn't -- nobody is asking the question what is the allowable unit of prosecution, as we are in duplicity cases, so if you imagine -- an offense that is similar to child enticement is murder, there's an actus reus, there's a mental state and there's a consequence that the Government has to prove. The consequence for murder is the death of the victim. The consequence for enticement is the persuasion of the victim.

In a venue issue, if I were to stand in Florida on the border and shoot into Georgia, we would say that's a continuing offense for venue purposes and venue would lie in either state, and that would be true for enticement as well. That does not answer the separate question of what is the allowable unit of prosecution for enticement, and that's the question the Court has to answer, the continuing -- the issue of a continuing offense being different in these two different contexts.

THE COURT: Okay.

MS. LANDES: Your Honor, the only other thing I would add is that Courts have consistently said, in going about this statutory interpretation, this task of determining what is the allowable unit of prosecution, that there's a presumption against answering the question by saying, well, it's a continuing offense. Sometimes it's obvious what Congress has intended, a possession offense, drug possession continues for as long as the defendant possesses the drugs, but an enticement offense completes, finishes, at the moment that the victim has been persuaded, enticed or coerced, at the moment that the victim's state of mind has been changed by the actions of the defendant, that's when the crime ends, and here in Count One what we have is multiple instances of that alleged over almost a year long period and described as a continuing offense.

THE COURT: All right. I understand your argument. Go ahead.

MS. LANDES: Thank you, Your Honor.

And so, moving on to Count Two, Count Two is sort of the weightier, more difficult part of our motion, because there's multiple aspects to it. We have moved to dismiss alleging both facial and as applied unconstitutional -- unconstitutionality. Two grounds for that, for the Constitutional argument. The first is just that Congress lacks the authority to enact this statute or to apply it in the way the Government has applied it. The most likely source of Constitutional authority for Congress would be the Foreign Commerce Clause.

What's important about that is that the Foreign Commerce Clause is not the Interstate Commerce Clause. The larger commerce clause has three parts to it, there's an Indian Clause, an Interstate Clause and a Foreign Clause, and what's different about the Foreign Clause is that it uses the word "with," commerce with foreign nations, instead of the word "among." So if we assume, and I think we should, that the founders do not use words haphazardly, that they use words conscientiously, that indicates that there's some difference, there's some difference in the Foreign Commerce Clause.

Historically what that would be is that we want our nation to speak with one voice to other nations, so we don't have Florida engaging in commerce with Croatia while Georgia is doing something different. The Foreign Commerce Clause requires that Congress does, it speaks as one voice for the nation. The second thing it does is it respects the sovereignty of foreign nations. In the context of the Interstate Commerce Clause, the States have ceded a certain amount of their sovereignty to the Federal Government and the United States Constitution. Croatia has not done that. Croatia has not ceded any of its sovereignty to the United States. So the clauses operate differently, and what I would suggest, Judge, is that what Courts should be doing is taking a totality of the circumstances approach to determine whether the statute at issue is regulating commerce with foreign nations, and when you go through the totality of the circumstances with this statute and in this case, the answer is no, it's not a regulation of commerce with Croatia, there's no impact on the United States, the alleged victim is a Croatian citizen. There's no territory nexus required in the statute.

If you imagine a United States service member stationed in Germany, the statute by its plain terms would prohibit him from traveling to Croatia to meet up with his 17-year-old girlfriend. So there's not a territorial nexus, that travel started abroad.

THE COURT: Well, let me ask you about a case that the Government points to where the Fifth Circuit has rejected some of the arguments, an argument that's pretty similar to what you made, and that's the United States -- the case of *United States versus Bredimus*, Fifth Circuit 2003, and there a defendant was convicted for traveling to Thailand with the intent of making child pornography, and the Fifth Circuit held that 2423(b) was a Constitutional use of the Foreign Commerce Clause. Tell me, doesn't that fly in the face of the argument that you're making?

MS. LANDES: It does, and certainly *Bredimus* is persuasive authority that cuts against the argument that we're making. What Courts have typically done, including the Eleventh Circuit, is to not grapple with the difficulty between the Foreign Commerce Clause and the Interstate Commerce Clause but to simply take the framework that Courts have applied for the Interstate Commerce Clause and applied it to the Foreign Commerce Clause, and that --

THE COURT: Well, what if, for instance, your client, according to the allegations, utilized the internet, he used apps, I believe, to communicate with someone in Croatia, he purchased a commercial flight out of the United States to go to

Croatia. Isn't that a misuse of the channels of commerce with Croatia? Doesn't that also affect commerce with Croatia?

MS. LANDES: Your Honor, I think it would be if this were an interstate case. Certainly if the travel was from Florida to Georgia, there would be no argument for me to make, and that's the other -- the argument that the Government makes, the channels of commerce argument. We reject that premise entirely, that the channels of commerce test is applicable in the Foreign Commerce Clause arena, it's not because the Foreign Commerce Clause is different, so -- and Justice Thomas pointed this out in *Baston* and sort of chided lower courts in the Eleventh Circuit for just adopting the Interstate Commerce Clause in the context of the Foreign Commerce Clause because they're different, and it --

THE COURT: Wasn't that an Eleventh Circuit decision?

MS. LANDES: It was, Your Honor. It was, and it's one in which the Court assumes that the Interstate -- without deciding expressly that the Interstate Commerce Clause framework would apply, and that drew a dissent from denial of certiorari from Justice Thomas, who pointed to the same Florida law review article that I've pointed to to suggest the differences between the clauses and how Courts might go about constructing a framework for the Foreign Commerce Clause.

Continuing through the totality of the circumstances, there's nothing commercial about the crime alleged in this case, it's very similar to the rape in *United States versus Morrison*, gender-related violence, just doesn't have anything to do with economic or commercial aspects in any way.

And then finally it doesn't respect Croatia's sovereignty. That's one of the purposes of the Foreign Commerce Clause, is to respect the sovereignty of the foreign nation. We have filed at docket 78 an English translation of the relevant penal codes in Croatia. Croatia, exercising its sovereignty through its Constitutional processes, has decided that it's going to permit sex with someone in Croatia as long as the person is over 15, so the statute in this case effectively prevents that, at least as to United States citizens, and so it does not respect the decisions that the sovereign country of Croatia has made.

THE COURT: Um-hum.

MS. LANDES: The Government's response is twofold. One is to point out language in cases like *Board of Trustees of the University of Illinois versus United States*, which indicates that the Foreign Commerce Clause is plenary or broader than the Interstate Commerce Clause, and to steal from Professor Goodno, who we've cited throughout our motion, what that does not say and what no one should expect is that that would mean that Congress can prevent a United States citizen from eating pasta in Italy, that's a -- if it's as broad as plenary, plenary and exclusive, then that would be permitted, and we can -- we can all assume that the founders did not intend for our limited form of Government to have Congress preventing United States citizens from eating pasta in Italy.

The other thing the Government does is suggest that this Court do what almost every other Court has done, which is to just sort of throw up its hands and apply the Interstate Commerce Clause framework to the Foreign Commerce Clause, and that's what Justice Thomas complained about, that's what Professor Goodno demonstrates I think ably is not the right answer.

THE COURT: Why don't you talk for a few minutes about your argument concerning the First Amendment and your claim that his freedom of thought, I think is what you call it, is protected under the First Amendment, that United States citizens have a right to travel and that he has a right to travel outside the country regardless of what his thoughts are.

I mean, let me just ask you, isn't this though more an argument for -- an argument that you might want to make to the jury, assuming this case ends up in a trial? I mean, isn't this really a jury issue as opposed to a motion to dismiss issue?

MS. LANDES: Your Honor, I have two answers to that. One is I do agree that it's an as-applied challenge, this aspect of our motion to dismiss is an as-applied challenge, so normally that would require at least the taking of evidence.

I don't agree that it's a jury issue, however. I do think it's an issue for the Court to determine, that if this statute is unconstitutionally punishing Mr. Pulido, then the indictment would need to be dismissed.

I believe that this is largely, again, a statutory construction issue, Your Honor. I agree with I think it's the Third Circuit, *United States versus Tykarsky*. If what the statute prohibits, if we -- its plain reading, it would prohibit traveling for the purpose of the illicit sex, "for the purpose of" being the phrase that really matters as far as this argument goes, and if it prohibits travel for the purpose of illicit sex then there's no First Amendment concern, there's no interstate travel -- or, excuse me, foreign travel concern, because no one has a right to take actions that are essentially integral to a crime, and if the Court were to interpret "for the purpose of" to mean the dominant purpose of the travel, or at least a but-for purpose of the travel, then there would be no Constitutional concern.

The problem arises, Your Honor, because the pattern jury instruction does not interpret it with its plain meaning. It's --

THE COURT: Well, the Pattern Jury Instructions, the Eleventh Circuit Pattern Jury Instructions only require the Government to show that sexual relations with a minor was one of the motives or purposes for the travel and not merely incidental to the travel.

MS. LANDES: That's right, Your Honor. So if it's -- and what it cites to in the commentary is out-of-circuit cases that rejected a dominant purpose instruction and rejected a significant purpose instruction. We know that this instruction permits conviction even if the purpose was not a dominant one and even if the purpose was insignificant. So I think a helpful hypothetical, Your Honor, is if you imagine a married couple plans a trip to the Bahamas, and perhaps they're tired, they both work, they have no kids, and the idea is to get away to sort of rejuvenate their marriage. The husband may have in his mind the possibility that in the Bahamas the couple may have sex and that may be good for their marriage, something along those lines, but he wants to go on the trip anyways. The purpose of the trip is to get away, get relaxation, and even if he knew that they would not have sex, say the wife said "We're not having sex in the Bahamas," this statute would allow conviction so long as he harbored that sort of hope, so long as it's not incidental to the travel.

So what we suggest is when Congress used the phrase "for the purpose of" the illicit sex, what that meant at a minimum is that the trip would not have occurred, that the defendant was at least motivated enough to get on the plane, that he would not have done so without the sex, and I think that that will be the sexual intent, and I think that will be starkly illustrated by the facts of this case. The alleged victim has said that she told Mr. Pulido before the trip that they -- that she did not want to have sex with him and that she wanted to wait, I think, until she completed the equivalent of high school, something along those lines.

So when Mr. Pulido gets on the plane, what the jury has to decide is to what extent was he motivated by this illicit sex motive, was it just sort of an abstract hope, would he have gotten on the plane without that intent, or was it just incidental to his travel. What the pattern instruction fails to do is really give them any instruction that would allow the Court to avoid the First Amendment challenge that we've made, because if it's just the sort of mere abstract hope or desire that sex occur during the trip then we've not ensured that the jury has found that this was an integral part of a crime. What we're doing instead is just prohibiting abstract thought, and that's what --

THE COURT: I don't -- you know, this isn't a married couple going to the Bahamas to refresh their marriage, this is a 24-year-old man, I think -- no, 22 or 23, 24-year-old man and a 14-year-old girl. Really different set of circumstances, Mr. Landes.

MS. LANDES: It is.

THE COURT: And your argument, if those were the facts, would be a valid argument, but that's not what we have here.

MS. LANDES: That's true, Your Honor, but the difference is only in the content of his thought, so -- and the Constitution prevents Congress from punishing for the -- punishing him for the content of his thought. Even if it's a horrific thought and one that we can all in this company agree is disgusting or wrong, the First Amendment prohibits Congress from punishing that, it prohibits Congress from punishing a mental state that is integral to a crime, and so if he got on the plane for the purpose of committing what would ultimately be a statutory rape in Croatia, that's a very different case from him getting on the plane and just sort of having an abstract desire to have sex with this particular minor victim, and that's what the pattern jury instruction does not distinguish between.

THE COURT: Well, I can tell you if all it were were thoughts and nothing else, we wouldn't be in the courtroom, all right? He wouldn't have been charged. You don't get charged for thoughts. It's when those thoughts are carried out, that's when you get charged. But I understand your argument.

Why don't you move on to Counts Three and Four, and that's the conspiracy to transport and transportation of a minor with intent to engage in sexual activity. So why don't you go ahead and make your argument with respect to those.

MS. LANDES: Thank you, Your Honor.

In this section of our motion, this is just a pleading problem, as to whether it's been sufficiently pled. So here we have a statute that prohibits the transport of a minor for the purposes of violating a certain crime. Normally the Government can simply reiterate the elements of the statutory language in the indictment and that would be sufficient, and that's happened in this case, it tracks -- the two counts track the statutory language. The exception to that general rule is that when the statute itself uses generic terms, such that you can't quite tell what is going on, then the Government is required to plead with more specificity.

THE COURT: Well, how about the *Sharpe* case that they cite to? They say the charging doctrine need only -- I'm sorry, the charging -- I guess it's -- the document, whether it's an indictment or whatever, in this case in the United States it would be an indictment, need only contain the elements of the offense intended to be charged and sufficiently apprize the defendant of what he must be prepared to meet. I mean, isn't that what's being done here? I mean, the indictment tracks the exact language of 18 U.S.C. Section 2422. I mean, isn't that specific enough to apprize your client of the conduct for which he's been charged, and so therefore the indictment is Constitutionally sufficient?

MS. LANDES: It's not, Your Honor, because it's not definite enough in this case. The statutory language that is tracked in the indictment says that the transport has to be for the purpose of any crime that someone could be charged with, to paraphrase, and so that's plainly a generic phrase, and Courts have allowed indictments charging even foreign law, even Russian law, on identical language.

THE COURT: Well, how about the *Panfil* case? I mean, the Eleventh Circuit found the language of 2422(b) to not be unconstitutionally broad or vague. And how about the *Kozak* and *McGill* case? I mean, there the Eleventh Circuit found a substantially similar indictment to be Constitutionally sufficient even though it did not specify the exact underlying crime. I mean, hasn't the Government met its burden here?

MS. LANDES: It's not -- it's not only because what in this case is charged is what's -- the case is described as a generic offense, so if we look at cases in which the indictment was insufficient, cases like *Decidue* or *Cruikshank,* what was charged there was that the defendant failed to follow orders or that the defendant failed -- or, excuse me, the defendant used false pretenses, and what the Court in those cases said is that phrase, "false pretenses" or failure to obey orders, is generic enough that the Government was required to plead with more specificity. So you have to plead which orders the defendant didn't follow, you have to plead what false pretenses were used, so it was insufficient to just track the statutory language, and there could not be a much more generic term than any other crime that can be charged, which is what's charged in this indictment.

So what the Government was required to do is, frankly, just what it did in Count One, which is to put Mr. Pulido on notice of the crime that he's alleged to have transported the victim to commit.

THE COURT: All right. Why don't you go ahead and wrap up then so that I can hear from Ms. Thelwell.

Anything else you'd like to say?

MS. LANDES: No, thank you.

THE COURT: Thank you, Mr. Landes.

Ms. Thelwell.

MS. THELWELL: Yes, Your Honor. I will go ahead and -- can you hear me?

THE COURT: Yes.

MS. THELWELL: And respond just as Mr. Landes did, going count by count.

It's the Government's position that the indictment in its entirety is sufficient for various reasons as outlined in the Government's response, but beginning with Count One, regarding a violation of 18 U.S.C. 2422(b), it's the Government's position that that statute is a continuing offense. The Government will agree with Mr. Landes that the Eleventh Circuit has not explicitly stated so, and by looking at the case law it appears that it just has not come to the Court's attention to address that specific issue; however, as Your Honor has already noted, in reviewing the case law surrounding an enticement charge, the vast majority of them involve conduct that occurred over several days, weeks and even many months, as the Court indicated. There's at least one case that I cited, I believe it was *United States versus Lee*, an Eleventh Circuit case from 2010, where there was conduct that occurred over a six month period, and that was sufficient.

So understanding --

THE COURT: His response, Mr. Landes' response was that that was an attempt -- I think that's what you said, Mr. Landes -- as opposed to being charged with a substantive crime. How would you respond to that?

MS. THELWELL: Yes, Your Honor. I don't believe that there is any difference as it relates to the conduct because it's clear when looking at the statute, Congress's intent is to punish an individual for the inducement, persuasion and enticement of a minor, and all those acts can occur over a period of time, regardless of whether or not it's through the communication with an undercover agent versus an actual minor. It does not change the fact or the nature of which the offense was committed. In fact, the only reason why it is an attempt in that particular circumstance is because there is no actual minor, but had there been a minor with the same exact conduct, it would have been a regular violation of 2422(b).

So it's the Government's position that Count One is not duplicative. We would still rely on the Fifth and Tenth Circuit Courts that have held that 2422(b) is a continuing offense. I understand Mr. Landes' argument as far as differentiating between, I guess, the circumstances in which the Courts made that conclusion when evaluating a venue situation, but it's the Government's position that that would not change here. The unit of prosecution is the enticement, and as I stated earlier, it's clear by the statute that an enticement of a child can occur over a period of time.

THE COURT: The reasoning is analogous, even if it's technically a different issue before the Court, we can use that reasoning and it's applicable to our situation.

MS. THELWELL: Yes, Your Honor.

THE COURT: Okay. I think I understand your response with respect to the first matter at issue. How about the second argument that he makes with respect to the power of Congress to regulate the misuse of channels of commerce for injurious purposes. I mean, that's basically part of his argument, it's the travel with the intent to engage in illicit sexual conduct. What is your response to that?

MS. THELWELL: Yes, Your Honor. As it has to do with the Foreign Commerce Clause argument, again, there is no specific Eleventh Circuit case -- or let me rephrase. The

Supreme Court has not specifically addressed the scope of the Foreign Commerce Clause, but it's clear that 2422 -- 23(b) is regulating the use of the channels, because it specifically says, and I believe it's element number 2, as far as what the Government has to prove, is that the defendant traveled in foreign commerce. So it's the Government's position that this is not a -- that this is a use of channels situation where the Court has to look as to whether or not Congress has the authority to keep the channels of the foreign commerce free from the injurious uses, which the Court has already said. The Court has already -- Your Honor has brought that case up, *United States versus Bredimus*, the Fifth Circuit case that is cited in the Government's response, which specifically found that Congress does have the authority to keep the channels of foreign commerce free from injurious uses, and the fact that this particular statute, 2423(b), has in fact prohibited this type of conduct and it has been upheld in various Courts throughout the country again shows that the point is to regulate the use of the channels.

I fail to see defense counsel's argument as to how this use of the channels does not apply in this case based on the facts. We have -- the evidence will show that, you know, Mr. Pulido in fact purchased an international flight traveling from the U.S. to Croatia, and so -- and I'd also highlight for the Court, the Courts have rejected similar arguments or arguments regarding the Commerce Clause in other crimes that are similar to 2423, such as a 2261, there's crimes under the Violence Against Women Act in 2262, because at that point it's again punishing the travel and using either interstate or foreign commerce to travel.

As it relates to Mr. Pulido's First Amendment rights, again, the United States would argue that there's nothing in 23 -- 2423 that punishes this man's thought. As the Court has already discussed with Mr. Landes, it's the act that accompanies the thought that is being punished.

Again, going back to the elements of the offense, the second element that the Government -- I'm sorry. Going back to the elements of the offense, the Government has to prove that the defendant traveled with the intent to engage in sexually explicit conduct. So it's not just merely that he traveled and it's not just mere that he had a thought, but it's both of those coupled together.

THE COURT: Is that how you would distinguish the scenario that Mr. Landes presented to me about a married couple traveling to, you know, a place like the Bahamas? Is that how you would distinguish it, or is there anything else you can think of as well?

MS. THELWELL: Besides the fact that, you know, a married couple traveling to another country to engage in a sex act is not illegal, I just don't think that that analogy was appropriate. I don't think that that is the best analogy to use under these circumstances.

Here Mr. Pulido, as the evidence will show, had plans prior to traveling that he had discussed with Mr. Jiminez, his father, that he had discussed with the victim, to engage in sex acts. Now, whether or not the victim told him prior to coming that she did not intend to engage in sex is of no consequence because -- and again, I think this dovetails back to a question you were asking of Mr. Landes, is this not an issue for the jury. These are facts that will come out before the jury to decide whether or not Mr. Pulido had the requisite intent prior to boarding the plane, and as shown by the text messages and all the communications that we have in this case, I do believe the Government will be able to meet that burden and show that he had the requisite intent. However, this is not something that should be decided in a pretrial motion to dismiss the indictment, but rather it should go to the jury to make that determination.

THE COURT: Right. So the Government has to meet its burden, that is, I think under the jury instructions that the illicit sex was the dominant purpose of the travel. I mean, if it can't meet its burden at trial then the jury would, you know, have to find him not guilty. That's the burden that the Government has to meet.

MS. THELWELL: And, Your Honor, I think maybe you may have misspoken, but the jury instructions say that the Government does not have to show that it was the defendant's dominant or only purpose for travel, but just that it was a motivating purpose or one of the reasons for the travel.

THE COURT: I'm sorry. Yeah, one of the motives or the purposes for the travel. Yes. I'm sorry. One of the -- I did misspeak. One of the motives or purposes of the travel. That's right.

It's his argument that the illicit sex was the dominant purpose of the travel, that's the argument that Mr. Landes has made. The jury instructions say that it's just as long as you show that it's one of the motives or purposes of the travel and not merely incidental to the travel, that's what the burden is. If the Government can't show that then the jury would have to find, you know, the defendant not guilty, if they follow the jury instructions. Yes.

MS. THELWELL: Correct. And while there is no Eleventh Circuit case discussing or at least ruling definitively that it's dominant purpose or a motivating purpose, I think the pattern instructions are illustrative of what the law in this circuit is, because they do recognize that it should be one of the motivating purposes.

When you look at the actual statutory language, it specifically says, 18 U.S.C. 2423(b), a person who travels in interstate commerce or travels in the United States or a

United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce with a motivating purpose of engaging in any illicit sexual conduct with another person shall be punished accordingly, and the fact that they use the terms "a motivating purpose" indicates that even Congress contemplated at the time that it drafted this statute that there could be many other reasons for traveling, therefore the Government would just have to prove that one of the purposes, a motivating purpose, was to engage in sexual activity. And that is consistent with many of the other circuits who have had the opportunity to address this question square on, which is the First, Second, Fifth, Sixth Seventh and Tenth Circuits all acknowledge that the Government does not have to prove the dominant purpose for the defendant's travel was to engage in sexually illicit conduct.

THE COURT: No, it's clear, the Eleventh Circuit Pattern Jury Instructions says one of the motives or purposes of travel and not merely incidental to the travel, no doubt, that's what the Pattern Jury Instructions say and that's what -- you know, following the Pattern Jury Instructions, which is what I would, that's how the jury would be instructed.

MS. THELWELL: At this time, Your Honor, I'm going to move on to Counts Three and Four, but I remember that Count Two had a lot of different arguments, so I want to make sure that I've sufficiently addressed them for you.

THE COURT: I believe you have. The ones that I've been concerned about you've addressed and you've made the corrections that are necessary, so that's fine.

Why don't you move on to Three and Four, please, where in essence he's argued that there isn't, you know, enough specificity here, it fails to allege the crime for which any person could be charged. I mean, in essence that's what has been argued, that there isn't sufficient information here as is necessary and that dismissal is appropriate.

What would you say in response to that?

MS. THELWELL: So the *McGarity* case from the Eleventh Circuit in 2012, they laid out and specifically said, you know, three things, the indictment has to provide essential elements for the charged offense, the Court has to look at whether or not the indictment notifies the accused of the charges to be defended against, and third, whether or not the indictment enables the accused to rely on the judgment upon -- under the indictment as a bar against double jeopardy or for any other subsequent prosecution, and it's the Government's position that Counts Three and Four of the indictment, they do that, they track the language of the statute, they indicate that the defendant -- they allege the essential elements of the offense, including the phrase which is in the statute, any sexual activity for which any person can be charged with a criminal offense.

Now, that specific statute has already been addressed by -- excuse me, that specific phrase has already been addressed by the Eleventh Circuit in *Panfil* in 2003 under a similar statute, the enticement statute, 2422(b), and so while the Eleventh Circuit has not looked at it under 2423, it's the Government's position that these statutes are similar and analogous enough to the point that we can take that same reasoning and reject the idea or the argument that the phrase "sexual activity for which any person can be charged in a criminal offense" is vague, because the Eleventh Circuit has already said it's not vague and it does not need ordinary citizens to guess at the meaning.

As the Court has already, I believe, mentioned, you know, yes, the Government could have alleged a specific statute, but it's not required to meet the Constitutional requirements for an indictment. Here the charge has already been sufficiently pled, and so it's the Government's position that there are no defects that would require a dismissal of the indictment for Counts Three and Four.

THE COURT: Okay. All right. I think you've summed up your arguments.

Anything else you'd like to say, Ms. Thelwell?

MS. THELWELL: No, Your Honor.

THE COURT: Okay. Thank you.

Anything in reply, Mr. Landes?

MS. LANDES: Thank you, Your Honor.

Your Honor, just taking again each count one at a time, the only thing I wanted to respond to as far as Count One is this argument that the Government has made that attempt is not any different from a completed crime. The difference is exactly -- goes exactly to the core of the allowable unit of prosecution, which is in an attempt crime the consequence does not occur, no one is persuaded, no one is enticed, in the same way that that consequence does not occur when an attempted murder victim does not die from his wounds. So it is different, and what has not been sufficiently answered by the Government is what is the allowable unit of prosecution for an enticement charge. We've laid out a suggestion it's completed at the moment that the minor is persuaded, and that's the allowable unit of prosecution and no more, so to lump in several instances of that over a year long period is duplicitous.

As far as the Foreign Commerce Clause, Your Honor, again, we simply reject the channels of commerce premise. So I agree that if the Interstate Commerce Clause could be overlaid directly on the Foreign Commerce Clause, it would be a very simple channels of commerce analysis, and certainly travel in commerce would be use of the channels of commerce, but because the Foreign Commerce Clause is different, we reject that premise, and it's not so simple as to say is this a regulation of the channels of commerce, it's a totality of the circumstances approach instead.

As to the First Amendment issue and the issue of the instruction, Your Honor, certainly the jury will decide whether the Court -- or, excuse me, whether the Government has met its burden, but if the instruction is wrong, we're going to end up with the wrong result, and that's -- that's what we've suggested in this case, is that the pattern instruction is insufficient because it allows for any purpose, even though the statute in its plain terms says that the travel has to be for the purpose of the illicit sexual act.

The other important point is that Ms. Thelwell is reading from the wrong version of the statute. The statute was amended towards the end of, I think, 2018. It now reads -- so if you pick up a code book, the most recent code book, you would be looking at the wrong version for this case, because Mr. Pulido's conduct is alleged to have occurred before the end of 2018, so the statute does not read "a motivating purpose," it reads "for the purpose of the illicit sex." The Government has got that right in the indictment, if they had not I would have been moving to dismiss for that reason, but what that means is the phrase that we're interpreting that we have to instruct the jury on is whether the travel was for the purpose of illicit sex and not just a motivating purpose.

THE COURT: Are you saying then that those jury instructions would be wrong? I mean, isn't that something to talk about when we decide how we're going to instruct the jury.

MS. LANDES: It is, generally, Your Honor, but it's an alternative grounds for deciding this motion.

I agree that if -- if I'm right about the jury instruction, there is no First Amendment concern, because the jury instruction would ensure that the jurors are deciding that he traveled for the purpose of commiting a crime.

What the instruction permits now is that he traveled for a purpose. It can be an insignificant purpose. It doesn't have to be the dominant purpose, it just doesn't -- it can't be an incidental purpose. So if we were to fix the jury instruction to make it correct, it would ensure that there's no Constitutional problem, and that's a particularly good reason to correct the jury instruction, because it avoids the Constitutional problem, that's the Constitutional avoidance canon of statutory instructions. So as the Court goes about determining what that phrase "for the purpose of" means in the statute, underlying that is the fact that there is a Constitutional problem that can be avoided if we go ahead and interpret "for the purpose of" to mean just what it says under its plain meaning, which was to say the dominant purpose, a definite purpose and a but-for purpose for the travel.

Your Honor, just to address *Panfil* for Counts Three and Four, *Panfil* is a Constitutional challenge to the statute in which the defendant challenged whether the statute itself is unconstitutionally vague. That's not my challenge. My challenge is to the wording of the indictment and the definiteness of the indictment. So although the language -- the statutory language in this case *and Panfil* are similar, that does not answer the question posed by the motion, which is whether that language is generic and therefore requiring the Government to plead with more specificity.

THE COURT: All right. Thank you to both of you. I'm going to go ahead and rule.

I won't go through the background information, we're all familiar with it and the parties have outlined it.

This is a four count indictment. The defendant has been charged with enticement and coercion of a minor with travel with intent to engage in illicit sexual conduct, conspiracy to transport a minor with intent to engage in sexual activity, and transportation of a minor with intent to engage in sexual activity.

In the Eleventh Circuit an indictment is Constitutionally sufficient if it presents the essential elements of the charged offense, notifies the accused of charges to be defended against and enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense, and that's the *Lang* case out of the Eleventh Circuit.

Each count of an indictment must be regarded as if it were a separate indictment and must stand on its own content and without dependence for its validity on the allegations of any other count not expressly incorporated.

So the Court takes a common sense approach in analyzing the language by practical, not technical considerations. That's the *McGarity* case. The test is not whether the indictment may have been drafted with more clarity but whether it conforms to minimal Constitutional standards.

An indictment on a statutory offense is sufficient when the alleged offense is stated in the words of the statute itself as long as those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. And while the language of the statute may be used in the general description of an offense, it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description with which he has been charged.

So Mr. Pulido has moved to dismiss all four counts against him. I have reviewed this matter, I've studied the law, I've heard oral argument, and I find that Mr. Pulido's request must be denied as to each count of the indictment for various reasons.

Contrary to his contention, I believe that enticement of a minor is a continuing offense, so therefore Count One is not duplicitous as charged. I reject Mr. Landes' argument, although I most certainly listened to it, that whether it's an attempt -- and case law talks about attempt versus, you know, an actual offense, and, true, the Eleventh Circuit may not have squarely ruled on the issue, but we do have good analogous case law from the Fifth and from the Tenth Circuit, and I believe that the Eleventh Circuit has treated the offense as a continuing offense even though it has not directly ruled on it. We've got the *Lee* case. We've got the *Yost* case. We've got the *Murrell* case.

With respect to his challenge to Count Two, it also fails. As pointed out by the Government, we've got nearly a century of jurisprudence which establishes that Congress enjoys broad, exclusive and plenary power to regulate the misuse of the channels of commerce for injurious purpose.

As we've discussed in this argument, Count Two does not punish just what Mr. Pulido was thinking, rather it requires a defendant to act and in this case to travel in foreign commerce with a purpose of engaging in illicit sexual conduct, and his fundamental right to travel does not include the right to travel with the purpose of engaging in illicit sexual conduct with a minor.

So we've gone through some of those cases as well and I believe that the statute is Constitutional and it is not unconstitutional as applied to him. Furthermore, with respect to these other issues that we've talked about, these are matters that can be addressed at time of trial.

Additionally, Mr. Landes, if you want to make an additional argument with respect to the dominant purpose of the travel, as you've done for me here, you most certainly can do it at trial. I imagine that the Government will continue to argue that, you know, the Pattern Jury Instructions, and it's absolutely true and correct, only require the Government to show that sexual relations with a minor was one of the motives or purposes of travel and not merely incidental to the travel, but, again, you can make those arguments at trial and I think that's where they're more appropriately made.

With respect to Counts Three and Four, they most certainly contain the essential elements of the offense, they sufficiently notify Mr. Pulido of the charges, and it enables him to rely upon the indictment against double jeopardy for any subsequent prosecution for the same offense.

I think here the indictment tracks the language of the statute, and so I believe that the indictment is Constitutionally sufficient. I think there's also good case law to support that decision, the *Kozak* case, the *Panfil* case, the *McGill* case.

I think the indictment stands for those reasons. I appreciate Counsel's thoughtful arguments on behalf of his client, Mr. Landes, but I respectfully, you know, disagree with you on that and that's my decision.

So the motion is denied for those reasons. I'm not going to enter a lengthy written order. I think the argument we've had here is sufficient, and there will be an endorsed order saying that for the reasons stated at this hearing the motion to dismiss is denied. I think that's -- I mean, my goal is to alert you to my decision and the reasons behind it and then we can move to the next step, all right?

So any other questions or any questions from anybody today on that? Mr. Landes?

MS. LANDES: No. Thank you, Your Honor.

THE COURT: Thank you, Mr. Landes.

Ms. Thelwell?

MS. THELWELL: No, Your Honor. Thank you.

THE COURT: Okay. All right. Again, I appreciate the excellent work of both of you. You really did a fine job on this and I appreciate it very much, and I appreciate your being here today to make those arguments.

I think we discussed at the status that there's the motion to suppress. Has that been -- that has not been scheduled for a hearing yet, has it? I mean, I've got the docket sheet in front of me. I don't believe that it has been.

MS. LANDES: Your Honor, I was granted leave to file a reply, that's due today, and I'll file that shortly.

THE COURT: Okay. All right. Sounds good. I don't have anything else. Thank you very much to all of you, and we are in recess.

MS. THELWELL: Thank you, Your Honor.

MS. LANDES: Thank you, Judge.

THE COURT: Thank you very much.

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(Proceedings concluded at 2:29 p.m.)

\- - - - -

C E R T I F I C A T E

This is to certify that the foregoing transcript of proceedings taken in a motion hearing in the United States District Court is a true and accurate transcript of the proceedings taken by me in machine shorthand and transcribed by computer under my supervision, this the 18th day of April, 2022.

/S/ DAVID J. COLLIER

DAVID J. COLLIER
OFFICIAL COURT REPORTER

APPENDIX B

From:	cmecf_flmd_notification@flmd.uscourts.gov
To:	cmecf_flmd_notices@flmd.uscourts.gov
Subject:	Activity in Case 8:20-cr-00292-VMC-CPT USA v. Pulido et al Order on Motion to Dismiss
Date:	Friday, March 12, 2021 3:33:01 PM

U.S. District Court

Middle District of Florida

Notice of Electronic Filing

The following transaction was entered on 3/12/2021 at 3:32 PM EST and filed on 3/12/2021

Case Name:	USA v. Pulido et al
Case Number:	8:20-cr-00292-VMC-CPT
Filer:	
Document Number:	83(No document attached)

Docket Text:
ENDORSED ORDER: For the reasons stated on the record at the March 12, 2021, hearing, Defendant Pulido's motion to dismiss (Doc. # [57]) is DENIED. Signed by Judge Virginia M. Hernandez Covington on 3/12/2021. (LEA)

8:20-cr-00292-VMC-CPT-1 Notice has been electronically mailed to:

James A. Muench james.muench2@usdoj.gov, CaseView.ECF@usdoj.gov, TPADOCKET.Mailbox@usdoj.gov, USAFLM.ARECF@usdoj.gov

Frank W. McDermott frank@injuryarrest.com, gfoster@injuryarrest.com

Lisa Marie Thelwell Lisa.Thelwell@usdoj.gov, CaseView.ECF@usdoj.gov, TPADOCKET.Mailbox@usdoj.gov, USAFLM.ECF@usdoj.gov

Samuel Landes Samuel_Landes@fd.org, Amanda_Kasperitis@fd.org

8:20-cr-00292-VMC-CPT-1 Notice has been delivered by other means to:

8:20-cr-00292-VMC-CPT-2 Notice has been electronically mailed to:

James A. Muench james.muench2@usdoj.gov, CaseView.ECF@usdoj.gov, TPADOCKET.Mailbox@usdoj.gov, USAFLM.ARECF@usdoj.gov

Frank W. McDermott frank@injuryarrest.com, gfoster@injuryarrest.com

Lisa Marie Thelwell Lisa.Thelwell@usdoj.gov, CaseView.ECF@usdoj.gov, TPADOCKET.Mailbox@usdoj.gov, USAFLM.ECF@usdoj.gov

Samuel Landes Samuel_Landes@fd.org, Amanda_Kasperitis@fd.org

8:20-cr-00292-VMC-CPT-2 Notice has been delivered by other means to:

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	**Case Number: 8:20-cr-292-VMC-CPT**
v.	**USM Number: 11176-509**
JORDAN JYSAE PULIDO	**Samuel Landes, AFPD**

JUDGMENT IN A CRIMINAL CASE

Defendant was found guilty to Counts One, Two, Three, and Four of the Indictment. Defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2422(b)	Enticement and Coercion of a Minor	August 12, 2018	One
18 U.S.C. § 2423(b)	Travel with Intent to Engage in Illicit Sexual Conduct	June 15, 2018	Two
18 U.S.C. §§ 2423(a) and (e)	Conspiracy to Transport Minor with Intent to Engage in Sexual Activity	July 23, 2018	Three
18 U.S.C. § 2423(a)	Transportation of a Minor with Intent to Engage in Sexual Activity	July 23, 2018	Four

Defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that Defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, Defendant shall notify the Court and United States Attorney of any material change in Defendant's economic circumstances.

Date of Imposition of Judgment:

February 23, 2022

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

March 3, 2022

IMPRISONMENT

Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of term of **ONE HUNDRED and TWENTY (120) MONTHS**. This term consists of a 120-month term as to each of Counts 1, 2, 3, and 4, all such terms to run concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

- Confinement at FCI Coleman so the defendant may be near family and friends.
- Defendant be allowed to study for and obtain his GED.
- Defendant be allowed to participate in the UNICOR program, if eligible.
- Defendant be allowed to participate in vocational training in the area of culinary arts, music, and engineering.

Defendant is remanded to the custody of the US Marshal to await designation by the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ____________________ to ______________________________________

at ____, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By:____________________________________
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, Defendant will be on a Life term of supervised release. This term consists of a Life term as to each of Counts 1, 2, 3, and 4, all such terms to run concurrently.

MANDATORY CONDITIONS

1. Defendant shall not commit another federal, state or local crime.
2. Defendant shall not unlawfully possess a controlled substance.
3. Defendant shall refrain from any unlawful use of a controlled substance. Defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - The mandatory drug testing provisions of the Violent Crime Control Act are suspended. However, the Court orders Defendant to submit to random drug testing not to exceed 104 tests per year.
4. Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.
5. Defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

Defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, Defendant shall comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by Probation Officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. Defendant shall report to the Probation Office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the Probation Officer instructs you to report to a different Probation Office or within a different time frame. After initially reporting to the Probation Office, Defendant will receive instructions from the court or the Probation Officer about how and when Defendant must report to the Probation Officer, and Defendant must report to the Probation Officer as instructed.
2. After initially reporting to the Probation Office, you will receive instructions from the court or the Probation Officer about how and when Defendant shall report to the Probation Officer, and Defendant shall report to the Probation Officer as instructed.
3. Defendant shall not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the Probation Officer.
4. Defendant shall answer truthfully the questions asked by your Probation Officer
5. Defendant shall live at a place approved by the Probation Officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
6. Defendant shall allow the Probation Officer to visit you at any time at your home or elsewhere, and Defendant shall permit the Probation Officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. Defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the Probation Officer excuses you from doing so. If you do not have full-time employment Defendant shall try to find full-time employment, unless the Probation Officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer at least 10 days in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
8. Defendant shall not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, Defendant shall not knowingly communicate or interact with that person without first getting the permission of the Probation Officer.
9. If you are arrested or questioned by a law enforcement officer, Defendant shall notify the Probation Officer within **72 hours**.
10. Defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. Defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the Probation Officer determines that you pose a risk to another person (including an organization), the Probation Officer may require you to notify the person about the risk and Defendant shall comply

with that instruction. The Probation Officer may contact the person and confirm that you have notified the person about the risk.

13. Defendant shall follow the instructions of the Probation Officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. Probation Officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature:____________________________ Date:________________________

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. Defendant shall participate in a mental health treatment program (outpatient and/or inpatient) and follow the probation officer's instructions regarding the implementation of this court directive. Further, defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Mental Health Treatment Services.

2. Defendant shall participate in a mental health program specializing in sexual offender treatment and submit to polygraph testing for treatment and monitoring purposes. Defendant shall follow the probation officer's instructions regarding the implementation of this court directive. Further, defendant shall contribute to the costs of such treatment and/or polygraphs not to exceed an amount determined reasonable by the probation officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.

3. Defendant shall register with the state sexual offender registration agency(s) in any state where the defendant resides, visits, is employed, carry on a vocation, or is a student, as directed by the probation officer.

4. The probation officer shall provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S. 943.0435) and/or the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248), and may direct the defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

5. Defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate including: schools, daycare centers, theme parks, playgrounds, etc.

6. Defendant is prohibited from possessing, subscribing to, or viewing, any images, videos, magazines, literature, or other materials depicting children in the nude and/or in sexually explicit positions.

7. Without prior written approval of the probation officer, defendant is prohibited from either possessing or using a computer (including a smart phone, a hand-held computer device, a gaming console, or an electronic device) capable of connecting to an online service or an internet service provider. This prohibition includes a computer at a public library, an internet cafe, your place of

employment, or an educational facility. Also, defendant is prohibited from possessing an electronic data storage medium (including a flash drive, a compact disk, and a floppy disk) or using any data encryption technique or program. If approved to possess or use a device, you must permit routine inspection of the device, including the hard drive and any other electronic data storage medium, to confirm adherence to this condition. The United States Probation Office must conduct the inspection in a manner no more intrusive than necessary to ensure compliance with this condition. If this condition might affect a third party, including your employer, you must inform the third party of this restriction, including the computer inspection provision.

8. Defendant shall have no contact, direct or indirect, with the victim, I.G. or her family.

9. Defendant shall submit to a search of his person, residence, place of business, any storage units under defendant's control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

10. Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or making an obligation for any major purchases without approval of the Probation Officer. Defendant shall provide the Probation Officer access to any requested financial information.

11. Defendant shall provide the probation officer access to any requested financial information.

CRIMINAL MONETARY PENALTIES

Defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment*
$400.00	**$2,715**	**WAIVED**	**N/A**	**N/A**

Defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If Defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pu. L. No. 115-299.

* Justice for Victims of Trafficking Act of 2015, Pub.L. No. 114-22.

Name of Payee	**Restitution Ordered**
Clerk, U.S. District Court ATTN: DCU 401 W Central Boulevard Suite 1200 Orlando, FL 32801 for distribution to the victims. Please contact: Financial Distribution Unit U.S. Attorney's Office for victim information 813-274-6000	$2,715

SCHEDULE OF PAYMENTS

Having assessed Defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

Special Assessment shall be paid in full and is due immediately.

Restitution obligation shall be payable to the Clerk, U.S. District Court, for distribution to the victims. While in Bureau of Prisons custody, you shall either (1) pay at least $25 quarterly if you have a non-Unicor job or (2) pay at least 50% of your monthly earnings if you have a Unicor job. Upon release from custody, you will be evaluated, and the Court may establish a new payment schedule accordingly. At any time during the course of post-release supervision, the victim, the government, or the defendant, may notify the Court of a material change in the defendant's ability to pay, and the Court may adjust the payment schedule accordingly.

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, unless otherwise directed by the Court, the Probation Officer, or the United States attorney.

Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, and (9) penalties, and (10) costs, including cost of prosecution and court costs.

Joint and Several

Restitution shall be paid jointly and severally:

Of the restitution obligation, $2,715.00 is joint and several with Roberto Santana Jimenez (Docket No.: 8:20-CR-00292-VMC-CPT.)

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Order of Forfeiture, that are subject to forfeiture. **[SEE ATTACHED ORDER]**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. Case No. 8:20-cr-292-VMC-CPT

JORDAN JYSAE PULIDO

PRELIMINARY ORDER OF FORFEITURE

Following a jury trial, the defendant was found guilty of enticement of a minor, in violation of 18 U.S.C. § 2422(b) (Count One); transportation of a minor, in violation of 18 U.S.C. § 2423(a) (Counts Two and Four); and conspiracy to transport a minor, in violation of §§ 2423(a) and (e) (Count Three), as charged in Counts One through Four of the Indictment.

The United States moves, pursuant to 18 U.S.C. § 2428 and Rule 32.2(b)(2) of the Federal Rules of Criminal Procedure, for a Preliminary Order of Forfeiture for an iPhone 7+ (S/N F2LSFE18HG00), model A1661, and a MacBook Pro laptop computer (S/N C02T56W5GTFM), model A1707.

The United States has established the required connection between the crimes of conviction and the assets. Because the United States is entitled to forfeit the property, the motion is GRANTED. Pursuant to 18 U.S.C. § 2428 and Rule 32.2(b)(2) of the Federal Rules of Criminal Procedure, the assets are FORFEITED to the United States of America for disposition according to law, subject to the provisions of 21 U.S.C. § 853(n).

This order shall become a final order of forfeiture as to the defendant at sentencing.

The Court retains jurisdiction to complete the forfeiture and disposition of the assets sought by the government.

DONE and ORDERED in Tampa, Florida, this 2 day of November, 2021.

Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies to:
All Parties/Counsel of Record

APPENDIX D

133 F.4th 1256
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jordan Jysae PULIDO, Roberto Santana Jimenez, Defendants-Appellants.

No. 22-10709
|
Filed: 04/08/2025

Synopsis

Background: Defendants, who were father and son, were convicted in the United States District Court for the Middle District of Florida, No. 8:20-cr-00292-VMC-CPT-1, Virginia M. Hernandez Covington, J., of conspiring to transport a minor with the intent that she engage in sexual activity, and son was additionally convicted of using the internet to persuade, induce, entice, or coerce a minor to engage in sexual activity, traveling with the intent to engage in illicit sexual contact, and transporting a minor with the intent that she engage in sexual activity. Defendants appealed.

Holdings: The Court of Appeals, Newsom, Circuit Judge, held that:

son's charge of using internet to knowingly persuade, induce, entice, and coerce minor to engage in sexual activity was duplicitous;

error in son's indictment charging him with duplicitous count of using internet to knowingly persuade, induce, entice, and coerce minor to engage in sexual activity was not harmless, and thus, vacatur of conviction on that count was warranted;

count of traveling with intent to engage in illicit sexual contact was constitutional as applied to defendant son;

statute criminalizing traveling with intent to engage in illicit sexual contact did not unconstitutionally burden rights under First and Fifth Amendments;

interpretation errors in translating minor's mother's testimony from Croatian to English did not render the trial fundamentally unfair in violation of defendant's rights to due process;

evidence was sufficient to support finding that defendant father had the requisite knowledge or intent for minor to engage in sexual activity in United States with defendant son, as would support conviction for conspiring to transport a minor with the intent that she engage in sexual activity;

defendant father failed to demonstrate that special agent's testimony that father was in United States illegally caused a miscarriage of justice that would warrant mistrial or a new trial;

district court did not clearly err in finding defendant father exercise undue influence over minor, as would support two-level sentencing enhancement; and

district court's imposition of two-level custody, care, or supervisory control over sentencing enhancement against defendant father was warranted.

Affirmed in part, vacated in part, and remanded in part.

Rosenbaum, Circuit Judge, concurred with opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection; Post-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

***1263** Appeals from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:20-cr-00292-VMC-CPT-1

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Frank W. McDermott, McDermott Law Firm, P.A., St Petersburg, FL, for Defendant-Appellant Roberto Santana Jimenez.

Before Rosenbaum, Newsom, and Abudu, Circuit Judges.

Opinion

Newsom, Circuit Judge:

Jordan Pulido started an online relationship with a Croatian girl, I.G., and with the aid of his father, Roberto Jimenez, eventually traveled to Croatia to have sex with her—and then, again with his father's help, brought her to the United States, where he continued to have sex with her. A grand jury indicted Pulido on multiple counts: (1) using the internet to persuade, induce, entice, or coerce a minor to engage in sexual activity; (2) traveling with the intent to engage in illicit sexual conduct; (3) conspiring to transport a minor with the intent that she engage in sexual activity; and (4) transporting a minor with the intent that she engage in sexual activity. The grand jury separately indicted Jimenez for conspiring with Pulido to transport a minor with intent that she engage in sexual activity.

Before trial, Pulido moved to dismiss his indictment on several grounds, to suppress evidence found on various electronic devices, and to exclude testimony about I.G.'s sexual predisposition. The district court denied Pulido's motions, and Pulido and his father went to trial together. Both Pulido and Jimenez filed motions for a judgment of acquittal at the close of the government's case, which the court denied. After a nine-day trial, a jury convicted both Pulido and Jimenez on all counts. Jimenez moved for a new trial and a mistrial, and Pulido joined the new-trial motion. The district court denied the defendants' post-trial motions. The court thereafter enhanced Jimenez's sentence on the grounds that he had exercised both (1) "undue influence" and (2) "custody, care, or supervisory control" over I.G.

On appeal, Pulido challenges the district court's denials of his pre- and post-trial motions, including his motion for judgment of acquittal. Jimenez challenges the district court's denial of his motion for judgment of acquittal, his post-trial motions, and the court's imposition of two sentencing enhancements. After careful review, and with the benefit of oral argument, we affirm in all respects save one: We vacate Pulido's conviction on the enticement count and remand for resentencing on the ground that the indictment was duplicitous.

I

Pulido, then a 23-year-old man, developed an online relationship with I.G., a 14-year-old Croatian girl, that, all told, spanned some 10 months, from the fall of 2017 to the summer of 2018. I.G. initially ***1264** told Pulido that she was 15 but later admitted to him that she was only 14. Pulido and I.G.'s friendship eventually developed into a romantic relationship, and the two "officially" became boyfriend and girlfriend by the end of March 2018.

Pulido and I.G.'s relationship was intimate. They shared their social-media passwords, for instance, so that they couldn't keep any secrets from one another. The two also discussed marriage and children, and at one point Pulido even told I.G. that he had bought her a ring. Importantly, Pulido told I.G. that the legal age to consent to sex in Croatia was 15. During video chats, Pulido and I.G. would engage in what Pulido referred to as "pillow talk"; Pulido masturbated on camera for I.G. and directed her to do the same for him.

Jimenez played an active role in Pulido's relationship with I.G. Pulido kept Jimenez apprised of his communications with I.G. and told his father that he had been "trying to convince [I.G.] to have sex with [him]." Ex. 30(G) part 1 at 82, Doc. 231-67. Jimenez often advised Pulido on what to say to I.G., and he told Pulido that I.G. was "the one who ha[d] to start something" and to "[k]eep [his] class" "[e]ven with girls that are old eno[u]gh." *Id.* at 82–83. Jimenez also communicated directly with I.G. on social media. He lectured I.G. about her behavior with other boys, told her that she wasn't sufficiently committed to Pulido, and scolded her for making mistakes in the relationship.

In June 2018, with Jimenez's financial assistance, Pulido traveled to Croatia the day before I.G.'s fifteenth birthday. Before the trip, he had told I.G. over social media that he wanted to have sex with her and perform oral sex on her during his visit. During their chats, Pulido and I.G. sometimes used a code, with the number "15"—the age of consent in Croatia and I.G.'s impending birthday—signifying sex.

Pulido proposed to I.G. the day she turned fifteen. The two had sex shortly thereafter and a number of other times during his stay. They didn't always use protection, and Jimenez, who had stayed behind in Florida, advised them—after falsely holding himself out as a doctor—about how they could avoid pregnancy.

Pulido stayed in Croatia for six weeks. At the end of Pulido's trip, Jimenez invited I.G. and her family to Florida for a visit. Pulido helped them apply for passports and visas, and Jimenez planned the trip and paid for their applications and airline tickets.

In July 2018, Pulido, I.G., and I.G.'s mother, brother, and sister traveled to Florida. Pulido and I.G. continued to have sex in Florida, usually at Pulido's initiation. When, after two weeks, I.G. and her family were set to return to Croatia, Jimenez instructed one of Pulido's brothers to hide I.G.'s passport and ID, and called his travel agent to cancel I.G.'s return ticket.

The night before I.G. and her family were supposed to leave, Pulido's family told I.G.'s brother and sister that I.G. wasn't going with them. Pulido and Jimenez convinced I.G. to tell her mother the same thing. I.G. testified at trial that she didn't want to stay in Florida but felt like she had to. I.G.'s mother told her that she had to return to Croatia with the family.

Early the next morning, Pulido and I.G. went to a restaurant and sat there for hours. I.G.'s mother realized when she woke up that I.G. wasn't in the house and panicked. When I.G.'s mother said she wanted to call the police, Jimenez told her that she shouldn't because Pulido would have I.G. request asylum—meaning that no one could see I.G. for months and he wouldn't be able to help get her home. Jimenez promised I.G.'s mother that he would help return I.G. safely to Croatia. In ***1265** fact, at the same time, Jimenez was texting Pulido to keep him informed regarding I.G.'s family's departure. When I.G. received a message from her mother while she and Pulido were in the restaurant parking lot, Pulido told her how to reply. After I.G.'s family left for the airport, she and Pulido returned to his house.

I.G. testified that when she told Pulido and Jimenez the next morning that she wanted to go home, they got angry. Jimenez yelled at I.G. for being irresponsible and not appreciating all the sacrifices that they had made for her. He told I.G. that he would try to get her a ticket back to Croatia as soon as possible, but he also repeatedly told her that he couldn't find one. According to Jimenez's travel agent, after he cancelled I.G.'s initial return flight, he never contacted her to book a new one.

At the same time Jimenez said he was trying to find I.G. a flight back to Croatia, he and Pulido were restricting her ability to communicate with her mother, allowing her to use their phones only briefly, and telling her what to say when she did so. I.G. further testified that, in the meantime, Jimenez completed asylum paperwork for her, had her sign it, and took her to see an immigration lawyer.

Eventually, I.G. was able to tell her mother that she wanted to come home. I.G.'s mother contacted the police, who promptly intervened. Florida Department of Law Enforcement officials were dispatched to Pulido's house for a welfare check, where Jimenez greeted and spoke with them about the situation. Jimenez told the agents that I.G. had indicated that she wanted to stay in Florida and showed them the immigration form that he said I.G. had completed.

During their visit, the agents asked to speak with I.G., so Jimenez went and got her. The officers spoke with I.G. alone and, after hearing her version of events and assessing the situation, they asked to speak with Pulido but were told that he wasn't there.

The agents contacted the Florida Department of Children and Families, which took I.G. into temporary custody. I.G. reunited with her mother at the Tampa airport a few days later, and the two flew back to Croatia together.

During interviews with various law-enforcement officers in the United States, I.G. denied having sex with Pulido. But once she was back in Croatia, I.G. admitted that she and Pulido had indeed had sex. I.G. said that she changed her mind about telling investigators because she had started to lose feelings for Pulido and that it was more important for them to know the truth than for her to avoid embarrassment.

Meanwhile, Pulido had fled to Mexico the day after Florida officials took temporary custody of I.G. He remained there until a family member informed him that it was safe to return. Homeland Security Investigations Special Agent Tavey Garcia, who had been assigned to I.G.'s case, advised Customs and Border Protection ("CBP") officers to be on the lookout for Pulido's return to the United States and to seize all of his electronic devices for a border search. Notwithstanding her alert, Pulido returned to the United States in September 2018 without detection.

Pulido traveled to Mexico again in May 2019. When he reentered the United States in early June, CBP agents stopped him, seized his iPhone and MacBook, and sent the devices to Agent Garcia.

Agent Garcia gave the iPhone and MacBook to a computer analyst who performed forensic searches of the devices by copying all of their data and making the ***1266** devices' files available for review.[1] The resulting report contained photographs of Pulido and I.G. cuddling and kissing, headshots of I.G. and her family used for their passports and visas, I.G.'s asylum application, screenshots of messages to I.G. on various social media platforms (*e.g.*, Face-book, WhatsApp), and iMessage and Skype chats. Agent Garcia reviewed the reports for both devices and took notes that she included in a written report.

1 A "forensic" search of an electronic device (alternatively called an "advanced" search) is distinct from a "basic" or "manual" search. *See Alasaad v. Mayorkas*, 988 F.3d 8, 13 (1st Cir. 2021) (noting that CBP policy categorizes an "advanced" search as one "in which an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents") (quotation marks and citation omitted).

II

A grand jury indicted both Pulido and Jimenez on a variety of charges. In particular, it charged Pulido with four counts: (1) using the internet to knowingly persuade, induce, entice, and coerce someone under the age of 18 to engage in sexual activity for which a person could be charged with a criminal offense, in violation of 18 U.S.C. § 2422(b); (2) traveling with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b); (3) conspiring to transport a minor with intent that she engage in sexual activity, in violation of 18 U.S.C. § 2423(a) and (e); and (4) transporting a minor with intent that she engage in sexual activity, in violation of 18 U.S.C. § 2423(a). The grand jury indicted Jimenez on one count of conspiring to transport a minor with intent that she engage in sexual activity, in violation of 18 U.S.C. §§ 2423(a) and (e).

Pulido moved to dismiss the indictment against him on several grounds. He contended that (1) the enticement count was duplicitous because although it nominally charged him with only one crime, it in fact improperly charged two or more separate and distinct offenses; (2) the traveling-with-intent count was unconstitutional because the statute on which it was predicated exceeded Congress's Foreign Commerce Clause power and impermissibly burdened his rights of "travel and free thought"; and (3) the transportation-of-a-minor counts were legally insufficient because they failed to identify an underlying Florida statute that he intended to violate.

The district court denied Pulido's motion. The court rejected Pulido's duplicitousness contention, reasoning that enticement of a minor is a "continuing offense" and, therefore, that the count was not duplicitous as charged. [2] The district court also held that the traveling-with-intent statute was constitutional, and that the transportation-of-a-minor counts were legally sufficient.

2 "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse ...." *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166, 59 S.Ct. 412, 83 L.Ed. 563 (1939) (quotation marks and citation omitted). It "is not complete upon the first act, but instead continues to be perpetrated over time." *United States v. Rojas*, 718 F.3d 1317, 1320 (11th Cir. 2013) (quotation marks and citation omitted). Conspiracy and possession of a firearm are illustrative examples. *See United States v. Gilbert*, 136 F.3d 1451, 1453 n.4 (11th Cir. 1998) (conspiracy); *United States v. Rivera*, 77 F.3d 1348, 1351 (11th Cir. 1996) (possession of a firearm).

Before trial, Pulido moved to suppress evidence recovered from his iPhone and MacBook. Pulido contended that the agents' review of the messages on his electronic devices violated the Fourth Amendment. In particular, he argued that under ***1267** the so-called "border search" exception, officials may make a warrantless search only for contraband and that, in doing so, they may only take a cursory glance. Relying on *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), Pulido asserted that officials needed, but lacked, a warrant to search his devices, or, at the very least, needed probable cause or reasonable suspicion to believe that they contained contraband. A magistrate judge held an evidentiary hearing and then recommended denying Pulido's motion, concluding that the border-search exception isn't limited to contraband and that the officers' search didn't violate the Fourth Amendment. Over objection, the district court accepted the magistrate judge's recommendation and denied Pulido's motion to suppress.

Pulido and Jimenez separately moved in limine to exclude two items of evidence. Pulido sought to exclude I.G.'s testimony that she was predisposed to chastity on the ground that it was inadmissible under Federal Rule of Evidence 412(a)(2), which bars the introduction of evidence offered to prove a victim's sexual predisposition. The district court denied the motion without prejudice, preferring to decide the matter at trial. [3] Jimenez moved to exclude evidence about his immigration status on the ground that it was irrelevant and prejudicial, but the government agreed that his legal status was irrelevant to the charged crime and explained that it had no intention of presenting any such evidence.

3 At trial, Pulido lodged repeated objections when I.G. testified about her predisposition to chastity, which the district court overruled.

Several issues arose during trial that have given rise to challenges on appeal. First, there were a few translation issues at the start of I.G.'s mother's testimony. For instance, during the first 27 minutes of her testimony, the government's lawyer initially asked I.G.'s mother questions in English, and she attempted to answer in English with some difficulty, raising a concern that she might not be properly understanding the questions. To ameliorate that risk, the judge asked her to answer in Croatian and allow an interpreter to translate. Even then, though, the judge also expressed concern that some of the interpreter's translations were summaries rather than word-for-word recitations.

Second, when the government called Agent Garcia to testify, Jimenez requested a sidebar conference because he was concerned that Garcia would testify that he was in the country illegally. The government repeatedly assured the judge that it had no intention of eliciting that information and that it only envisioned Garcia testifying that Jimenez wasn't a medical doctor. Immediately after the conference, though, when the prosecutor asked Garcia if she could determine whether Jimenez was a doctor, she responded that "[b]ased on [her] investigation, [she] determined that Mr. Jimenez entered the United States legally in the '80s, but he remained in the United States—." Trial Tr. Day 7 at 140:18–24, Doc. 218. Jimenez promptly objected, and the judge struck Garcia's response from the record and instructed the jury to disregard it. When Jimenez later moved for a mistrial based on Agent Garcia's testimony about his immigration status, the judge (while acknowledging that the testimony was "really inappropriate") reserved ruling on the issue. *Id.* at 165:5, 7; 168:19.

At the close of the government's case, Pulido moved for a judgment of acquittal on the same duplicitousness ground that he had raised in his motion to dismiss. ***1268** Jimenez separately moved for a judgment of acquittal, arguing that no reasonable juror could find beyond a reasonable doubt that he was guilty of the conspiracy. Specifically, he contended, there was no evidence that he intended to transport I.G. to Florida for the purpose of her engaging in unlawful sexual acts there. The district court denied both motions, and the jury convicted Pulido and Jimenez on all counts.

Following the verdict, Jimenez moved for a new trial based on (1) the translation irregularities involving I.G.'s mother's testimony, (2) the admission of evidence regarding I.G.'s virginity and sexual inexperience, and (3) Agent Garcia's testimony regarding his immigration status. Pulido joined Jimenez's motion, which the district court denied on all counts. The district court acknowledged that the law generally requires continuous word-for-word translation, but it held that the summaries didn't render the trial fundamentally unfair in the light of all the evidence presented: I.G.'s mother testified for more than four and a half hours, and only the first 27 minutes were in English; when she testified in English, her responses indicated that she understood the questions. The court further held that I.G.'s testimony about her sexual inexperience was admissible under Rule 412. That rule, the court concluded, protects alleged victims from cross-examination about their sexual histories and sexual dispositions; it does not prevent a victim from producing relevant evidence regarding her virginity, chastity, etc. And finally, the court held that Agent Garcia's testimony necessitated neither a new trial nor a mistrial because (1) her statement was unelicited and unresponsive, (2) it was followed immediately by a curative instruction, and (3) there was substantial evidence of Jimenez's guilt.

At sentencing, the district court enhanced Jimenez's sentence over his objection. As relevant here, the court applied both (1) a two-level enhancement under U.S.S.G. § 2G1.3(b)(1)(B) on the ground that Jimenez exercised "custody, care, or supervisory control" over I.G. and (2) a two-level enhancement under § 2G1.3(b)(2)(B) on the ground that he exercised "undue influence" over her.

Pulido and Jimenez both appealed.

III

We divide our discussion into two parts. We first address Pulido's challenges to the district court's orders denying his motion to dismiss, his motion to suppress, and his motion for a new trial.[4] We then consider Jimenez's motion for acquittal based on sufficiency of the evidence, his motion for a mistrial, and his challenges to the two sentence enhancements.

4 For reasons explained below, we find that we needn't reach Pulido's Rule 412 argument that the district court erred in refusing to exclude evidence that I.G. was predisposed to chastity.

A

1

Pulido first argues that the district court erred in denying his motion to dismiss. In particular, he contends (1) that the enticement-of-a-minor count is duplicitous, (2) that the traveling-with-intent count violates the Foreign Commerce Clause, and (3) that the traveling-with-intent count impermissibly burdens his rights of travel and "free thought."[5] We'll take each challenge in turn.

5 Pulido initially contended that the transportation-of-a-minor count was legally insufficient, but he has since conceded that a decision issued after his indictment forecloses his insufficiency challenge, and he raises that challenge before us solely to preserve it. *See* *United States v. Doak*, 47 F.4th 1340, 1352–53 (11th Cir. 2022).

***1269 a**

i

Pulido contends that the district court should have dismissed his indictment on the ground that the enticement-of-a-minor count was "duplicitous."[6] Although the issue is not without some complexity, we agree with him.[7]

6 For ease of reference, we will refer to "enticement" as a stand-in for the four distinct means of violating 18 U.S.C. § 2422(b): persuading, inducing, enticing, and coercing a minor to engage in sexual activity.

7 We normally review a district court's decision to deny a motion to dismiss for abuse of discretion, *United States v. Di Pietro*, 615 F.3d 1369, 1370 n.1 (11th Cir. 2010), but because determining whether an indictment was duplicitous requires a legal inquiry, we review the decision here de novo, *see* *United States v. Burton*, 871 F.2d 1566, 1573 (11th Cir. 1989); *United States v. Hassoun*, 476 F.3d 1181, 1185 (11th Cir. 2007). But, as with most non-structural errors, we will assess the district court's holding for harmlessness. *Cf.* *Hicks v. Head*, 333 F.3d 1280, 1285 (11th Cir. 2003) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [non-structural] errors that may have occurred are subject to harmless-error analysis." (quoting *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986))); *cf.* *United States v. Deason,* 965 F.3d 1252, 1267–68 & n.3 (11th Cir. 2020) (stating that charging duplicitous counts is not a structural error).

"A count in an indictment is duplicitous if it charges two or more separate and distinct offenses." *United States v. Seher*, 562 F.3d 1344, 1360 (11th Cir. 2009) (quotation marks and citation omitted). The risk of a duplicitous count is that "(1) [a] jury may convict a defendant without unanimously agreeing on the same offense; (2) [a] defendant may be prejudiced in a subsequent double jeopardy defense; and (3) [a] court may have difficulty determining the admissibility of evidence." *United States v. Deason*, 965 F.3d 1252, 1267 (11th Cir. 2020) (citation omitted). To determine whether a count is duplicitous, we "look to the text of the underlying statute" and consider "what conduct constitutes a single offense." *Id.* (citations omitted).

The indictment here charged Pulido with violating 18 U.S.C. § 2422(b), in conjunction with Fla. Stat. §§ 800.04(4)(a) and (b). Section 2422(b) reads as follows:

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

Here, the criminal "sexual activity" that served as the hook for § 2422(b)'s application was "lewd or lascivious battery" under Fla. Stat. § 800.04(4). At the relevant time, that statute read as follows:

> (a) A person commits lewd or lascivious battery by:
>
> 1. Engaging in sexual activity with a person 12 years of age or older but less than 16 years of age; or
>
> 2. Encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.

Fla. Stat. § 800.04(4)(a) (2014). The Florida statute defines "sexual activity" as "the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." *Id.* § 800.04(1)(a). ***1270** Accordingly, for our purposes, Pulido violated § 2422(b) if he enticed I.G. to have oral, vaginal, or anal intercourse with him.

Importantly here, "[t]he underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself." *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004).[8] Thus, put simply, a person can be guilty of violating § 2422(b) if he entices a minor to engage in sexual activity, regardless of whether the sexual activity ever occurs. *See id.* at 1287.

8 Although *Murrell* arose under § 2422(b)'s "attempts" clause, *see* 368 F.3d at 1286, its description of what constitutes a violation applies equally to the completed version of the crime.

Pulido contends before us that because § 2242(b) criminalizes the act of enticement itself, the criminal offense is complete the moment the minor is enticed. It's possible, he argues, for a minor to have been enticed on multiple occasions regardless of when—or again, even whether—any sexual activity occurred. In such a case, Pulido contends, an indictment would need to list multiple enticement offenses to cover each criminal act. He faults his indictment for listing only one enticement count to cover a 10-month period during which he and I.G. engaged in numerous conversations about sex and had numerous sexual encounters. This is problematic, he says, because it allows for the possibility that the jurors didn't unanimously agree on the *same* act of enticement. By way of illustration, Pulido posits that some jurors might have concluded that he enticed I.G. in messages that he sent before he traveled to Croatia; others might have concluded that he did so while he was in Croatia; and still others might have found that he did so only when he and I.G. returned to Florida.

The government denies that the indictment was duplicitous. It contends that enticement can be demonstrated through a pattern of activity because, it says, "[w]e know enticing a child to engage in illicit sexual activity is ordinarily a process, not a discrete act; each act in the process need not be charged separately."[9] Br. of Appellee at 49–53.

9 The government argued before the district court that § 2422(b) is a "continuing offense." As already explained, *see supra* at 1266 n.2, a continuing offense is a crime that "is not complete upon the first act, but instead continues to be perpetrated over time." *Rojas*, 718 F.3d at 1320. Significantly, though, "offenses should not be considered continuing unless the explicit language of the ... statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing offense." *Id.* (quotation marks and citation omitted and alteration adopted). The government seems to have abandoned its continuing-offense theory on appeal.

It seems to us that Pulido and the government are talking past one another. It's true, as the government asserts, that it can point to a pattern of activity to prove the commission of the enticement offense. But it's also true that such a pattern culminates in a discrete episode of enticement. In that moment, the instant when the minor has been enticed after days (or weeks, or months) of conduct by the defendant, the § 2422(b) offense has occurred.

So, as applied to this case, it may be that it took Pulido weeks or months to entice I.G. to engage in illicit sexual activity with him. But the moment that Pulido was able to move I.G.'s mental state from one of hesitation to one of agreement *for the first time*, he violated § 2422(b). Subsequent episodes in which he successfully moved her mind would constitute distinct acts of enticement, and thus independent ***1271** violations of the statute. By failing to charge multiple enticement counts in a case that involved a 10-month relationship, numerous online conversations about sex, and multiple sexual encounters in both Croatia and Florida, the government produced an indictment that creates the risk that the jury "may [have] convict[ed Pulido] without unanimously agreeing on the same offense." *Deason*, 965 F.3d at 1267. And that makes the § 2422(b) count duplicitous.

ii

Before vacating the § 2242(b) count and conviction, we must assess whether allowing the count to go to trial was harmless. It wasn't.

"The harmless-error test is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Cannon*, 987 F.3d 924, 947 (11th Cir. 2021) (quotation marks and citation omitted). The government has the burden to prove that an error was harmless. *Id.*

Here, the government contends that any duplicitousness was harmless because "[t]here is no risk that the jury found Pulido guilty without unanimously agreeing that Pulido's conduct satisfied the elements of enticement." Br. of Appellee at 55. It asserts that the district court's instruction requiring the jury to unanimously agree to the method of the commission (*i.e.*, whether Pulido persuaded, induced, enticed, or coerced) was sufficient to allay any concerns about lack of unanimity.

That is incorrect. The problem isn't that the jury might not have unanimously agreed to the *method* by which Pulido violated § 2422(b). Rather, the problem is that it might not have unanimously agreed about the *moment* that I.G. was enticed. I.G. testified at trial that she and Pulido had sex several times in Croatia, and also frequently in Florida at Pulido's initiation. The government never demonstrated the moment at which I.G. was enticed, nor did it seek to prove I.G.'s mental state at any particular point during the 10-month period. With so many episodes of sexual activity—each of which may (or may not) have been induced by one or more acts of enticement—we cannot say that the government has carried its burden of proving harmlessness beyond a reasonable doubt.

* * *

Because the enticement-of-a-minor count was duplicitous, and because the error wasn't harmless, we vacate Pulido's conviction on that count and remand with instructions for the district court to dismiss it.

b

Pulido next asserts that the district court should have dismissed his traveling-with-intent count on the ground that Congress violated the Foreign Commerce Clause in enacting § 2423(b).[10]

10 We review de novo a district court's denial of a motion to dismiss on constitutional grounds. *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1377 n.3 (11th Cir. 2011).

The Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. "Neither [we] nor the Supreme Court has thoroughly explored the scope of the Foreign Commerce Clause." *United States v. Baston*, 818 F.3d 651, 667 (11th Cir. 2016). But we have assumed (without deciding) in recent cases that Congress's authority under the Foreign Commerce Clause is at least as broad as its authority under the Interstate Commerce Clause. *Id.* at 668; *United States v. Davila-Mendoza*, 972 F.3d 1264, 1271 (11th Cir. 2020). "In other words," we have said:

> ***1272** Congress's power under the Foreign Commerce Clause includes at least the power to regulate the "channels" of commerce between the United States and other countries, the "instrumentalities" of commerce between the United States and other countries, and activities that have a "substantial effect" on commerce between the United States and other countries.

Baston, 818 F.3d at 668 (citing *Gonzales v. Raich*, 545 U.S. 1, 16–17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005)).

Pulido resists that equivalency. He accepts that Congress can regulate "the use of the channels of [foreign] commerce," and "the instrumentalities of [foreign] commerce, or persons or things in [foreign] commerce, even though the threat may only come from [intranational] activities." *See* Br. of Appellant Pulido at 55–56 (quoting *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995)). But, he says, the "substantial effects" category recognized in the Interstate Commerce Clause context shouldn't extend to Foreign Commerce Clause cases like this one. *Id.* And, the argument goes, because the conduct for which he has been charged —traveling with an intent to engage in illicit sexual conduct with I.G.—is a non-commercial act, his § 2423(b) count would have to rest on a "substantial effects" rationale.

We disagree. This isn't a "substantial effects" case; it's a "channels of [foreign] commerce" case. The power over channels of commerce under the Interstate Commerce Clause permits Congress to "keep the channels of interstate commerce free from immoral and injurious uses." *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)). Because § 2423(b) criminalizes traveling in foreign commerce with an intent to engage in illicit sexual activity, it's directed at people who, for example, buy plane tickets—as Pulido did here—to commit illicit activity in foreign countries. That is a regulation of a channel of foreign commerce with a purpose of keeping it "free from immoral and injurious uses." *Id.*

Because we conclude that Congress acted within its Foreign Commerce Clause power to regulate the channels of foreign commerce when it enacted § 2423(b), we hold that the travel-with-intent count was constitutional as applied to Pulido. [11] Accordingly, we affirm the district court's judgment on that count.

11 In concluding that the enactment of § 2423(b) was a valid exercise of Congress's Foreign Commerce Clause power over channels of foreign commerce, we join our sister circuits. *See, e.g.*, *United States v. Han*, 230 F.3d 560, 562–63 (2d Cir. 2000); *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006); *United States v. Bredimus*, 352 F.3d 200, 205–08 (5th

Cir. 2003); *United States v. Stokes*, 726 F.3d 880, 894–95 (7th Cir. 2013).

c

Pulido finally contends that the district court should have dismissed his indictment on the ground that § 2423(b) impermissibly burdens his rights of "travel and free thought" under the First and Fifth Amendments. [12] We are unpersuaded.

12 As with Pulido's Foreign Commerce Clause argument, we review de novo the district court's denial of his motion to dismiss on First and Fifth Amendment grounds. *Ibarguen-Mosquera*, 634 F.3d at 1377 n.3.

To be clear, contrary to Pulido's framing, § 2423(b) doesn't criminalize "thought" in the abstract. Nor does it "prohibit traveling with an immoral thought, or even with an amorphous intent to engage in sexual activity with a minor." ***1273** *United States v. Tykarsky*, 446 F.3d 458, 471 (3d Cir. 2006). Rather, it criminalizes a concrete act—namely, the act of traveling in foreign commerce with the purpose of committing an illegal sex act with a minor. And "no federal court has ever held that an individual has a fundamental right to travel for an illicit purpose." *Id.* at 472 (quotation marks and citation omitted).

It remains unclear whether Pulido challenges § 2423(b) on its face or as applied. To the extent that he challenges the statute's constitutionality facially, he hasn't demonstrated that it "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *United States v. Hansen*, 599 U.S. 762, 769–70, 143 S.Ct. 1932, 216 L.Ed.2d 692 (2023) (quotation marks and citation omitted). And to the extent that Pulido challenges § 2423(b) as applied to his case, he did far more than think immoral thoughts or travel with amorphous intentions—he bought a plane ticket, traveled to Croatia, and had sex with a 15-year-old girl. [13]

13 *See* *United States v. Gamache*, 156 F.3d 1, 8 (1st Cir. 1998) ("[A]ppellant, at a minimum, engaged in a *series of acts* long past the 'mere thinking' stage.... [I]t can hardly be claimed that punishment for 'mere thought' is at issue.").

Because Pulido has not sustained his burden to show that § 2423(b) unconstitutionally burdens his First or Fifth Amendment rights either facially or as applied, we affirm the district court's denial of his motion to dismiss on this count.

2

Pulido next challenges the district court's denial of his motion to suppress evidence found on his iPhone and MacBook because, he says, the searches of those devices violated the Fourth Amendment. More specifically, he contends that the district court erred in holding that the Fourth Amendment's "border search" exception covers the warrantless, suspicionless searches of his devices. [14]

14 In reviewing a motion-to-suppress decision, "we review the district court's factual findings for clear error and its legal conclusions *de novo*." *United States v. Vergara*, 884 F.3d 1309, 1312 (11th Cir. 2018) (citation omitted).

We apply a two-step analysis to evaluate the validity of a search at the border. *United States v. Alfaro-Moncada*, 607 F.3d 720, 726 (11th Cir. 2010). Step one focuses on whether there was statutory authority to conduct the search. *Id.* (citing *United States v. Ramsey*, 431 U.S. 606, 611–15, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977)). Step two asks whether the search was reasonable under the Fourth Amendment. *Id.* (citing *Ramsey*, 431 U.S. at 615–16, 97 S.Ct. 1972). Here, no one disputes that there was statutory authority, so we proceed directly to the Fourth Amendment reasonableness inquiry.

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, ... papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Under Supreme Court precedent, police generally need a warrant to conduct a search. *United States v. Vergara*, 884 F.3d 1309, 1312 (11th Cir. 2018). "[F]rom before the adoption of the Fourth Amendment," however, border searches "have been considered to be 'reasonable' by the single fact that the person or item in question has entered into our country from outside." *Ramsey*, 431 U.S. at 619, 97 S.Ct. 1972. This is because border searches implicate the "long-standing right of the sovereign to protect itself," *id*. at 616, 97 S.Ct. 1972, a right that is "at its zenith at the international border," ***1274** *United States v. Flores-Montano*, 541 U.S. 149, 152, 124 S.Ct. 1582, 158 L.Ed.2d 311 (2004). And because the government has such a strong interest in searching at the border, "the balance between the interests of the government and the privacy right of the individual is struck more favorably to the government." *Alfaro-Moncada*, 607 F.3d at 728.

In that vein, we have held that border searches never require a warrant—or even probable cause—to be reasonable. *Vergara*, 884 F.3d at 1312 (citing *Ramsey*, 431 U.S. at 619, 97 S.Ct. 1972). Indeed, we have gone further to say that "we require reasonable suspicion at the border only 'for highly intrusive searches of a person's body such as a strip search or an x-ray examination.' " *Id.* (quoting *Alfaro-Moncada*, 607 F.3d at 729). And even more specifically, and more relevantly here, we have held that "the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border." *United States v. Touset*, 890 F.3d 1227, 1231 (11th Cir. 2018); *see also id.* at 1233 ("The Supreme Court has never required reasonable suspicion for a search of property at the border, however non-routine and intrusive, and neither have we."). Together, *Vergara* and *Touset* make this an easy affirmance.

Not so, Pulido says. Despite our decisions' categorical language, he asserts that we should treat searches of private messages on cell phones differently for two reasons. First, relying on *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), in which the Supreme Court held that an officer's search of a cell phone didn't fall within the Fourth Amendment's search-incident-to-arrest exception, Pulido insists that searching a cell phone is so intrusive of a person's privacy that it (in effect) warrants an exception to the border-search exception. Second, he contends that searching private text messages on a person's devices exceeds the historical justification for the border-search exception—namely, detecting contraband—and, therefore, that the exception's indulgent reasonableness rule shouldn't apply.

We rejected similar *Riley*-based arguments in *Vergara* and *Touset*. In *Vergara*, we stated expressly that "[b]order searches have long been excepted from warrant and probable cause requirements, and the holding of *Riley* does not change this rule." 884 F.3d at 1312–13. And in *Touset*, we reiterated that "[a]lthough the Supreme Court stressed in *Riley* that the search of a cell phone risks a significant intrusion on privacy, our decision in *Vergara* made clear that *Riley*, which involved the search-incident-to-arrest exception, does not apply to searches at the border." 890 F.3d at 1234. In particular, we explained in *Touset* that in those instances when we have required reasonable suspicion for a border search, we have defined "intrusiveness" by reference to bodily integrity —"the indignity that will be suffered by the person being searched." *Id.* (citation omitted). Intrusiveness, therefore, is a function of the "personal indignity" that a search causes, not of its scope or extent. *Id.* And in *Touset*, "we fail[ed] to see how the personal nature of data stored on electronic devices could trigger this kind of [personal] indignity" when existing precedent recognized no such afront to one's personal dignity even in the search of his home. *Id.* (citing *Alfaro-Moncada*, 607 F.3d at 729, 732). Simply put, we said that "[p]roperty and persons are different." *Id.* (citing *Flores-Montano*, 541 U.S. at 152, 124 S.Ct. 1582).

Vergara and *Touset* likewise foreclose Pulido's argument that government officials exceeded the scope of the border-search exception, which, he says, is limited by the government's sovereign interest in excluding contraband from the country. ***1275** Forensically extracting and then reading all his private messages, Pulido contends, transgresses the scope of a permissible border search. But again, *Vergara* and *Touset* are not so easily cabined. Neither opinion purports to restrict the operation of the border-search exception to searches for contraband. To the contrary, both opinions use categorical language. *See, e.g.*, *Vergara*, 884 F.3d at 1312 ("[W]e require reasonable suspicion at the border *only* for highly intrusive searches of a person's body ...." (emphasis added) (quotation marks and citation omitted)); *Touset*, 890 F.3d at 1233 ("The Supreme Court has never required reasonable suspicion for a search of property at the border, however non-routine and intrusive, and neither have we."); *id.* at 1234 ("Property and persons are different."); *id.* at 1231 ("[T]he Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border.").

Because our precedents in the border-search context state both (1) that we require reasonable suspicion only for highly intrusive searches of a person's body and (2) that forensic searches of electronic devices don't require any level of suspicion, we affirm the district court's holding that the government's search of Pulido's iPhone and MacBook didn't violate the Fourth Amendment.

3

Pulido finally challenges the district court's denial of his new-trial motion based on translation irregularities during I.G.'s mother's testimony, which he contends violated his due-process rights. [15]

15 "We review the district court's denial of a motion for new trial for abuse of discretion." *United States v. Sweat*, 555 F.3d 1364, 1367 (11th Cir. 2009). We review de novo questions of law, including whether a defendant's due-process rights have been violated. *See* *United States v. Underwood*, 446 F.3d 1340, 1345 (11th Cir. 2006); *United States v. Savage*, 701 F.2d 867, 868 n.1 (11th Cir. 1983).

For constitutional purposes, we must determine whether any of the irregularities rendered Pulido's trial "fundamentally unfair." *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990) (quotation marks and citation omitted). The "general standard" requires continuous word-for-word translation of everything relating to the trial. *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir. 1990). " '[O]ccasional lapses,' " however, "will not render [a] trial 'fundamentally unfair' " because "defendants have no constitutional 'right' to flawless, word for word [interpretations]." *Gomez*, 908 F.2d at 811 (citation omitted). "[I]nterpreters should nevertheless strive to translate exactly what is said," and "courts should discourage interpreters from 'embellishing' or 'summarizing' live testimony." *Id.*

Pulido asserts that the interpretation irregularities during I.G.'s mother's testimony rendered his trial fundamentally unfair. In particular, he says (1) that I.G.'s mother struggled to understand the interpreter's accent and got confused listening to both English and Croatian, and (2) that some interpretations were notably shorter than I.G.'s mother's responses, indicating that they weren't accurate translations. The district court disagreed, and so do we.

The district court reasonably allowed I.G.'s mother to answer questions in English but encouraged her to use the interpreter if she was unsure. While the court noted some irregularities in I.G.'s mother's testimony, it exercised due care to ensure that any errors were remedied. Once the court observed that I.G.'s mother was having difficulty responding in English, it directed her to answer in Croatian and allow ***1276** the interpreter to translate her answers into English. It also sustained Jimenez's objection to ensure that all remaining questions asked to I.G.'s mother would be translated to her in Croatian. It then reminded the interpreter that the translations of her testimony needed to be word-for-word. The interpreter had assured the court moments before that he was translating everything and not summarizing. And in its order denying the motion for a new trial, the court emphasized that the portion of I.G.'s mother's testimony that was in English occupied only 27 minutes out of four and a half hours she spent on the stand. The court further confirmed that for these 27 minutes, I.G.'s mother understood what she was being asked. [16]

16 Additionally, we conclude that there was no "cumulative error." *See* Br. of Appellant Pulido at 67. There was, at most, only one error—the district court's refusal to exclude evidence of I.G.'s predisposition for chastity. And because we have vacated the enticement count of Pulido's indictment, we needn't reach Pulido's Rule 412 challenge to that ruling.

Accordingly, we hold that any interpretation errors didn't render the trial fundamentally unfair. The district court didn't abuse its discretion in denying the new trial motion, and we affirm its decision in that respect.

* * *

To summarize, with respect to Pulido's challenges, we hold as follows: First, we affirm the district court's rejection of Pulido's challenges to his indictment except for his contention that the enticement count was duplicitous; on that count, we vacate his conviction and remand for resentencing with instructions that the enticement count be dismissed. Second, we affirm the district court's decision declining to suppress the evidence found on Pulido's electronic devices. Third, we hold that the district court did not abuse its discretion in denying Pulido a new trial based on the translation irregularities that attended I.G.'s mother's testimony.

B

We turn, then, to Jimenez. We start with the district court's rejection of his motion for judgment of acquittal, followed by the court's denial of his motion for a mistrial, and conclude with the court's imposition of two sentencing enhancements.

1

Jimenez first challenges the district court's denial of his motion for judgment of acquittal, in which he asserted that there was insufficient evidence to convict him of conspiring to transport I.G. in violation of 18 U.S.C. §§ 2423(a) and (e).[17] In particular, Jimenez argues that the record was devoid of evidence that he intended for I.G. to engage in sexual activity in the United States. We disagree.

17 "We review *de novo* a district court's denial of judgment of acquittal on sufficiency of evidence grounds." *United States v. Fleury*, 20 F.4th 1353, 1367 (11th Cir. 2021) (citation omitted). "[W]e view the evidence in the light most favorable to the prosecution and draw all reasonable inferences and credibility choices in its favor." *Id.* (quotation marks and citation omitted). "[W]e will uphold the denial of judgment of acquittal —and affirm the guilty verdict—if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

"To support a conspiracy conviction, the government must prove 1) an agreement to commit an unlawful act and 2) an overt act by one of the conspirators in furtherance of the conspiracy." *United States v. Parker*, 839 F.2d 1473, 1477 (11th Cir. 1988). "A conspiracy may, indeed usually ***1277** must, be proven through circumstantial evidence." *Ibarguen-Mosquera*, 634 F.3d at 1385. The substantive offense underlying Jimenez's conspiracy conviction prohibits "knowingly transport[ing] an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2423(a). When charging a person with conspiracy to commit a substantive offense, the conspiracy "cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *United States v. Ross*, 131 F.3d 970, 980–81 (11th Cir. 1997) (quoting *Ingram v. United States*, 360 U.S. 672, 678, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959)). So the government had to prove that Jimenez had, as at least one of his purposes in transporting I.G. to the United States, an intent that she have sex with Pulido. *See United States v. Doak*, 47 F.4th 1340, 1354 (11th Cir. 2022). "[A]n alternative plausible innocent explanation is not enough to prove that the conduct was not motivated by illicit sexual activity." *Id.* at 1355 (quotation marks and citation omitted).

Jimenez focuses on the intent element. He explains that while he had conversations with Pulido and I.G. about sex, the government failed to provide evidence that he had the requisite knowledge or intent that the two would have sex in the United States. He asserts (1) that any conversations about sex were conducted while Pulido was in Croatia where sex with I.G. was legal and (2) that those conversations don't demonstrate that he intended for Pulido and I.G. to continue having sex in the United States.

The government responds that the circumstantial evidence introduced at trial supports the jury's verdict that at least one reason for I.G. coming to the United States was for her and Pulido to have sex. With respect to Jimenez's intent, in particular, the government emphasized that he (1) coached Pulido how to convince I.G. to have sex with him; (2) knew about the sexual activity between Pulido and I.G.; (3) spoke with I.G. regarding her sexual experiences; (4) pretended to be a doctor and instructed I.G. how she could avoid pregnancy; (5) hid Pulido's relationship with I.G. from her family; (6) paid for I.G.'s plane ticket to the United States; (7) helped ensure that I.G. didn't return to Croatia with her family; (8) filled out asylum paperwork for I.G.; (9) limited I.G.'s ability to communicate with her mother; and (10) obstructed I.G.'s efforts to return to Croatia.

We agree with the government that a reasonable jury could conclude that Jimenez conspired to transport I.G. to the United States with an intent that she engage in sex with Pulido while she was here. Jimenez knew about the sexual nature of the relationship between Pulido and I.G. He actively coached Pulido how to convince I.G. to have sex with him. He communicated with I.G. directly through social media about her sexual activity, even going so far as pretending to be a doctor to advise her how to avoid pregnancy. And, with full awareness of the nature of I.G.'s relationship with Pulido, Jimenez paid for her plane ticket to the United States. When I.G. arrived in Florida, Jimenez tried to hide her relationship with Pulido from her family. And when I.G. was scheduled to return to Croatia with her family, Jimenez helped ensure that she stayed behind, and when that was successful, he filled out asylum paperwork for her and limited her ability to communicate with her mother. That is more than enough. Accordingly, we ***1278** affirm the district court's denial of Jimenez's motion for judgment of acquittal.

2

Jimenez next challenges the district court's denial of his motion for a mistrial or a new trial, which focused on Agent Garcia's testimony about his immigration status. [18]

18 We review the denial of both types of motions for abuse of discretion. *United States v. Valois*, 915 F.3d 717, 723 n.2 (11th Cir. 2019) (mistrial); *Sweat*, 555 F.3d at 1367 (new trial).

A district court may grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). The decision to grant a new trial is within "the sound discretion of the trial court." *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). This determination rests with the district court because it "is in the best position to evaluate the prejudicial effect of a statement or evidence on the jury." *United States v. Blakey*, 960 F.2d 996, 1000 (11th Cir. 1992).

We have held that to obtain a new trial a defendant must show that his "substantial rights [were] prejudicially affected" and, further, that such prejudice occurs "when there is a reasonable probability that, but for the remarks, the outcome of the trial would have been different." *United States v. Emmanuel*, 565 F.3d 1324, 1334 (11th Cir. 2009) (quotation marks and citation omitted). "Prejudicial testimony will not mandate a mistrial where there is significant evidence of guilt which reduces the likelihood that the otherwise improper testimony had a substantial impact on the jury." *United States v. Anderson*, 782 F.2d 908, 916 (11th Cir. 1986) (citation omitted). Additionally, "[w]hen a curative instruction has been given to address some improper and prejudicial evidence, we will reverse only if the evidence is so highly prejudicial as to be incurable by the trial court's admonition." *United States v. Harriston*, 329 F.3d 779, 787 n.4 (11th Cir. 2003) (quotation marks and citation omitted).

The district court refused to grant a mistrial or new trial because, it found, Jimenez hadn't demonstrated that Agent Garcia's testimony caused a miscarriage of justice. We agree and, in doing so, decline Jimenez's invitation to adopt a per se rule that every mention of a defendant's illegal immigration status is incurably prejudicial.

Like the district court, we are troubled by Agent Garcia's testimony, which wasn't responsive to the question she was asked and which she offered sua sponte. Her testimony is doubly troubling given (1) that Jimenez had successfully moved in limine before trial to exclude any reference to his immigration status and (2) that the testimony was offered almost immediately after counsel had a sidebar with the district judge about the risks of such evidence.

Even so, as the district court explained in denying Jimenez's motion, Garcia's testimony was "stray, ... unelicited, and unresponsive." *United States v. Pulido*, No. 8:20-CR-292-VMC-CPT, 2022 WL 562351, at *7 (M.D. Fla. Feb. 23, 2022). Moreover, the district court acted quickly to sustain Jimenez's objection, struck the testimony from the record, and gave a curative instruction that the jury should disregard it. *Cf.* *United States v. Valois*, 915 F.3d 717, 726 (11th Cir. 2019) ("We presume that the jury followed the district court's curative instructions." (citation omitted)). Finally, the other evidence of Jimenez's guilt was substantial, further reducing the likelihood ***1279** that Garcia's testimony had a meaningful impact on the jury. *See supra* at 1277-78. [19]

19 *Sanchez v. Davis*, 888 F.3d 746 (5th Cir. 2018) (Costa, J., single-judge order), on which Jimenez relies, is distinguishable. First, and most obviously, the single-judge order there resolved only a threshold procedural issue, not the merits of any claim. A federal habeas corpus petitioner had sought a certificate of appealability requesting permission to challenge a district court's rejection of his contention that his state-court trial counsel had rendered ineffective assistance when he failed to object to a question about his immigration status. In *Sanchez*, the judge concluded only that the petitioner had met the baseline showing necessary to the issuance of a COA—namely, that "jurists of reason" could disagree with the district court's resolution of the claim. *Id.* at 749, 751–52; *see also* 28 U.S.C. § 2253(c)(2). Second, and in any event, there are conspicuous factual distinctions. To be sure, Judge Costa stated that "a defendant's illegal status is considered so inflammatory that it is often the subject of motions in limine, the point of which is to ensure that testimony is not revealed to the jury that is so prejudicial that even a subsequent instruction to disregard cannot undo the damage." *Davis*, 888 F.3d at 751. He also noted that "the introduction of even a single impermissible mention of a defendant's immigration status is often a highly prejudicial bell that cannot be unrung." *Id.* at 752. Notably, though, in granting the COA, Judge Costa emphasized "a jury note showing that [the petitioner's] unlawful status was a topic during deliberations." *Id.* Here, there is no such smoking gun.

Accordingly, we affirm the district court's denial of Jimenez's motion for a mistrial or a new trial.

3

Jimenez lastly challenges two sentencing enhancements. In particular, he contends that the district court erred in applying a two-level "undue influence" enhancement under U.S.S.G. § 2G1.3(b)(2)(B) and a two-level "custody, care, or supervisory control" enhancement under U.S.S.G. § 2G1.3(b)(1)(B).[20] We'll take each in turn.

20 We review a sentencing court's application of the Guidelines de novo and its factual determinations for clear error. *United States v. Demarest*, 570 F.3d 1232, 1239 (11th Cir. 2009).

a

Section 2G1.3(b)(2)(B) directs a district court to increase a defendant's offense level by two if he "unduly influenced a minor to engage in prohibited sexual conduct." We have explained that "[b]ecause undue influence is a factual finding, we review for clear error." *United States v. Whyte*, 928 F.3d 1317, 1336 (11th Cir. 2019).

Comment 3(B), which we followed in *Whyte*, states that a reviewing court should "closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior." *Id.* (quoting U.S.S.G. § 2G1.3(b)(2)(B), cmt. 3(B)). The same comment provides that there is a rebuttable presumption of undue influence if the defendant is at least 10 years older than his minor victim. *Id.* In determining whether a defendant has rebutted the presumption, the court should consider whether the defendant's conduct "displayed an abuse of superior knowledge, influence and resources." *Id.* (citation omitted).[21]

21 We have since clarified that the commentary can't alter the scope of an unambiguous provision of the Sentencing Guidelines. *See United States v. Dupree*, 57 F.4th 1269, 1273–77 (11th Cir. 2023) (en banc). We don't read Comment 3(B) as expanding § 2G1.3(b)(2)(B). Moreover, Jimenez hasn't argued that *Dupree* abrogated or otherwise undermined our decision in *Whyte* in this respect; rather, he contends that he has rebutted the presumption of undue influence articulated in the commentary.

Jimenez claims that even though he was more than 10 years older than I.G. and helped to pay for I.G. and her family ***1280** to come to the United States, he didn't abuse any superior knowledge, influence, or resources. The government responds by emphasizing that Jimenez (1) purchased I.G.'s plane ticket to the United States; (2) refused to rebook I.G.'s flight home; (3) controlled I.G.'s access to her mother after she returned to Croatia; (4) prepared I.G.'s asylum paperwork; (5) told a law enforcement officer that he shouldn't have spoken to I.G. without Jimenez's permission; (6) misleadingly told I.G. that he was a doctor so that she would talk to him about sex; and (7) instructed I.G. to tell her mother that she wouldn't be returning to Croatia.

For purposes of assessing whether the undue-influence enhancement applies, we consider a broad range of "[r]elevant conduct." U.S.S.G. § 1B1.3; *see also United States v. Castaneda-Pozo*, 877 F.3d 1249, 1251 (11th Cir. 2017). In particular, we may consider not only Jimenez's conduct "during" and "in preparation for" the offense of conspiring to transport I.G. to the United States but also any post-offense conduct aimed at "attempting to avoid detection or responsibility." U.S.S.G. § 1B1.3(a)(1)(B). "Relevant conduct" further includes all harm that "resulted from" or "that was the object of" the acts and omissions by Jimenez, *id.* § 1B1.3(a)(3), and "any other information specified in the applicable guideline," *id.* § 1B1.3(a)(4).

We hold that the district court did not clearly err in finding that Jimenez exercised undue influence over I.G. By spending his own money to pay for I.G.'s visa application and fly her to the United States, Jimenez used his "resources" to "influence" I.G.'s decision to travel. By posing as a doctor and then discussing I.G.'s fertility with her, he used his superior "knowledge" to "influence" her decisions regarding when and how to engage in sexual activity with Pulido. And by instructing I.G. to tell her mother that she wouldn't be returning to Croatia, promising—but then refusing—to book her flight home, and controlling I.G.'s communications with her mother after she returned to Croatia, he used his "influence" to compromise the voluntariness of her decision to stay in the United States. Given this evidence, we hold that the district court correctly applied the undue-influence enhancement, and we affirm its decision in that respect.

b

Last up: Jimenez's challenge to the district court's imposition of the "custody, care, or supervisory control" enhancement. Section 2G1.3(b)(1)(B) instructs a sentencing court to enhance the offense level by two if a minor involved in a sex-related crime "was otherwise in the custody, care, or supervisory control of the defendant." U.S.S.G. § 2G1.3(b)(1)(B). Jimenez contends that the district court erroneously imposed this enhancement because, among other reasons, he didn't have custody of I.G. until after he had completed his offense conduct.

The district court applied the enhancement because, in its view, Jimenez was responsible for all conduct in furtherance of the conspiracy, which it described as "getting I.G. to have sex with Pulido." Sentencing Tr. at 17:4–6, Doc. 285. We agree.

To begin, the commentary to § 2G1.3 makes clear that the enhancement is "intended to have broad application"—such that, for instance, it may be imposed even where a minor is only "temporarily" entrusted to the defendant. U.S.S.G. § 2G1.3 cmt. n.2(A). Moreover, for reasons already explained, in assessing the appropriateness of Jimenez's sentence, we may consider all "[r]elevant conduct"—*i.e.*, not only his actions undertaken in preparation for and during the conspiracy, but also his actions ***1281** thereafter that were aimed at "attempting to avoid detection or responsibility," as well as any harm that "resulted from" or "that was the object of" his acts and omissions. U.S.S.G. §§ 1B1.3 (a)(1)(B), (a)(3).

Here, the case that I.G. was entrusted to Jimenez's care is straightforward. At the very least, Jimenez unquestionably exercised supervisory control over I.G. when she stayed at his home in Florida after her family returned to Croatia. The district court found that I.G.'s mother entrusted her daughter to Jimenez, and I.G. physically lived in his house for the week following her family's departure. Jimenez hasn't demonstrated that this factual determination was clearly erroneous. *See Demarest*, 570 F.3d at 1239. Accordingly, we agree that when I.G. lived under Jimenez's roof for a full week—without her family there with her—he assumed a caretaker-like status over her, *see United States v. Isaac*, 987 F.3d 980, 992 (11th Cir. 2021) (applying the enhancement where the defendant acted as a temporary caretaker charged with looking after the victim's wellbeing), and we therefore affirm the district court's application of the "custody, care, or supervisory control" enhancement.

IV

For the foregoing reasons, we **AFFIRM** the district court's judgment on all matters related to Pulido except his enticement count. On that issue, we **VACATE** his conviction and **REMAND** for resentencing in accordance with this opinion and with instructions that the enticement count be dismissed. We **AFFIRM** the district court's judgment on all matters related to Jimenez.

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

Rosenbaum, Circuit Judge, Concurring:
I join the Majority Opinion in full but write separately to highlight two points about our decision to vacate Pulido's 18 U.S.C. § 2422(b) conviction. First, our Circuit's strict approach to duplicitous indictments requires us to vacate Pulido's conviction, even though our sister circuits may have upheld it. Second, our decision will require the government to charge § 2422(b) violations by the enticement, not by the victim. And that defies the reality of the crime Congress intended to prevent.

As the Majority Opinion points out, a defendant violates § 2422(b) when the defendant *entices* the minor to engage in illegal sexual activity, Maj. Op. at 1269-70 that is, when the minor, in part because of the defendants' actions, *decides* to engage in illegal sexual activity with the defendant. Throughout an entire relationship, a defendant may engage many times in illegal sexual activity with a minor.

So it's no stretch to say that a count alleging a single violation of § 2422(b) based on a victim's entire relationship with a defendant may include multiple enticements (and thus multiple § 2422(b) violations under our precedent).

But it does not necessarily follow under the statutory text that an indictment is improper just because it alleges § 2422(b) violations by victim, rather than by enticement. After all, outside our Circuit, the government routinely charges § 2422(b) violations by the victim, not the enticement—and courts routinely uphold those conviction without discussion of potential duplicity issues. *See, e.g.*, *United States v. Greaux-Gomez*, 52 F.4th 426, 440 (1st Cir. 2022); *United States v. Harris*, 991 F.3d 552, 554 (4th Cir. 2021).

But our duplicity precedent differs from that of other circuits. We have made clear that "two distinct offenses" must be "alleged ***1282** in a separate and distinct count of the indictment." *United States v. Schlei*, 122 F.3d 944, 979

(11th Cir. 1997) (quoting *Bins v. United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 149, 13 L.Ed.2d 87 (1964)).[1] And under our prior-precedent rule, that precedent binds us. *See United States v. Davis*, 730 F.2d 669, 672 (11th Cir. 1984). So we must enforce our rule and require the government to charge individually the distinct enticements that occur throughout a victim's entire relationship with a defendant.

1 All Fifth Circuit decisions issued by the close of business on September 30, 1981, are binding precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Other circuits, by contrast, have not taken such a strict approach to duplicitous indictments. Some have adopted a "general rule that criminal charges may aggregate multiple individual actions that otherwise could be charged as discrete offenses as long as all of the actions are part of 'a single scheme.' " *United States v. Moloney*, 287 F.3d 236, 240 (2d Cir. 2002) (quoting *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981)); *see also United States v. Canas,* 595 F.2d 73, 78–79 (1st Cir. 1979). In other words, just because the government *can* charge multiple violations separately does not mean that it *must* do so. And that makes some sense. When the "essence" of the alleged crime is a "single scheme," the risk of unfairness to the defendant is "slight," *Margiotta*, 646 F.2d at 733, because a jury must unanimously agree that the totality of the defendant's conduct violates the pertinent statute.

That is especially true for how the government prosecutes § 2422(b) offenses. The essence of the offense is often a "single scheme": a prolonged, impermissible sexual relationship with a minor. So when a jury convicts a defendant of perpetrating such a relationship in violation § 2422(b), it necessarily unanimously concludes that the defendant caused the minor's mental state to change from not agreeing to engage in a sexual relationship with the defendant to agreeing to do so. To be sure, without a proper instruction,[2] there is the chance that jurors do not debate and agree on the exact *instance* when the victim's mental state changed. But even in that case, there is no dispute that the jurors unanimously agreed that the defendant violated the statute.

2 Because a duplicitous indictment is not a structural error, we assess in each case whether the duplicitous count was harmless. *See United States v. Deason*, 965 F.3d 1252, 1267 (11th Cir. 2020). And an instruction to the jury may render a duplicitous indictment harmless. *See United States v. Damrah*, 412 F.3d 618, 623 (6th Cir. 2005) (concluding a unanimity instruction rendered any duplicity harmless); *Cf. Schlei*, 122 F.3d at 980 (concluding duplicity doomed the indictment and noting the "absence of a unanimity instruction"). For instance, if the district court had instructed the jurors that they must unanimously agree as to at least one instance where Pulido persuaded, induced, enticed, or coerced I.G. to engage in illegal sexual activity during the course of their relationship, then we could have been sure that

> the jury unanimously agreed as to at least one completed § 2422(b) offense. Any duplicity would have been harmless, and we would have upheld the conviction.

Still, our precedent forecloses us from entertaining such contentions. And that leads me to my second point: our precedent will force the government to charge § 2422(b) violations by the enticement, rather than the victim, which defies the reality of the crime Congress enacted § 2422(b) to prevent.

Congress amended § 2422(b) to its modern form in 1996 to combat the growing ***1283** trend of "cyberpredators interacting with minors online." Andriy Pazuniak, *A Better Way to Stop Online Predators: Encouraging A More Appealing Approach to § 2422(b)*, 40 SETON HALL L. REV. 691, 696 (2010). Congress was concerned that "[t]he anonymous nature of the on-line relationship allows users to misrepresent their age, gender, or interests. [So] [p]erfect strangers can reach into the home and befriend a child." H.R. REP. NO. 105-557, at 12 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 680. In other words, Congress sought to prevent the harm and trauma of an inappropriate and illegal sexual relationship that a cyberpredator's single but ongoing enticement caused.

And that makes sense because, as a matter of reality, a victim's second and later sexual acts with the same predator are often further consequences of the initial (and continuing) enticement. After all, once a predator has, over days, weeks, months, or even years, changed a victim's mind so that the victim acquiesces in the first sexual act, the victim's reluctance to engage in sexual acts with the predator has been breached. So the victim may be more likely to acquiesce in additional sexual acts without further enticement. And in any case, even if further enticement occurs, it's often fair to say that the initial enticement was vital to convincing the victim's later sexual acts. So charging § 2422(b) violations by each sexual act enticed throughout that relationship ignores both reality and the core ill Congress sought to combat.

That, in turn, leads to some odd, and even harmful, results. For starters, it may be impossible to ascertain whether a victim's state of mind changed multiple times throughout their relationship with the defendant or whether the victim's entire relationship with the defendant derived from the initial enticement. But because the government must charge individual enticements separately, it will likely have to parse the victim's sexual activities by the event to effectively capture each time the victim's state of mind changed (or if it never did). And beyond the practical issues that may pose for a witness who may struggle to remember their thoughts and feelings at such a granular level, it will force the victim to relive before a grand jury and in open court harsher versions of the trauma they already endured.

Plus, the government will charge multiple times a crime that already carries a ten-year mandatory-minimum sentence with the possibility of up to life in prison. 28 U.S.C. § 2422(b). Congress vested judges with the discretion to determine the proper sentence within that range based on the totality of the facts before them. But forcing the government to charge by the enticement, rather than the victim, multiplies the statutory minimum;

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it eliminates the application of our usual sentencing practices that secure uniform and proportionate punishments; and, in some cases, it may even impose an effectively automatic life sentence.

This is all to say the Majority Opinion arrives at the correct disposition under our precedent, but I have deep concerns about the correctness of our precedent. Congress enacted § 2422(b) to prevent the instigation of illegal sexual relationships with minors online. It understood that a single enticement, inducement, persuasion, or coercion could instigate a prolonged sexual relationship that inflicts immense and lasting trauma on minor victims. And the government has routinely charged § 2422(b) violations on that understanding. But our duplicity jurisprudence—an anomaly compared to that of other circuits—will now force the United States to charge and try cases by the enticement, rather than the victim. And that departs from the reality ***1284** of the crime the defendant perpetrated, all while harming the victim in the process.

All Citations

133 F.4th 1256, 30 Fla. L. Weekly Fed. C 2059

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APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

JORDAN JYSAE PULIDO

Case Number: 8:20-cr-292-VMC-CPT

USM Number: 11176-509

Samuel Landes, AFPD

AMENDED JUDGMENT IN A CRIMINAL CASE

(Amended in accordance with the Eleventh Circuit Court of Appeals mandate vacating Defendant's conviction on Count One of the Indictment and remanding the case for resentencing.)

Defendant was found guilty after a jury trial of Counts One, Two, Three, and Four of the Indictment. Defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 U.S.C. § 2423(b)	Travel with Intent to Engage in Illicit Sexual Conduct	June 15, 2018	Two
18 U.S.C. §§ 2423(a) and (e)	Conspiracy to Transport Minor with Intent to Engage in Sexual Activity	July 23, 2018	Three
18 U.S.C. § 2423(a)	Transportation of a Minor with Intent to Engage in Sexual Activity	July 23, 2018	Four

Defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count One of the Indictment is dismissed in accordance with the Eleventh Circuit Court of Appeals mandate.

IT IS ORDERED that Defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, Defendant shall notify the Court and United States Attorney of any material change in Defendant's economic circumstances.

Date of Imposition of Judgment: February 23, 2022

Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

September 10, 2025

IMPRISONMENT

Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **ONE HUNDRED TWENTY (120) MONTHS**. This term consists of a 120-month term as to each of Counts Two, Three, and Four, all such terms to run concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

- Defendant continue to be housed at FCI Coleman, so that he may be near his family and friends.
- Defendant be allowed to take college-level classes.
- Defendant be allowed to continue to participate in the UNICOR program.

Defendant is remanded to the custody of the US Marshal to await designation by the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ____________________ to ______________________________________

at ____, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By:____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, Defendant shall serve a **TWENTY (20) YEAR** term of supervised release. This term consists of a 20-year term as to each of Counts Two, Three, and Four, all such terms to run concurrently.

MANDATORY CONDITIONS

1. Defendant shall not commit another federal, state, or local crime.
2. Defendant shall not unlawfully possess a controlled substance.
3. Defendant shall refrain from any unlawful use of a controlled substance. Defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - The mandatory drug testing provisions of the Violent Crime Control Act are suspended. However, the Court orders Defendant to submit to random drug testing not to exceed 104 tests per year.
4. Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.
5. Defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

Defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of Defendant's supervised release, Defendant shall comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for Defendant's behavior while on supervision and identify the minimum tools needed by Probation Officers to keep informed, report to the court about, and bring about improvements in Defendant's conduct and condition.

1. Defendant shall report to the Probation Office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the Probation Officer instructs you to report to a different Probation Office or within a different time frame. After initially reporting to the Probation Office, Defendant will receive instructions from the court or the Probation Officer about how and when Defendant must report to the Probation Officer, and Defendant must report to the Probation Officer as instructed.
2. After initially reporting to the Probation Office, you will receive instructions from the court or the Probation Officer about how and when Defendant shall report to the Probation Officer, and Defendant shall report to the Probation Officer as instructed.
3. Defendant shall not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the Probation Officer.
4. Defendant shall answer truthfully the questions asked by your Probation Officer
5. Defendant shall live at a place approved by the Probation Officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
6. Defendant shall allow the Probation Officer to visit you at any time at your home or elsewhere, and Defendant shall permit the Probation Officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. Defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the Probation Officer excuses you from doing so. If you do not have full-time employment Defendant shall try to find full-time employment, unless the Probation Officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer at least 10 days in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
8. Defendant shall not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, Defendant shall not knowingly communicate or interact with that person without first getting the permission of the Probation Officer.
9. If you are arrested or questioned by a law enforcement officer, Defendant shall notify the Probation Officer within **72 hours**.
10. Defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. Defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the Probation Officer determines that you pose a risk to another person (including an organization), the Probation Officer may require you to notify the person about the risk and Defendant shall comply

with that instruction. The Probation Officer may contact the person and confirm that you have notified the person about the risk.

13. Defendant shall follow the instructions of the Probation Officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. Probation Officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature:______________________________ Date:_________________________

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. Defendant shall participate in a mental health treatment program (outpatient and/or inpatient) and follow the Probation Officer's instructions regarding the implementation of this court directive. Further, Defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Mental Health Treatment Services.

2. Defendant shall participate in a mental health program specializing in sexual offender treatment and submit to polygraph testing for treatment and monitoring purposes. Defendant shall follow the Probation Officer's instructions regarding the implementation of this court directive. Further, Defendant shall contribute to the costs of such treatment and/or polygraphs not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third-party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.

3. Defendant shall register with the state sexual offender registration agency(s) in any state where Defendant resides, visits, is employed, carries on a vocation, or is a student, as directed by the Probation Officer.

4. The Probation Officer shall provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S. 943.0435) and/or the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248), and may direct the Defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

5. Defendant shall have no direct contact with minors (under the age of 18) without the written approval of the Probation Officer and shall refrain from entering into any areas where children frequently congregate, including: schools, daycare centers, theme parks, playgrounds, etc.

6. Defendant is prohibited from possessing, subscribing to, or viewing any images, videos, magazines, literature, or other materials depicting children in the nude and/or in sexually explicit positions.

7. Without prior written approval of the Probation Officer, Defendant is prohibited from either possessing or using a computer (including a smart phone, a hand-held computer device, a gaming console, or an electronic device) capable of connecting to an online service or an internet service provider. This prohibition includes a computer at a public library, an internet cafe, Defendant's place of employment, or an educational facility. Also, Defendant is prohibited from possessing an electronic data storage medium (including a flash drive, a compact disk, and a floppy disk) or using any data encryption technique or program. If approved to possess or use a device, Defendant must permit routine inspection of the device, including the hard drive and any other electronic data storage medium, to confirm adherence to this condition. The United States Probation Office must conduct the inspection in a manner no more intrusive than necessary to ensure compliance with this condition. If this condition might affect a third party, including Defendant's employer, Defendant must inform the third party of this restriction, including the computer inspection provision.

8. Defendant shall have no contact, direct or indirect, with the victim, I.G., or her family.

9. Defendant shall submit to a search of his person, residence, place of business, any storage units under Defendant's control, computer, or vehicle conducted by the United States Probation Officer at a

reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

10. Having been convicted of a qualifying felony, Defendant must cooperate in the collection of DNA, as directed by the Probation Officer.

11. The mandatory drug testing requirements of the Violent Crime Control Act are suspended. However, Defendant must submit to random drug testing not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

Defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment*
SATISFIED	SATISFIED	WAIVED	N/A	N/A

Defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If Defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

SCHEDULE OF PAYMENTS

Having assessed Defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

Special Assessment shall be paid in full and is due immediately.

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, and (9) penalties, and (10) costs, including cost of prosecution and court costs.

FORFEITURE

Defendant shall forfeit to the United States those assets that are subject to forfeiture as previously identified in the Order of Forfeiture and any subsequent orders.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

APPENDIX F

2026 WL 879751
Only the Westlaw citation
is currently available.
United States Court of
Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Jordan Jysae PULIDO,
Defendant-Appellant.

No. 25-13215
|
Non-Argument Calendar
|
Filed: 03/31/2026

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:20-cr-00292-VMC-CPT-1

Attorneys and Law Firms

Julia Kapusta, U.S. Attorney Service - Middle District of Florida, U.S. Attorney, DOJ-USAO, Appellate Division, Tampa, FL, for Plaintiff-Appellee.

Samuel Landes, Laura Daines, Federal Defender Organization, Middle District of Florida, Tampa, FL, for Defendant-Appellant.

Before Jill Pryor, Newsom, and Branch, Circuit Judges.

Opinion

PER CURIAM:

***1** Jordan Pulido appeals his convictions for transporting a minor with the intent to engage in criminal sexual activity and conspiring to transport a minor with the intent to engage in criminal sexual activity. Pulido argues that the indictment was insufficient because it failed to identify the specific criminal sexual offenses serving as the predicate for these charges under 18 U.S.C. § 2423(a).

Summary disposition is appropriate where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groen-dyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

We "review the district court's denial of a motion to dismiss the indictment for abuse of discretion" and the sufficiency of an indictment de novo. *United States v. Schmitz*, 634 F.3d 1247, 1259 (11th Cir. 2011) (quoting *United States v. Pendergraft*, 297 F.3d 1198, 1204 (11th Cir. 2002)). "An indictment 'is sufficient if it (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.' " *United States v. Chalker*, 966 F.3d 1177, 1190 (11th Cir. 2020) (quoting *United States v. Woodruff*, 296 F.3d 1041, 1046 (11th Cir. 2002)).

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Section 2423(a) imposes criminal penalties upon "[a] person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce ... with intent that the individual engage ... in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2423(a). In *Doak*, we held that an indictment containing charges of § 2423(a) is legally sufficient even if it omits the criminal sexual offenses underpinning those charges. *United States v. Doak*, 47 F.4th 1340, 1352-53 (11th Cir. 2022). We reasoned that those underlying offenses are not essential elements of § 2423(a), but rather a means of showing an essential element, specifically, that the defendant intended to commit a criminal sexual offense. *Id.* While we stated that "it is best practice to include the statutes criminalizing the sexual activity," we clarified that doing so was not mandatory. *Id.* at 1353.

Under the law-of-the-case doctrine, findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal unless there is new evidence, an intervening change in controlling law that dictates a different result, or the appellate decision would cause manifest injustice because it is clearly erroneous. *Stout by Stout v. Jefferson Bd. of Educ.*, 882 F.3d 988, 1014 (11th Cir. 2018).

***2** We are bound to adhere to our prior panel precedent unless that precedent has been abrogated by this Court sitting en banc or by the Supreme Court. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016).

Here, we conclude that summary affirmance is warranted because the government has met its burden of showing that its position is correct as a matter of law. *Doak*, which forecloses Pulido's argument, is binding under the prior precedent rule. Moreover, because we affirmed Pulido's convictions under § 2423(a) during his first appeal, summary affirmance is also warranted under the law-of-the-case doctrine.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2026 WL 879751

