In the Supreme Court of the United States

No. 26____

Dimitri McKenzie, Applicant

v.

United States of America

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Ketanji Brown Jackson
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the First Circuit

Pursuant to Rules 13.5, 30.1, and 30.2 of this Court, counsel for Dimitri McKenzie respectfully requests a 60-day extension of time, to and including Monday, January 25, 2027, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. Unless extended, the time to file a petition for a writ of certiorari will expire on Tuesday, November 24, 2026. Applicant invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). Undersigned counsel was appointed under the Criminal Justice Act.

This case presents an important, often-litigated question implicating a criminal defendant's rights at trial: Whether in a prosecution for attempted sex trafficking of a child under 18 U.S.C. §§ 1591(a)(1) and 1594(a), where an adult police agent posed as a minor and no actual minor exists, the government may obtain a conviction even if the jury concludes that the defendant correctly believed that the adult was an adult, so long as the government proves that the defendant recklessly disregarded a risk that the adult was a minor. The First Circuit answered in the affirmative in a holding that implicates not only this statute but the application of *mens rea* to attempt crimes more broadly.

Sting operations are a common tactic of law enforcement, in which police first pose as accomplices of suspects and then arrest the suspects once they take a substantial step towards the completed offense. *See United States v. Hacha*, 727 F.3d 815, 817 (7th Cir. 2013). Because it is a police sting, the completed offense is often impossible. *Id.* For example, a sting operation inviting a suspect to rob a drug stash house involves no actual drug stash house, or a sting operation in which a suspect solicits sex from a

child online involves no actual child. *See, e.g., Hacha*, 727 F.3d at 817 (sting involving non-existent stash house); *United States v. Medina*, 155 F.4th 11, 14 (1st Cir. 2025) (sting involving fictional minor). Instead, law enforcement deceives the suspect about the existence of those factual elements of the offense in order to protect the public from the risk of a completed offense. *Hacha*, 727 F.3d at 817.

When a required factual element of an offense does not exist, the government must instead prove beyond a reasonable doubt the defendant *believed* that the non-existent factual element existed. *See, e.g., United States v. Williams*, 553 U.S. 285, 301, 128 S. Ct. 1830, 1843 (2008); *see also United States v. Farner*, 251 F.3d 510, 512 (5th Cir. 2001). Defense of these cases thus frequently turns upon the defendant's *mens rea* and whether he actually believed in the existence of the required but missing factual element of the offense. For example, the defendant might argue he never believed there was a drug-stash house, or that the person chatting online was a child. Before this case, no reported case had approved a jury instruction to

convict a defendant even if he did not actually believe the missing but required factual element existed.

In Mr. McKenzie's case, he was charged with attempting to sex traffic a 14-year-old minor that he was to meet at a hotel. 18 U.S.C. § 1591(a)(1) (substantive offense) and 18 U.S.C. § 1594(a) (criminalizing attempt). A factual element of that offense was that the person "had not attained the age of 18 years," and the *mens rea* attached to that factual element was that the defendant "knew, or recklessly disregarded" that fact. 18 U.S.C. § 1591(a). There was no minor, because this was a police sting operation. Instead, Mr. McKenzie was shown a picture of an adult woman (actually a person cooperating with police) and told that she was a minor. He testified at his trial that once he saw the picture, he believed that he was meeting an adult.

The government sought and obtained an instruction that the jury should convict Mr. McKenzie if he *either* believed that the adult was a minor *or* if he recklessly disregarded a risk that the adult was a minor. Mr. McKenzie objected, arguing that because there was no minor, he could

only be convicted if the government proved that he actually believed there was a minor. The trial court gave the instruction requested by the government. After the court instructed the initially deadlocked jury to continue deliberations and subsequently excused one juror, the jury convicted Mr. McKenzie.

On appeal, the First Circuit affirmed Mr. McKenzie's conviction. *United States v. McKenzie*, 178 F.4th 74 (1st Cir. 2026). Mr. McKenzie argued that because there was no minor, he could not have been reckless about the minor's age, and instead could only be convicted if he actually believed the adult woman he was to meet was a minor. Instead, the jury instructions permitted conviction for being reckless about the adult woman's age, which Mr. McKenzie argued presented a case of legal impossibility. The First Circuit, concluding that it wrote upon a "blank slate," *McKenzie*, 178 F.4th at 83, held that the jury was correctly instructed that it could convict Mr. McKenzie if he were reckless about the age of the adult woman posing as a minor in this case, even if the jury credited his testimony that he correctly believed the adult was an adult. *McKenzie*, 178 F.4th at 85.

The First Circuit's holding permitted a conviction for an attempt crime even though neither the actual circumstances nor the circumstances as the defendant believed them to be would constitute the completed federal offense. That constitutes a new crime of recklessly obeying the law, which conflicts with the holdings of other circuit courts of appeals and merits this Court's review.

This Court has found federal *mens rea* questions worthy of review before. As this Court explained in *Elonis*, even when a statute is silent on a required mental state, federal courts will read into the statute a *mens rea* necessary to separate wrongful conduct from innocent conduct. *Elonis v. United States*, 575 U.S. 723, 736, 135 S. Ct. 2001, 2010 (2015). The First Circuit's holding reverses that practice, instead reading into the statute a *mens rea* that inculpates even innocent conduct. Mr. McKenzie testified that he was seeking to meet an adult whom he correctly believed was an adult. If the jury credited that testimony, he should have been acquitted. The First Circuit erred by affirming an instruction that allowed his conviction despite his belief that the adult was an adult.

Counsel for applicant respectfully requests a 60-day extension of time to and including Monday, January 25, 2027, within which to file a petition for a writ of certiorari. Undersigned counsel represented the applicant below and has been diligently working on the petition, but a number of other appellate and trial matters have required counsel's attention during the last three weeks, including an opposition to a motion to dismiss the appeal in *United States v. Lugo*, Nos. 26-396 & 26-504 (2d Cir.), filed Nov. 9, 2026; a reply brief in *United States v. Romero Reyes*, No. 26-1105 (1st Cir.), filed Nov. 9, 2026; an appellant's brief in *United States v. Pritchett*, No. 25-1928 (2d Cir.), filed Nov. 4, 2026; and oral argument in *New Hampshire v. Blaisdell* before the New Hampshire Supreme Court, held on Nov. 3, 2026. The foregoing are all court-appointed criminal cases. An extension would allow counsel time to analyze the issues presented, review the record, and prepare the petition for filing.

The undersigned counsel also has several upcoming deadlines between now and the current filing deadline, including: A brief in *New Hampshire v. Vittum*, No. 2026-0018 (N.H.), due Nov. 16, 2026; a brief in *New*

Hampshire v. Trueman, No. 2026-0023 (N.H.), due Nov. 19, 2026; and oral argument before New Hampshire's Sentence Review Board in *New Hampshire v. Raymond*, No. 216-2022-CR-1821, on Nov. 20, 2026. The foregoing are all likewise court-appointed criminal cases.

Additionally, the undersigned is a solo practitioner focused upon indigent defense. An extension would permit counsel time to not only craft the petition, but to enlist the aid of fellow appellate criminal defense practitioners, who will have their own prior commitments and require time to review the draft petition.

Respectfully submitted,

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NOVEMBER 12, 2026

In the Supreme Court of the United States

No. 26____

Dimitri McKenzie, Applicant

v.

United States of America

CERTIFICATE OF SERVICE

I, Jeremiah R. Newhall, counsel for applicant Dimitri McKenzie appointed under the Criminal Justice Act, certify that, on November 12, 2026, one copy of the Application for an Extension of Time To File a Petition for a Writ of Certiorari in the above-captioned case was sent by third-party carrier for overnight delivery to:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave., N.W.
Room 5616
Washington, DC 20530-0001

I further certify that all parties required to be served were served.

Respectfully Submitted,

/s/ Jeremiah R. Newhall
Jeremiah R. Newhall

APPENDIX

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United States Court of Appeals
For the First Circuit

No. 24-2087

UNITED STATES OF AMERICA,

Appellee,

v.

DIMITRI MCKENZIE,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Barron, Chief Judge,
Howard and Kayatta, Circuit Judges.

Jeremiah R. Newhall, with whom Newhall Law Firm was on brief, for appellant.

Karen L. Eisenstadt, Assistant United States Attorney, with whom Leah B. Foley, United States Attorney, was on brief, for appellee.

June 12, 2026

KAYATTA, Circuit Judge. In response to an online advertisement for commercial sex, Dimitri McKenzie agreed to pay for sex with "Bri," who he was told was fourteen years old. Unbeknownst to McKenzie, "Bri" did not exist, and the ad had been posted as part of an undercover operation conducted by federal law enforcement. When McKenzie arrived at an agreed-upon hotel later that night, agents arrested him. A federal jury subsequently convicted him of attempted sex trafficking of a child, in violation of 18 U.S.C. §§ 1591 and 1594.

McKenzie appeals his conviction, citing various alleged errors in the trial proceedings and the judgment entered against him. Because we find no merit in McKenzie's trial-related arguments, we affirm his conviction. In so doing, we also clarify the judgment as described below.

I.

A.

We provide the facts of this case with the following glosses: Because McKenzie raises a challenge to the sufficiency of the evidence, we relate the facts relevant to that challenge "in the light most favorable to the prosecution"; as to the facts relevant to McKenzie's other claims, "we provide a more or less neutral summary" and "reserve further exposition of those facts for our analysis of the claims themselves." United States v. Díaz-Rosado, 857 F.3d 116, 117 (1st Cir. 2017) (citation modified).

B.

This case arises from an online undercover operation conducted in the Boston area by Homeland Security Investigations (HSI).[1] On November 2, 2022, HSI special agent Kristen Draper posted an advertisement on a commercial-sex website.[2] According to testimony later given at trial, the ad showed two "young-looking" adult women, fully clothed and with faces obscured by emojis. The accompanying text read "fresh, tight, and ready for a good time" and listed an age of "99 years old."[3]

Around 8:30 p.m., McKenzie texted the phone number listed on the ad. Agent Draper responded, and the conversation proceeded as follows[4]:

DRAPER: I got couple young and fresh. bri 14 yo and jes 12 yo. one hour is $400 with both or $300 for 1 some things are lil extra
MCKENZIE: I'm not into anything under 18

[1] This "sting" operation has given rise to at least two other cases that have reached this circuit recently. See United States v. Medina, 155 F.4th 11 (1st Cir. 2025), cert. denied, No. 25-6203, 2026 WL 79673 (U.S. Jan. 12, 2026) (mem.); United States v. Quraishi, No. 25-1115 (1st Cir. argued Sept. 3, 2025).

[2] Multiple HSI agents participated in the operation. For the sake of simplicity, we use Agent Draper as a stand-in for the entire undercover team.

[3] At trial, Agent Draper testified that the website does not allow a user to select an age under eighteen years old, so she intended the listed age of ninety-nine years old to indicate that the poster "couldn't post the actual age of the individuals being advertised."

[4] We reproduce the messages here in their original form, aside from minor changes for clarity, which appear in brackets.

DRAPER: ok no worries babe. hit me up if u change your mind

McKenzie responded twenty-two seconds later:

MCKENZIE: Feds
DRAPER: your the feds? u gotta tell me
MCKENZIE: Hell no
You Definitely are
DRAPER: nope. but just let us be. thanks
MCKENZIE: I only have 100
Could you do that
DRAPER: i could do it for one girl for 20 mins. so like a [quick visit]
no extras
def no anal
wear condom
MCKENZIE: Ok
DRAPER: which girl. you like young and super tight or lil more experience with 14 yo
MCKENZIE: 14

At that point, it was 8:52 p.m., and about twenty-two minutes had passed since McKenzie initiated the conversation. McKenzie then asked Agent Draper to "[v]erify" by sending a picture of "Bri."[5] When the picture did not come through, McKenzie texted, "Im out I'm just really suspicious of this whole thing." But sixteen seconds later, he followed up: "What's the address." After Agent Draper sent the address for a hotel in Waltham, Massachusetts, McKenzie asked, "Is there anyway you can confirm you not the feds." The two then discussed how each could trust that the other was not law enforcement. At one point, in response to McKenzie's requests for verification, Agent Draper stated, "i

[5] Because no "Bri" existed, we put her name in quotations.

aint sending porn. thats some federal prison shit." Eventually, McKenzie implored, "Please I want this I'm just scared."

In response, Agent Draper called McKenzie twice, but she got no response either time. A few minutes later, McKenzie called back, and Agent Draper picked up. During the ensuing conversation, Agent Draper apparently intimated that "Bri" and "Jes" were her daughters and agreed to provide a picture of "Bri." After the call, when the picture did not immediately come, McKenzie called again -- without an answer -- and then texted, "Hey" and "You still there?" At that point, Agent Draper sent an age-regressed image of an adult woman with the date scrawled on her palm; in the image, the woman has a nose piercing and what appears to be a tattoo on her wrist largely covered by her sleeve.[6] Within moments, McKenzie replied, "I'm on my way." Agent Draper then explained the procedure: McKenzie would meet Agent Draper outside the hotel, and, if she approved, she would give him the key card to a hotel room where "Bri" would be waiting for him.

Before arriving, McKenzie texted once more, this time asking whether Agent Draper was available for commercial sex. When she said no and McKenzie called that suspicious, she retorted, "Seriously dude I'm not tryna be rude but this is what we do... if

[6] Agent Draper testified at trial that the image had been put through an age-regression application. McKenzie did not challenge this testimony below and does not do so before us, either.

ur not interested that's cool." Within a minute, McKenzie clarified, "I'm on my way [right now]."

Twenty minutes later, after stopping at an ATM to withdraw $120, McKenzie met Agent Draper in the hotel parking lot. It was roughly 10:37 p.m. The two confirmed the details of their deal, McKenzie showed that he had the agreed-upon $100, and Agent Draper handed him a room keycard. Agents then emerged and arrested McKenzie.

II.

A federal grand jury in the District of Massachusetts subsequently indicted McKenzie on one count of attempted sex trafficking of a child, in violation of 18 U.S.C. § 1591(a)(1), (b)(2) and § 1594(a). The case proceeded to trial, where, McKenzie asserts, the district court committed several errors that prejudiced his defense. We recount here only a sketch of the proceedings, shading in the details later as we confront each alleged error.

At trial, the government primarily relied on the testimony of Agent Draper, accompanied by transcripts of the text messages and phone calls between her and McKenzie. The defense case consisted solely of McKenzie's testimony on his own behalf. Based on that testimony, the defense argued that McKenzie had no prior sexual interest in minors, that he did not actually believe "Bri" was a minor, and that he went to the hotel intending only to

"talk" to "Bri" and help her escape trafficking rather than to have commercial sex.

After three days of deliberation, the jury returned a guilty verdict.[7] The district court entered judgment against McKenzie and sentenced him to a term of imprisonment of 126 months.

III.

McKenzie's primary argument on appeal presents a question of mens rea: What awareness of the fictional "Bri's" age did McKenzie need to have to be guilty of attempted sex trafficking of a minor?[8]

McKenzie argues that, because no actual minor was involved in this case, the government needed to prove that he believed "Bri" was under the age of eighteen. The government, for its part, contends that it only needed to show that McKenzie acted with reckless disregard as to "Bri's" age. We hold that, as to the age of the person solicited, the mens rea element of attempted

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[7] On the second day of deliberations, a Friday, the jury reported being deadlocked and the court gave an Allen charge. See Allen v. United States, 164 U.S. 492, 501 (1896). Because one juror had a flight the next morning, the court gave the parties a choice: either press on with deliberations and risk a mistrial if the jury did not reach a verdict by the end of the day, or replace the departing juror with the first alternate and resume deliberations the following Monday. At McKenzie's request, the court proceeded with the latter option, and the jury convicted McKenzie on Monday morning.

[8] Throughout this opinion, we use the term "minor" to refer to a person under the age of eighteen and the term "adult" to refer to a person aged eighteen or older.

sex trafficking of a minor is satisfied by proof that the defendant either believed, or recklessly disregarded a substantial and unjustifiable risk, that the person solicited for commercial sex was under the age of eighteen. Our reasoning follows.

A.

The issue of mens rea arises in two of McKenzie's challenges on appeal -- one to the district court's jury instructions and one to the sufficiency of the evidence. The two challenges make essentially the same argument: Absent the involvement of an actual minor, a conviction for attempted sex trafficking of a minor requires that the defendant actually believed the person he solicited for commercial sex was under the age of eighteen; reckless disregard as to the person's age, McKenzie contends, is not enough.[9]

The material facts regarding this issue are undisputed. The government presented no evidence that McKenzie's conduct involved any actual minor. Both individuals pictured in the

[9] McKenzie originally framed his claim of instructional error more broadly, seemingly contending that reckless disregard as to age would not be sufficient even if an actual minor was involved. However, at oral argument, counsel for McKenzie conceded -- sensibly in view of the statutory text -- that a defendant could be convicted of attempted sex trafficking of a minor based on a mens rea of reckless disregard as to age if the defendant's conduct involved an actual minor. In light of that concession, we view McKenzie's instructional-error and sufficiency-of-the-evidence challenges as coextensively asserting that reckless disregard as to age is only insufficient where, as here, no actual minor was involved.

original advertisement that McKenzie responded to were adults. The picture of "Bri" that Agent Draper sent McKenzie depicted an adult put through age-regression software. And no minor was in the hotel room that Agent Draper directed McKenzie to right before his arrest.

In relevant part, the district court's mens rea instruction stated:

> So what [the government has] got to prove beyond a reasonable doubt is that Mr. McKenzie, not what he testified to, but he intended to entice, obtain, patronize, or solicit a person to engage in a commercial sex act.
>
> [And that] Mr. McKenzie knew that the object of the commercial sex act was a child who had not obtained the age of 18 years or that he was acting in reckless disregard of whether that person was 18 or not. And so you have in mind -- first of all, he has to have intended sex for money. Now this is only an attempt, because there really wasn't a person here in the room. An attempt to do that. And then the second point is he has got to know or at least genuinely believe that the person who is being offered for the commercial sex act is a minor under the age of 18 years or he was acting in reckless disregard, he didn't care whether the person was or was not.

McKenzie timely objected to the inclusion of the "reckless disregard" mens rea standard, thereby preserving his claim of instructional error for appeal. See United States v. Stefanik, 674 F.3d 71, 76 (1st Cir. 2012). He also preserved his sufficiency-of-the-evidence claim by moving for a judgment of

acquittal at the close of the government's case and renewing that motion at the close of evidence. See id. at 74. Both challenges present a question of law, which we review de novo. Id. at 76 (claim of instructional legal error); id. at 74 (sufficiency of the evidence).[10]

B.

As this issue is essentially one of statutory interpretation, "we begin with the language of the statute itself." In re Fin. Oversight & Mgmt. Bd. for P.R., 919 F.3d 121, 128 (1st Cir. 2019). The statute in question defines the offense of sex trafficking of a minor as, in relevant part:

> (a) . . . knowingly . . .
> (1) . . . recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], obtain[ing], advertis[ing], maintain[ing], patroniz[ing], or solicit[ing] by any means a person . . .
> knowing, or, . . . in reckless disregard of the fact, . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act . . . .

[10] McKenzie's instructional-error claim challenges only the inclusion of the "reckless disregard" mens rea standard in the jury instructions, not the form or wording of the instructions. See Stefanik, 674 F.3d at 76 (differentiating between categorical challenges to the giving of an instruction at all and challenges to the "form or wording" of an instruction (quoting Uphoff Figueroa v. Alejandro, 597 F.3d 423, 434 (1st Cir. 2010))). Likewise, McKenzie's sufficiency-of-the-evidence argument challenges only the absence of an actual minor. He does not contend that the evidence could not support a finding of reckless disregard as to age. Nor does he challenge any other element of the offense.

18 U.S.C. § 1591(a).[11] Section 1594(a), in turn, makes it an offense to "attempt[] to violate section . . . 1591." Id. § 1594(a).

As relevant here, then, the substantive offense of sex trafficking of a minor requires two mental states: (1) knowingly soliciting a person; while (2) knowing that, or recklessly disregarding the fact that, a minor will be caused to engage in commercial sex by virtue of that solicitation. We are concerned here only with the latter mental state, under which reckless disregard as to age is clearly sufficient for a conviction of sex trafficking of a minor. Although the statute does not define "reckless disregard," caselaw establishes that "[a] person acts recklessly, in the most common formulation, when he 'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards." Borden v. United States, 593 U.S. 420, 427 (2021) (quoting Model Penal Code § 2.02(2)(c) (A.L.I. 1985)); see also Neder v. United States, 527 U.S. 1, 21 (1999) ("Where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless

[11] For convenience, we refer to the menagerie of actions proscribed by § 1591(a)(1) -- recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, and soliciting -- as, simply, "soliciting" or "solicitation." We note, however, that the statute requires knowledge, not just reckless disregard, of age when the charge is based on advertising. 18 U.S.C. § 1591(a).

the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." (citation modified)).

As for attempted sex trafficking of a minor, McKenzie concedes that reckless disregard as to age generally suffices for a conviction. He also concedes that an attempt conviction does not generally require that the person solicited be an actual minor (such as where an adult, undercover officer poses as a minor). See, e.g., Bronson v. United States, No. 22-1745, 2023 WL 9900908, at *1 (1st Cir. Sep. 5, 2023) ("[Petitioner's] contention that he is actually innocent of the crime [of attempted sex trafficking of a minor] because there was no actual minor involved here fails to present a debatable claim."). McKenzie argues instead that, where the person solicited is not actually a minor, reckless disregard is not sufficient: The defendant must believe the person solicited is a minor. We therefore must determine whether this reading of the statute is correct.

c.

The parties each assert that out-of-circuit caselaw resolves this issue. We are unconvinced.

The government, for one, points out that several out-of-circuit cases involving undercover officers posing as minors list reckless disregard as to age as a sufficient mens rea for attempted sex trafficking of a minor. See, e.g., United States v. Haas, 986 F.3d 467, 478 (4th Cir. 2021) ("To sustain this

attempted-sex-trafficking-of-a-child conviction, the government must have proven that . . . [the defendant] knew or recklessly disregarded that the person was under the age of eighteen . . . ."). Yet, in each such case, the reviewing court either rested its decision on a finding of knowledge or else was not asked to decide the particular issue before us. See id. (addressing claim that defendant did not engage in a substantial step); United States v. Puff, No. 23-4457, 2025 WL 830439, at *2–3 (4th Cir. Mar. 17, 2025) (unpublished opinion) (per curiam) (concluding evidence supported finding of knowledge); United States v. Tunchez, 772 F. App'x 105, 106 (5th Cir. 2019) (unpublished opinion) (per curiam) (reviewing facts suggesting knowledge); United States v. Zam Lian Mung, 989 F.3d 639, 642–43 (8th Cir. 2021) (rejecting, on plain-error review, argument that reckless-disregard standard did not apply to sex trafficking of a minor absent allegations of force, fraud, or coercion of the minor); United States v. Baker, No. 24-1242, 2025 WL 342862, at *1 (9th Cir. Jan. 30, 2025) (unpublished opinion) (deciding evidence supported finding of knowledge); United States v. Robinson, 993 F.3d 839, 844 (10th Cir. 2021) (addressing argument that defendant did not intend for target to engage in commercial sex acts until after she was no longer a minor).

McKenzie, for his part, reads the out-of-circuit caselaw as requiring that, where the person solicited either is an adult

posing as a minor or does not exist at all, the defendant believe the person solicited was a minor. In doing so, he points primarily to the Eighth Circuit's decision in United States v. Wolff, 796 F.3d 972 (8th Cir. 2015) (per curiam). The defendant there had been ensnared in a sting operation when he tried to arrange for commercial sex with a sixteen-year-old. Id. at 973. Faced with Wolff's argument that a conviction required an actual minor, the Eighth Circuit explained that "the government must prove the requisite intent applicable to the predicate offense, but proof of the ability to actually carry out the predicate offense is not required for conviction under an attempt statute." Id. at 974–75. In the end, "Wolff's subjective intent to engage in a commercial sex act with someone he believed to be a minor female," combined with the steps he took toward that goal, "constitute[d] attempted sex trafficking of a minor in violation of 18 U.S.C. § 1594(a)." Id. at 975. That Wolff's belief as to age was sufficient, though, does not mean that reckless disregard would not have been as well. See United States v. Saldaña-Rivera, 914 F.3d 721, 725 (1st Cir. 2019) (observing that courts may "cho[o]se to rest on obviously sufficient grounds for affirmance without suggesting that other grounds [are] also not available"); see also United States v. Medina, 155 F.4th 11, 20–22 (1st Cir. 2025) (similarly approving of jury instructions that required knowledge as to age, without indicating that a reckless-disregard-as-to-age instruction would

have been improper), cert. denied, No. 25-6203, 2026 WL 79673 (U.S. Jan. 12, 2026) (mem.).

McKenzie also points to United States v. Jayavarman, 871 F.3d 1050 (9th Cir. 2017). In Jayavarman, the Ninth Circuit rejected the argument that an attempt to produce and transport a visual depiction of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2251(c), required the presence of an actual minor, holding that "a defendant may be convicted of an attempt to violate § 2251(c) if he believes that the victim is a minor, even if the victim turns out to be an adult." Id. at 1059. McKenzie reads this as requiring such belief when there is no actual minor involved. And, because a completed offense under § 2251(c) imposes strict liability as to age, id. at 1058, McKenzie argues we should not understand an attempt to violate § 1591(a) to require any lower mens rea than an attempt to violate § 2251(c).

There are two problems with this reasoning. First, as with Wolff, Jayavarman's conclusion that belief as to age suffices for an attempt to violate § 2251(c) does not mean that such belief is required. Second, even if it did, § 2251(c)'s strict liability regime in fact makes it an inappropriate comparator for attempted sex trafficking of a minor. This is because "[t]he rationale for punishing factually impossible attempts" -- i.e., where no minor is present -- "is that the defendant has taken substantial steps with a culpable mens rea." Kenneth W. Simons, Mistake and

Impossibility, Law and Fact, and Culpability: A Speculative Essay, 81 J. Crim. L. & Criminology 447, 480 n.109 (1990). "This rationale, however, does not extend to strict liability, which requires no culpability at all." Id. In contrast, § 1591(a)'s "reckless disregard" is a culpable mens rea, requiring some awareness of a substantial risk of criminality. For this reason, we find Jayavarman's holding as to § 2251(c) unhelpful in understanding § 1591(a).

So, as far as the precedent cited by the parties goes, we are left with a blank slate upon which to write our answer.

D.

We turn, then, to the federal law of attempt in general. "There is no statutory definition of attempt anywhere in the federal law." United States v. Dworken, 855 F.2d 12, 16 (1st Cir. 1988). Instead, this circuit turns to the Model Penal Code to define "attempt." United States v. Benítez-Beltrán, 892 F.3d 462, 468 (1st Cir. 2018). Under that definition, "we have viewed the two key elements of the offense of attempt as (1) an intent to commit the substantive offense and (2) a substantial step towards its commission." United States v. Doyon, 194 F.3d 207, 210 (1st Cir. 1999) (citation modified).

However, that "intent" need not attach to all elements of the substantive offense. Rather, as the commentary to the Model Penal Code explains, the requisite intent "extends to the conduct

of the actor and to the results that his conduct causes" but "need not encompass all of the circumstances included in the formal definition of the substantive offense." A.L.I., Model Penal Code & Commentaries § 5.01 cmt. 2, at 301 (1985). These "circumstances" "refer to the objective situation that the law requires to exist," such as the traditional requirement that a burglary take place at night. Id. at 301 n.9. As to these circumstances, "it is sufficient that [the defendant] acts with the culpability that is required for commission of the completed crime." Id. at 301; see also Simons, supra, at 478–84 (discussing application of different mental states to circumstances and results for attempt liability).

In arguing that the government must show he subjectively believed "Bri" was under eighteen to convict, McKenzie points to the second element of attempt, the "substantial step," which requires that the defendant "purposely do[] or omit[] to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Dworken, 855 F.2d at 16 (emphasis added) (quoting Model Penal Code § 5.01(1)(c) (A.L.I. 1985)). However, the language "under the circumstances as he believes them to be" simply ensures that, where a defendant believes a circumstance of the offense exists, the fact that the defendant is mistaken in that belief will not prevent a conviction for attempt. A.L.I., supra, § 5.01 cmt. 2, at 302

n.12. It does not override the principle that, as to such circumstances, an attempt defendant need only "act[] with the kind of culpability otherwise required for commission of the crime." Dworken, 855 F.2d at 16 (quoting Model Penal Code § 5.01(1)(c) (A.L.I. 1985)).

For example, suppose a law makes it a crime to knowingly injure a person while recklessly disregarding that the person is an FBI agent. See Herbert Wechsler, William Kenneth Jones & Harold L. Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, 61 Colum. L. Rev. 571, 575-76 (1961).[12] Under the foregoing framework for attempt liability, the injury is the result that a defendant must intend, while "the fact that the victim is an agent would be only a circumstance as to which the actor [must have] the kind of culpability otherwise required for commission of the crime." Id. (quotation marks omitted). There would thus be an attempt to violate the statute if the actor attempted to injure a person, while recklessly disregarding the risk that the victim may be an FBI agent. Id. This is true regardless of the actor's subjective beliefs because "the language 'under the circumstances

[12] We have relied on this article before in understanding the law of attempt, as it "was written by the Chief Reporter and Special Consultants of the Model Penal Code, and was substantially adopted in the official commentary to the Code." Dworken, 855 F.2d at 16-17, 17 n.2.

as he believes them to be' . . . does not affect the analysis of cases like" this FBI agent hypothetical. A.L.I., supra, § 5.01 cmt. 2, at 302 n.12. The actor may, in fact, genuinely believe that the person is not an FBI agent, but the actor may also believe in circumstances that create a substantial and unjustifiable risk that the person is an FBI agent, such as that the person is wearing an FBI jacket and displaying an FBI badge. See also id. at 301–03, 303 n.13 (dissecting similar hypotheticals).

To apply this framework to sex trafficking of a minor, then, we must identify the conduct, result, and circumstances of the offense. That offense, as we have noted, prohibits knowingly soliciting a person while knowing or recklessly disregarding "that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a). The act of soliciting a person is plainly "the conduct of the actor," A.L.I., supra, § 5.01 cmt. 2, at 301, to which the "intent to commit the substantive offense," Doyon, 194 F.3d at 210 (quotation marks omitted), must extend for an attempt conviction. Similarly, the language "will be caused to engage in a commercial sex act" suggests that commercial sex is "the result[] that [the defendant's] conduct causes," to which such intent also must apply. A.L.I., supra, § 5.01 cmt. 2, at 301.

The age of the person solicited, on the other hand, is a "circumstance." Id.; see also id. at 301–02 (describing "the

age of the victim" as a circumstance of the offense of "sexual intercourse with a female under a prescribed age"). It is separated from the "conduct" of solicitation in § 1591(a) by a paragraph break and a distinct mens rea. And, unlike causing a person to engage in a commercial sex act, the age of the person solicited cannot be a result of the defendant's conduct since the defendant does not cause that person to be a minor. For an attempted-sex-trafficking-of-a-minor conviction, then, as to the circumstance of the age of the person solicited, "it is sufficient that [the defendant] acts with the culpability that is required for commission of the completed crime," id. at 301 -- to wit, with either knowledge or reckless disregard.

Therefore, the federal law of attempt liability suggests that an attempt to violate § 1591(a) -- i.e., an attempt to commit sex trafficking of a minor under § 1594(a) -- may be found where a defendant intends to solicit a person for commercial sex, if the defendant recklessly disregards whether the person solicited is under eighteen. That is so, even if the defendant believes the person to be an adult. This framework does not distinguish between those cases where the person solicited is actually a minor and those where the person solicited either turns out to be an adult posing as a minor or does not exist at all. Rather, the foregoing analysis indicates that, contrary to McKenzie's arguments, a mens rea of reckless disregard as to age suffices for an attempt

conviction even where the defendant's conduct involved no actual minor.

E.

Nevertheless, McKenzie seems to point to the statutory text, which refers to "the fact" "that the person has not attained the age of 18 years," 18 U.S.C. § 1591(a), to imply that an attempt conviction requires the actual existence of a person younger than eighteen. See Fact, Black's Law Dictionary (12th ed. 2024) (defining "fact" as "[s]omething that actually exists"). Under that reading, it might make sense to require that an actual minor be solicited for an attempt conviction relying on the reckless-disregard standard. On the other hand, several considerations convince us that the better reading is that no actual minor need be involved.

First, we must interpret § 1591(a), the substantive offense statute, not on its own but through the lens of § 1594(a), the attempt statute. We deal here with an "attempt[] to violate section . . . 1591." 18 U.S.C. § 1594(a). For such an attempt, not every fact necessary for the completed offense needs to be present, since "proof of the ability to actually carry out the predicate offense is not required for conviction under an attempt statute." Wolff, 796 F.3d at 974–75. McKenzie develops no argument why the "fact" of an actual minor would be uniquely necessary for an attempt conviction.

Second, requiring the presence of an actual minor would clash to some extent with indications of congressional intent in the most recent legislation to meaningfully amend § 1591(a), the Justice for Victims of Trafficking Act of 2015 (JVTA), Pub. L. No. 114-22, 129 Stat. 227. See Bittner v. United States, 598 U.S. 85, 96-98 (2023) (considering "drafting history" -- i.e., amendments to a statutory provision over time -- as one of several "contextual clues" toward that provision's meaning). The JVTA amended § 1591(a) by adding three new prohibited actions -- patronizing, soliciting, and advertising -- and clarifying that knowledge as to age is required where the action alleged is advertising a person for commercial sex. §§ 108(a)(1), 118(b)(1)-(2), 129 Stat. at 238, 247. In a statement of purpose in the JVTA, Congress expressed its intent to "mak[e] absolutely clear . . . that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders." Id. § 109(4), 129 Stat. at 239. In so doing, Congress favorably cited an Eighth Circuit opinion that reinstated the attempted-sex-trafficking convictions of two defendants caught in a sting operation in which adult law-enforcement agents posed as a man offering his girlfriend's minor daughters for commercial sex, using age-regressed photos of adult female officers. Id. § 109(3), 129 Stat. at 239 (citing United States v. Jungers, 702 F.3d 1066 (8th Cir. 2013)); see Bittner,

598 U.S. at 98 n.6 ("A preamble, purpose clause, or recital is a permissible indicator of meaning." (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 217 (2012))).

In other words, in the JVTA, Congress simultaneously (1) implicitly affirmed that a conviction for attempted sex trafficking of a minor may properly arise from a sting operation involving no actual minor, (2) did not amend § 1591(a) or § 1594(a) to clearly require knowledge or belief as to age for such a conviction, and (3) did amend § 1591(a) to require such knowledge in different circumstances (i.e., where the defendant only advertised a person for commercial sex). To be clear, the Eighth Circuit's decision in Jungers did not speak directly to the mens rea required for an attempt conviction. Nor would requiring the government to prove belief as to age in sting-operation cases prevent law enforcement from gaining convictions from such operations. See, e.g., Tunchez, 772 F. App'x at 106 (affirming conviction arising from similar sting operation based on defendant's belief that undercover officer was a minor). Still, the JVTA shows that Congress knows how to unequivocally require a higher mens rea for certain sex trafficking convictions. That it did not do so for attempted sex trafficking of a minor supports reading the statute to allow an attempt conviction, even absent an actual minor, based on reckless disregard as to age.

Finally, the policy behind modern attempt liability suggests no actual minor need be involved where the defendant has the culpable mental state of recklessness. McKenzie argues that, where an actual minor is involved, the defendant "threatens real harm," but "[a] defendant who seeks sexual contact with an adult or an imaginary person, while being reckless about their age, does not." However, between "the dangerousness of the actor's conduct" and "the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime," "the proper focus of attention is the actor's disposition." A.L.I., supra, § 5.01 cmt. 1, at 298; see also Dworken, 855 F.2d at 16 ("The function of this definition [of attempt] is to make amenable to the corrective process those persons who have manifested a propensity to engage in dangerous criminal activity."). A defendant who solicits commercial sex from a person, recklessly disregarding a substantial risk that the person is under eighteen, has shown a willingness to endanger a minor, regardless of whether the person solicited was under eighteen (or existed at all).

F.

The foregoing points toward the conclusion that a defendant may be convicted of attempted sex trafficking of a minor where he acts with reckless disregard as to whether the person solicited is a minor, even if that person is, in fact, an adult or a nonexistent creation of law enforcement.

McKenzie, though, contends that such a conclusion would permit a conviction in the face of legal impossibility. A "pure legal impossibility . . . arises when no statute proscribes the result that the defendant expected, desired, and intended to achieve." United States v. Fernandez, 722 F.3d 1, 31 (1st Cir. 2013) (citation modified). We have said before that "[p]ure legal impossibility is always a defense," including when the charged crime is an inchoate offense. United States v. Carter, 15 F.4th 26, 36 (1st Cir. 2021) (quoting Fernandez, 722 F.3d at 31). After all, a person cannot be convicted of attempting to do something that itself is not unlawful. See Fernandez, 722 F.3d at 31 ("[A] hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place." (quoting United States v. Hsu, 155 F.3d 189, 199 n.16 (3d Cir. 1998))).[13]

[13] In contrast, "factual impossibility," in which "a circumstance unknown to the defendant prevents him from achieving a specific objective," United States v. Dixon, 449 F.3d 194, 201–02 (1st Cir. 2006), is "not a defense to liability for inchoate offenses such as conspiracy or attempt," Carter, 15 F.4th at 47 (citation modified). For example, if a defendant believes he is soliciting a seventeen-year-old for commercial sex but is actually soliciting a nineteen-year-old, it would be factually impossible for him to complete the offense of sex trafficking of a minor, but that factual impossibility would not preclude an attempt conviction. See United States v. Chavez, 29 F.4th 1223, 1228 (10th Cir. 2022). "Pure legal impossibility" may also be distinguished from "mixed fact/law impossibility," which "involve[s] a factual mistake relating to a legal determination." Fernandez, 722 F.3d at 31 (quoting Ira P. Robbins, Attempting the Impossible: The Emerging Consensus, 23 Harv. J. on Legis. 377, 394 (1986)). In such a situation, "the actor's goal is illegal, but commission of the offense is somehow rendered impossible by attendant

From this premise, McKenzie's argument proceeds as follows. The district court's jury instructions allowed the jury to convict McKenzie if he acted with reckless disregard as to "Bri's" age, even if he truly believed "Bri" was an adult. But if he truly believed "Bri" was an adult, then, at most, he intended to solicit commercial sex with an adult. And § 1591(a) does not prohibit solicitation of commercial sex with an adult.[14] Therefore, the jury instructions permitted a conviction for an attempt to commit a legally impossible offense.

We are not persuaded. In framing this as a case of legal impossibility, McKenzie misconstrues the doctrine. In his view, "[t]he test is whether, if all things were as the defendant believed them to be, the defendant's intended acts would have violated a statute." In fact, the pertinent question is whether the law "proscribe[s] the goal that the defendant sought to achieve." Hsu, 155 F.3d at 199 n.16 (quoting Ira P. Robbins, Attempting the Impossible: The Emerging Consensus, 23 Harv. J. on

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circumstances." See Hsu, 155 F.3d at 199 n.16. Most federal courts of appeal do not recognize "mixed fact/law impossibility" as a defense, Hsu, 155 F.3d at 199 & n.16, though we have not weighed in one way or the other, Fernandez, 722 F.3d at 31 (distinguishing this type of impossibility from pure legal impossibility).

[14] Section 1591(a) does criminalize the solicitation of an adult where force, threats, fraud, or coercion cause the adult to engage in commercial sex. The government does not press any argument that this alternate ground for criminal liability applies to McKenzie's case.

Legis. 377, 389 (1986)). Even under the situation described by McKenzie, his goal was not the solicitation of commercial sex with an adult but rather the solicitation of commercial sex with a person whose potential minority he recklessly disregarded. That McKenzie believed that person to be an adult does not mean that he intended it so. He may have, instead, intended simply to solicit commercial sex, without caring whether the person solicited was an adult or a minor. That does not make out a legal impossibility defense. See generally Simons, supra, at 478–83, 479 n.105 (dissecting hypothetical where "the crime of receiving stolen property requires only reckless, conscious disregard of the risk that they are stolen," defendant receives property believing it is not stolen, property is in fact not stolen, and yet defendant's belief is reckless, under same Model Penal Code-derived definition of "reckless" we use here).

This conception of legal impossibility may be narrower than McKenzie had hoped, but that is a function of the statute. Although we have said that "[p]ure legal impossibility is always a defense," Carter, 15 F.4th at 36 (quoting Fernandez, 722 F.3d at 31), legal impossibility must be adjudged through the lens of the offense as defined by statute, see United States v. Bailey, 444 U.S. 394, 406 (1980) ("Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates."). Congress has chosen to prohibit not just

the knowing solicitation of a minor for commercial sex, but the knowing solicitation of a person for commercial sex, while knowing or recklessly disregarding that such person is a minor. To qualify for the defense of legal impossibility, then, it is not enough that McKenzie simply believed that "Bri" was an adult in the face of a substantial risk that she was not. See A.L.I., supra, § 5.01 cmt. 2, at 302 n.12, 303 n.13 (explaining that, as to offense of injuring person while recklessly unaware of FBI position, "the actor's mistaken belief as to the particular circumstances is made irrelevant by law").

That this is not a case of legal impossibility becomes clear once one tweaks the facts. Suppose McKenzie genuinely believed "Bri" was an adult, but that belief was mistaken -- "Bri" was actually a minor. McKenzie's proposed legal-impossibility analysis would equally apply to this scenario because, if all things were as he believed them to be, he would only be trying to solicit an adult and could therefore not be guilty of attempted sex trafficking of a minor. This scenario, however, would not be one of legal impossibility, but of mistake of fact -- which would not be a cognizable defense to attempted sex trafficking of a minor. See United States v. Encarnación-Ruiz, 787 F.3d 581, 585 (1st Cir. 2015) (construing defendant's mistaken belief as to victim's age as a mistake-of-fact defense). "It is a basic principle of criminal law that ignorance or mistake of fact may

provide a defense to a crime if it negates the requisite element of intent." United States v. Mardirosian, 602 F.3d 1, 8 (1st Cir. 2010) (citation modified). But "an actor whose mistake was reckless cannot use that mistake as a defense to a crime of recklessness." 1 Wharton's Criminal Law § 13:2 (16th ed. 2021). So McKenzie's belief that "Bri" was an adult would not give rise to an issue of legal impossibility if "Bri" were a minor, so long as his belief was reckless.[15] Likewise, it does not give rise to an issue of legal impossibility even though "Bri" was not a minor.

G.

Finally, McKenzie expresses a concern, understandable in some sense, that, under our holding today, the offense of attempted sex trafficking of a minor "would capture a host of innocent conduct between consenting youthful adults." We feel confident that this is not so for two reasons.

First, these statutory provisions cover only the knowing solicitation of a person, knowing or recklessly disregarding that such person "will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a); see also id. § 1591(e)(3) (defining

[15] Indeed, McKenzie argues only that "[t]he charge as instructed to the jury was legally impossible without an actual minor" and concedes that, "[i]f the [person solicited] had been a minor, then reckless disregard of her age would be an appropriate jury charge." He provides no reason, however, why one situation -- no minor -- is a legal impossibility but the other -- actual minor -- is not, if the defendant's reckless belief is the same in both situations.

"commercial sex act" as "any sex act, on account of which anything of value is given to or received by any person"). They would not, for example, apply to an individual who meets a young-looking but adult person online or in a bar and has consensual, noncommercial sex with that person.[16]

Second, the "reckless disregard" standard is not a light one. It requires that the defendant be aware of the risk that the person solicited is a minor, that the risk be substantial, and that ignoring that risk represent a "gross deviation" from the norm. Borden, 593 U.S. at 427; see also Michael T. Cahill, Attempt, Reckless Homicide, and the Design of Criminal Law, 78 U. Colo. L. Rev. 879, 902 (2007) (explaining that "there is not always a lot of moral difference between knowledge and recklessness" because a reckless person still "recognizes a significant risk" but "is interested in performing a certain act, or achieving some other result, regardless of that risk"). We thus find it unlikely

[16] McKenzie counters that "there are numerous federal crimes prohibiting sexual contact with minors without limitation to commercial sex, and Congress could add a recklessness mens rea to any of them." But to the extent that we presume that Congress, in enacting a law, considers the law's practical ramifications within the context of other laws, that presumption applies to the other laws that Congress has enacted, not to those it might enact in some hypothetical future. See, e.g., Norman Singer & Shambie Singer, 2B Sutherland Statutes and Statutory Construction § 51.2 (7th ed. 2025) ("Courts assume that a legislature always has in mind previous statutes relating to the same subject when it enacts a new provision."). Similarly, that some forms of commercial sex may be lawful in some states, as McKenzie points out, makes no difference to our understanding of this federal statute.

that we today construct a trap for the unwary. Rather, we feel secure this "trap" will only capture actors who intend to solicit another person for commercial sex, recognize that the person very well may be a minor, and continue in their conduct all the same.

H.

We therefore hold that a defendant may be convicted of attempted sex trafficking of a minor, in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(a), where he acts in reckless disregard of a substantial and unjustifiable risk that the person solicited is under eighteen -- regardless of whether the person solicited turns out to actually be under eighteen. That being so, we find no error in the district court's jury instructions and no merit in McKenzie's sufficiency-of-the-evidence argument.

IV.

Next, we consider McKenzie's argument that the district court erred in refusing to instruct the jury on entrapment. We find no cause for reversal here.

We review de novo a preserved challenge to a district court's refusal to give an entrapment instruction. United States v. Dávila-Nieves, 670 F.3d 1, 9 (1st Cir. 2012). "To obtain an entrapment instruction, the defendant must show, with 'some hard evidence,' that (1) the government induced the commission of the charged crime and (2) he was not otherwise predisposed to commit it." United States v. O'Donovan, 126 F.4th 17, 40 (1st Cir. 2025)

(quoting United States v. Sandoval, 6 F.4th 63, 100 (1st Cir. 2021)). "In other words, the record must contain evidence that makes the entrapment theory 'plausible' or 'superficially reasonable.'" United States v. Pérez-Rodríguez, 13 F.4th 1, 19 (1st Cir. 2021) (quoting United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998)). In reviewing the record, we must take the facts in the light most favorable to the defendant and indulge all reasonable inferences to his benefit. Id.

We begin -- and end -- with the inducement prong. To establish inducement, a defendant must show that government agents engaged in conduct "that would cause a person not otherwise predisposed to commit a crime to do so." United States v. Hinkel, 837 F.3d 111, 117 (1st Cir. 2016). In that sense, the inducement must be "improper." Pérez-Rodríguez, 13 F.4th at 17. A sting operation that "[m]erely provid[es] an opportunity to commit a crime is not improper inducement." O'Donovan, 126 F.4th at 40. Rather, improper inducement requires "opportunity plus something else." Id. This "plus" factor may consist of "intimidation and threats, 'dogged insistence,' playing on the defendant's sympathies, [or] 'repeated suggestions.'" Pérez-Rodríguez, 13 F.4th at 17 (quoting United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994)); see also Dávila-Nieves, 670 F.3d at 10 ("Typical plus factors are excessive pressure by the government upon the

defendant or the government's taking advantage of an alternative, non-criminal type of motive." (citation modified)).

Here, McKenzie points to several facts allegedly showing improper inducement. To start, he emphasizes that, when Agent Draper first offered him twelve-year-old "Jes" and fourteen-year-old "Bri," McKenzie responded that he was "not into anything under 18"; yet, he says, the government persisted. He also argues that Agent Draper used photos of adult women as another form of inducement. Next, he suggests Agent Draper downplayed the harm of commercial sex with a minor by comparing it to child pornography. And he contends that, toward the end of their conversation, Agent Draper "cajoled [him], telling him that they had no time for talking, it was time for action." Finally, McKenzie points out that it took two hours for Agent Draper to talk him into the transaction. Not one of these facts evinces improper inducement.

First, the fact that McKenzie said at the outset that he was "not into anything under 18" is of no help to him. The record is clear that Agent Draper at that point ended the exchange, which later recommenced only because McKenzie again reached out to Agent Draper, without any intervening indication that she had "anything" over eighteen to offer. See United States v. Medina-Ortiz, 160 F.4th 11, 17 (1st Cir. 2025) (rejecting inducement argument where, after undercover officer told defendant she was fourteen,

"[defendant] (despite having time to consider his actions during the communication pause) reconnected with 'her'").

The photos that Agent Draper used did not give rise to inducement, either. McKenzie implies that it was improper for Agent Draper to use adult women in the original ad and the later verification photo of "Bri." The unstated premise is that Agent Draper was luring McKenzie in by intentionally making "Bri" look like an adult. But Agent Draper was doing the opposite: using age-regression software to make an adult look like a minor, thereby buttressing -- rather than belying -- Agent Draper's express representations that she had nothing to offer McKenzie if he did not want a minor.

Nor was there anything improper in Agent Draper's expressed hesitation to send a pornographic picture of "Bri" on the ground that it could land her in federal prison. McKenzie contends that we should read into Agent Draper's statement an attempt to downplay the seriousness of having commercial sex with a minor. While we have found that "downplaying the harm caused by child abuse" can be a plus factor, Pérez-Rodríguez, 13 F.4th at 20 (citation modified), nothing in Agent Draper's comment about the penalties associated with child pornography suggests that commercial sex trafficking does not harm the subject minor. Cf. id. (highlighting that government agent "repeatedly stated that

this imagined [sexual] encounter would be a positive experience for the minor"); see also id. at 20–21 (collecting cases).

Similarly, Agent Draper did not cajole McKenzie in any way. In the portion of the text transcripts to which McKenzie points, Agent Draper merely said, "if ur not interested that's cool," "Lol k just don't know if ur for real or just wanna talk," and asked him twice whether he was close to the hotel. Even drawing reasonable inferences in McKenzie's favor, we do not read Agent Draper's messages as saying, as McKenzie reads them, that "they had no time for talking, it was time for action." Agent Draper at no point said the deal would be off the table if McKenzie did not arrive soon; she merely asked where he was. In fact, at the beginning of this part of the exchange, she gave him yet another chance to walk away if he was not interested in commercial sex with "Bri."

Finally, we see nothing improper in the duration of Agent Draper's connections with McKenzie. Certainly, the length of the government's interactions with a defendant may suggest inducement. Compare Gamache, 156 F.3d at 11 (stressing that "the Government persevered for almost seven months to elicit the offense conduct"), with Medina-Ortiz, 160 F.4th at 14–16 (finding no inducement in operation spanning several days). But, here, McKenzie took less than twenty-two minutes from the start of the interaction to make clear his intent to have sex with a fourteen-year-old. From that

point, McKenzie focused on trying to confirm Agent Draper was not a "fed" then showed up at the agreed-upon hotel a little over two hours after their conversation began. In so proceeding, McKenzie "demonstrate[d] an eagerness to commit the crime rather than reluctance that was overcome only by inducement." Dávila-Nieves, 670 F.3d at 11.

Because McKenzie failed to produce any evidence of improper inducement on the part of Agent Draper, the district court did not err in refusing to give his requested entrapment instruction.[17]

v.

McKenzie also challenges the district court's evidentiary rulings excluding three sets of evidence he sought to introduce in his defense: (1) a church sermon McKenzie gave shortly before his arrest, (2) testimony from McKenzie's father regarding McKenzie's good character and state of mind, and (3) cross-examination of Agent Draper regarding McKenzie's lack of a criminal record and the penalties for child pornography.

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[17] We note that McKenzie also argues the district court applied the wrong standard below. However, our conclusion on de novo review that no entrapment instruction was warranted renders harmless any error in the district court's standard. See United States v. Symonevich, 688 F.3d 12, 24 (1st Cir. 2012) ("An error mandates reversal only when it is prejudicial based on a review of the entire record."). Similarly, given that McKenzie's challenge falters on the inducement prong of entrapment, we need not consider McKenzie's arguments on the predisposition prong. See Pérez-Rodríguez, 13 F.4th at 19.

"To preserve a claim of error in a ruling to exclude evidence, a party need only inform the court of the substance of the evidence by an offer of proof." United States v. Saemisch, 18 F.4th 50, 59 (1st Cir. 2021) (citing Fed. R. Evid. 103(a)(2)). Where the claim has not been preserved, we apply plain-error review, which requires an appellant to show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Encarnacion, 26 F.4th 490, 504 (1st Cir. 2022) (quoting United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001)). Where the claim has been preserved, we review the district court's decision for abuse of discretion. Saemisch, 18 F.4th at 59. Even under this standard, though, we will not reverse "if the error was harmless, that is, if it is highly probable that the error did not affect the outcome of the case." Neece v. City of Chicopee, 106 F.4th 83, 93 (1st Cir. 2024) (citation modified).

As to the substantive rules applied to evidentiary challenges, relevance serves as the touchstone. Irrelevant evidence is inadmissible at trial. Fed. R. Evid. 402. Evidence is relevant only if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R.

Evid. 401. Of course, other rules further limit the admissibility of relevant evidence, but preservation and relevance suffice to guide us through McKenzie's evidentiary challenges.

A.

First, McKenzie claims error in the district court's exclusion of a sermon McKenzie gave at his church on October 2, 2022, one month before his arrest. In the sermon, McKenzie referred to himself as "somebody here who has transgressed against God," discussed his loneliness, and explained the need to "go to God and pray and let him clean you up." After McKenzie and the government filed motions in limine on the subject, the district court excluded the sermon as irrelevant. McKenzie argues the district court erred because the sermon was relevant to corroborate his trial testimony that "he sought adult prostitutes out of loneliness in the year leading up to his arrest," as well as to rebut the government's argument that he fabricated that testimony to support his defense.

We review for abuse of discretion and find no error in the district court's decision.[18] McKenzie's sermon falters at the doorstep of relevance under Rule 401. Whether McKenzie felt lonely

[18] The government asserts that we should apply plain-error review because McKenzie did not tie his sermon to his state of mind below. Because we conclude McKenzie loses even under an abuse-of-discretion standard, we need not address the government's waiver argument. See Medina, 155 F.4th at 21 n.6.

or sought out commercial sex with adults has no "tendency to make [the] fact more or less probable" that he attempted to solicit commercial sex with "Bri" while recklessly disregarding a substantial risk that she was a minor. Fed. R. Evid. 401. These facts may have spoken to McKenzie's motive for seeking out commercial sex generally, but McKenzie's conviction for attempted sex trafficking did not hinge on motive. See Medina, 155 F.4th at 21 (distinguishing intent from motive). The district court did not abuse its discretion in excluding this evidence as irrelevant.

B.

McKenzie also challenges the district court's exclusion of proposed testimony from his father. A week before trial, the government filed a motion in limine addressing his father's potential testimony regarding McKenzie's religious beliefs and lack of sexual interest in minors. The motion asked the district court "to compel the defense to make an offer of proof as to the expected testimony of [McKenzie's father] and to exclude questioning in areas that call for speculation, hearsay, or inadmissible opinion of character evidence." McKenzie responded with his own motion in limine "to admit evidence of defendant's state of mind." The motion described his father's testimony as "regarding [the McKenzies'] faith, world view, and the concepts that (1) humans can not comprehend God's eternal plan, and (2) God offers redemption to sinners through good works." The district

court addressed McKenzie's motion orally, stating, "there's a motion in limine to admit evidence of the defendant's state of mind, and three matters have been set forth there. None of them is relevant. They're all excluded."[19] When defense counsel pressed the court regarding McKenzie's father, specifically whether, if McKenzie testified that his religion impacted his decision on the day in question, his father could then be permitted to testify, the court elaborated, "It's advisory. I've made my ruling. I don't know what's going to happen. We'll see."

Now, on appeal, McKenzie asks us to find error in that advisory, pretrial ruling that the proffered testimony by McKenzie's father would not be relevant. Generally, where a defendant raises an evidentiary issue in a motion in limine, the issue will be preserved for appeal if the district court rejects the defendant's argument unconditionally. Encarnacion, 26 F.4th at 504; see also Fed. R. Evid. 103(b). Where the district court's ruling is conditional, though, the defendant must re-raise the issue at trial to preserve his appellate rights. Id. Here, the district court made its ruling with regard to McKenzie's father's testimony conditional by labelling the ruling "advisory" and suggesting that McKenzie's testimony might change the court's

[19] The "three matters" referred to comprise: (1) the sermon; (2) McKenzie's father's testimony regarding his religious beliefs; and (3) notes from McKenzie's phone, the exclusion of which McKenzie does not challenge here.

mind. McKenzie never sought to introduce any of his father's testimony at trial thereafter, failing to preserve his claim for appeal. See United States v. Grullon, 996 F.3d 21, 31 (1st Cir. 2021) (finding evidentiary claim unpreserved where district court made "preliminary" ruling and defendant "made no attempt to raise the . . . evidence during trial").

The entirety of McKenzie's challenge with respect to his father's testimony is thus subject to plain-error review. However, McKenzie has failed to make any plain-error argument on appeal. As a result, we treat the challenge as waived entirely. See United States v. Martínez-Mercado, 132 F.4th 61, 68–69 (1st Cir. 2025) ("A defendant on appeal waives a forfeited claim when his brief fails to even mention plain error, let alone argue for its application." (citation modified)).

c.

We next turn to the district court's exclusion of testimony regarding McKenzie's lack of a criminal record and the penalties for child pornography.

During cross-examination of Agent Draper, defense counsel asked, "After, um, Mr. McKenzie was arrested, did you check to see if he had ever been arrested for anything before?" The government objected, and the district court sustained the objection without further discussion. McKenzie argues only that this exclusion constituted error because his lack of a criminal

record was relevant to the propensity prong of his proposed entrapment defense. But given the district court's finding that McKenzie failed to make even a plausible showing of improper inducement -- and our affirmance of that finding -- McKenzie's propensity to commit the crime (or lack thereof) was irrelevant.

For a similar reason, we find no reversible error in the exclusion of testimony regarding the penalties for child pornography. Earlier in the cross-examination of Agent Draper, defense counsel requested the court's permission to ask "a limited question suggesting that the penalties for child pornography are similar to the penalties for this crime." The court denied that request. McKenzie claims the testimony would have been relevant to his "downplaying" theory of inducement in his entrapment defense. But our finding that Agent Draper's reference to child pornography in her text messages with McKenzie did not constitute improper inducement renders harmless any error in excluding this evidence. Even with the child-pornography penalties, McKenzie would not be entitled to an entrapment instruction.

VI.

Finally, McKenzie contends that the specific judgment entered by the district court has erroneously deprived him of certain sentence-related benefits under the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

The First Step Act grants some prisoners time credits toward their sentences for completing "evidence-based recidivism reduction programming." 18 U.S.C. § 3632(d)(4)(A). A prisoner serving a sentence under 18 U.S.C. § 1594 is eligible for such programming, but a prisoner serving a sentence under 18 U.S.C. § 1591 is not. 18 U.S.C. § 3632(d)(4)(D)(xxvii). The district court's judgment describes McKenzie's offense as "Attempted Sex Trafficking of a Child," and lists as the statutory sections violated, "18 USC § 1591(a)(1), (b)(2) and 18 USC § 1594(a)." Based on the inclusion of § 1591 in the judgment, McKenzie tells us, the Bureau of Prisons (BOP) has deemed him ineligible for the First Step Act's time credits. The government does not dispute that McKenzie, who was convicted only of an attempt under § 1594, should be eligible for such time credits. The question is how to remedy this situation.

McKenzie asks that we remand for the district court to correct the judgment under Federal Rule of Criminal Procedure 36. Pursuant to Rule 36, "the court may at any time correct a clerical error in a judgment." Fed. R. Crim. P. 36; see, e.g., United States v. Ahmed, 51 F.4th 12, 19 n.4 (1st Cir. 2022) (remanding to allow parties to request Rule 36 correction where defendant was charged with substantive healthcare fraud but judgment incorrectly listed conviction as conspiracy to commit healthcare fraud). But no clerical error occurred here. Because § 1594(a) covers attempts

to commit a variety of offenses,[20] the judgment needed to include statutory references to § 1591(a)(1) and (b)(2) to clarify which offense was attempted and what penalties attached.[21] And "[t]he inclusion of statutory references to both the [attempt] statute and the sections describing the object of the [attempt] does not transform the judgment into one that describes a conviction of the substantive crime." United States v. Warren, 5 F.4th 1078, 1081 (9th Cir. 2021). After all, under "Nature of Offense," the judgment correctly states, "Attempted Sex Trafficking of a Child." This case, then, does not fit within Rule 36's remit for clerical errors.

In the alternative, McKenzie asks the panel to state that his attempt conviction "is not legally equivalent to a conviction under 18 U.S.C. § 1591," at least for purposes of the First Step Act. We agree with this approach, which has already been adopted by the Ninth Circuit in an analogous case. See Warren, 5 F.4th at 1081 n.2 ("[Defendant] now has the opportunity to present to the BOP this opinion, which construes the judgment to reflect that Defendant committed a single offense under 18 U.S.C. § 1594(c)."); see also United States v. Phillips, No. CR

[20] In full, § 1594(a) reads, "Whoever attempts to violate section 1581, 1583, 1584, 1589, 1590, or 1591 shall be punishable in the same manner as a completed violation of that section."

[21] Section 1591(a)(1) provides the substantive offense, while § 1591(b)(2) provides the penalty.

13-286, 2022 WL 17415077, at *3 (E.D. La. Dec. 5, 2022) (following a similar approach). The First Step Act specifically makes prisoners serving a sentence under § 1594 eligible for its time credits. But, as we have explained, a judgment of conviction under § 1594 must include a reference to the underlying substantive offense. Thus, under the BOP's alleged reading, every prisoner convicted under § 1594 would be held ineligible for the First Step Act's time credits, in contravention of the Act's direct statutory mandate. We therefore clarify that McKenzie has been convicted only under 18 U.S.C. § 1594, not 18 U.S.C. § 1591.

VII.

For the foregoing reasons, we find no reversible error and affirm McKenzie's conviction under 18 U.S.C. § 1594.

United States Court of Appeals
For the First Circuit

No. 24-2087

UNITED STATES,

Appellee,

v.

DIMITRI MCKENZIE, a/k/a Dimitri Shawn McKenzie,

Defendant - Appellant.

Before

Barron, Chief Judge,
Howard, Kayatta, Gelpí, Montecalvo,
Rikelman, Aframe, and Dunlap,
Circuit Judges.

ORDER OF COURT

Entered: August 26, 2026

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
David Gerard Tobin, Timothy E. Moran, Donald Campbell Lockhart, Karen Lisa Eisenstadt, Torey B. Cummings, Meghan Chambers Cleary, Brian Alexander Fogerty, Jeremiah R. Newhall, Dimitri McKenzie

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:22-cr-10312-WGY-1

UNITED STATES OF AMERICA

vs.

DIMITRI McKENZIE

****

For Jury Trial Before:
Judge William G. Young

United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, June 4, 2024

****

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
rhr3tubas@aol.com

don't think I have to order it. We'll revisit it on Thursday morning if they have some objection.

All right, let's, um -- actually let me sketch out the charge here.

In this case we'll have a general verdict. My charge always follows the same form, I remind the jury of the essential aspects in a criminal case, that Mr. McKenzie started innocent, that the burden rests on the government, proof to a unanimous jury beyond a reasonable doubt. I talk about the jury's function, then I talk about my function in delivering the charge, that they don't pick out any particular part of the charge.

I talk about -- I go then to the sources of proof, I distinguish direct and circumstantial evidence. I, um, go over the sources of evidence. In this case the sources of evidence are twofold, that -- at least as we stand now, they are the testimony of the witnesses and the exhibits. I give a stock charge on how the, um, the power of the jury to evaluate, um, such testimony. I talk about the drawing of reasonable inferences, but no guesswork or speculation.

I have every reason to compliment you -- well then I take a moment, while Ms. Gaudet passes out the verdict slips, because I think they should have the verdict

slips. The general verdict will simply recite the name of the charge and will say "We find Mr. McKenzie not guilty or guilty on that charge." That's the only question they'll be asked.

The, um -- while she's passing that out, I compliment you sincerely, I think this case has gone very appropriately, and then having done that, I will say "Pay no attention to the lawyers," in effect reminding them that you weren't there and that your job is as advocates, but you're not the sources of evidence. I say the same thing about me, that they should take no clue from me, I have no clue to give them. And then I get into the actual substance of the charge.

I've gone over the five elements. I think the issue -- and I will give them again. I will however define further "substantial step" largely in the manner that the government has requested.

I imagine the dispute is -- and really I shouldn't rule on it, I don't like to give advisory opinions, but, um, as we stand now, Ms. Hackett, I don't know that you're entitled to an entrapment charge. I do think since -- a real issue here is, as I've been listening to the case is, is he looking for a commercial sex act with an adult, a crime, but not the crime charged, indeed, not beyond the jurisdiction of this court, or is he

looking for a commercial sex act with a minor, under the years of 18, which is what we're talking about?

I am persuaded by the defense's suggestion that we're not going to talk about acting recklessly here, this is a specific intent crime, he's got to intend that. Um, so -- well I just don't see -- I don't see -- I think what we'll do is I won't go any further on entrapment, we'll wait until both sides have rested. That's fair. We're going to take a recess anyway. And we can talk about an entrapment charge, if any charge there be. So pass that because that's a possibility.

Ms. Cummings, you didn't like something that you heard?

(Laughter.)

MS. CUMMINGS: Your Honor, very respectfully, um, I have two questions. The first is with respect to your mens rea or the "may have recklessly disregarded," um, in the standard, does that come directly from the First Circuit pattern instruction?

THE COURT: I understand.

MS. CUMMINGS: But I believe that "may have recklessly disregarded" modifies the mens rea as to the age of the person, not to his intent to commit the crime.

THE COURT: Well he's got to know that it's a

minor?

MS. CUMMINGS: Or recklessly disregarded the age of the person.

THE COURT: (Laughs.) "Recklessly disregarded the age of the person," it being -- let's say he is seeking sex with an adult on this record, if he is, he's not guilty. Do you agree? What's in his mind?

MS. CUMMINGS: Not if he was recklessly disregarding what he was told about the age of the person he was going to have sex with.

THE COURT: And -- well so the question is a reasonable person would have known what was being offered here was a minor?

MS. CUMMINGS: I think so.

THE COURT: Well feel free to brief that. I'm not sure that's so.

MS. CUMMINGS: Yes, your Honor.

THE COURT: Yeah, all right.

MS. HACKETT: There's a couple of issues. I think what I would like to do is just submit something in writing. There is a recent case out of Puerto Rico, from the First Circuit, that I think is very similar to this case on entrapment. And I think there's a big difference between the drug cases on entrapment and the kind of sex cases on entrapment. So I would like to put

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

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vs.

DIMITRI McKENZIE

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Judge William G. Young

United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
Boston, Massachusetts 02210
Thursday, June 6, 2024

****

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the close of all the evidence, correct?

MS. HACKETT: Yes, please.

THE COURT: It is renewed. It's denied. Your rights are saved.

Now turning to the charge. I'm not going to charge on entrapment, his testimony is he didn't commit the crime. It's not that anyone pressured him or overreached, if indeed there's any evidence of that, he didn't commit the crime, and I imagine the defense will so argue, and that's up to the jury. So entrapment plays no role here.

I will include the language "reckless disregard," the statute requires it, and I can see that it fits, but his specific intent must be to have a commercial sex act with a minor child or in reckless disregard of the situation, that would be his intent, that's the criminal mens rea.

All right, we'll recess, so you can be ready for the final arguments. We'll stand in recess until 10 minutes of 11:00. We'll recess.

THE CLERK: All rise.

(Recess, 10:35 a.m.)

(Resumed, jury enters, 10:50 a.m.)

THE COURT: We've come now to that portion of the case where the attorneys get the chance to make closing

else. We'll resume in 10 minutes. We'll stand in recess.

THE CLERK: All rise for the jury.

(Jury leaves, 11:45 a.m.)

(Resumed, 11:55 a.m.)

JUDGE'S CHARGE TO JURY:

THE COURT: Now for just a moment, I'll ask the jury to please stand.

(Jury stands.)

This was a tradition on the court where I started my judicial service and I continue it today, that at the beginning of the charge in a so-called "criminal case," the judge and the jury stand and face one another.

Now we stand up now not out of respect for the jury system, the reason we all rise as you come in and out, but we stand now to acknowledge the enormous responsibility that rests upon each of us, on me accurately and fairly to explain in detail the law that you must follow, and on you the awesome responsibility to sift through this evidence with equal fairness and impartiality to the end that justice may be done.

The government, Mr. McKenzie, have a constitutional right to be judged by a jury of the people, and it has been said that that jury must be "as

fair and impartial as the lot of humanity will admit." I think it's been best said by one of really the finest judges I ever knew, Richard Arnold from Arkansas, and he said this: "There has to be a safe place. We have to be it." That is what is imposed on each of us.

Please be seated.

(Jury is seated.)

Now I'll start by considering the jury's role. When I'm done here, two of your number will be called out as alternates, and you will not deliberate, you'll hang out in my lobby there down the hall from the jury room. If you're an alternate, I don't want you to think for one moment that your time is wasted, that's not the truth, it's simply, um, how serious we take jury deliberations, because it sometimes happens -- actually it happened here in the trial two trials ago, in our session, that, um -- I forget what it was, but something happened at home or something with respect to one of the jurors and we had to excuse the juror. Now if that were to happen, then of course I send in an alternate.

But so important are the alternates, that I will then instruct that you have to start the deliberations all over again, because it's a different jury. It's not 11 people saying, "Well now let us tell you where we are and this is what we think." That's not fair. You just

start again considering the evidence with now the new jury. That's how important the alternates are.

Now talking to most of you, because most of you will deliberate, the verdict here, and it's a simple question, there's only one question, is Mr. McKenzie not guilty or is he guilty of the specific crime that is charged? Your verdict must be unanimous either way, all of you agreeing, nobody going along. It's not a majority vote. And the agreement must be a genuine agreement, not "Well most people think this and therefore I should think this and we can go home." You've violated your oath if that were to happen. It's got to be a true agreement among the jurors either way.

Let's turn to my function. My job now is, as I've just said, accurately to instruct you in the law, but let me say a few words about the Judge's charge.

First of all, keep all my remarks in mind together, I'm trying to build for you a mental framework within which you, and you alone, will decide what the facts actually prove or fail to prove. So don't pick out part of it and say "Ah-hah, the case turns on this that," no, I will charge as to each element and each aspect of the case. That does not mean that I think anything's proved or anything has not been proved, I just took it -- I must give you a complete framework so

that you can decide, you can decide where the truth lies.

I keep talking about proof, so let's, um, talk about the essential principles in our system of justice. Here Mr. McKenzie truly started this trial innocent. None of us had heard any evidence, I'd seen some legal papers, but they don't prove a thing. And in the course of the trial, that that principle told us that it is the government that has to prove the case and prove it beyond a reasonable doubt.

Mr. McKenzie didn't have to do anything. He didn't have to take the stand, but he did, and his evidence is the same as the evidence of any other witness that you heard here. That is to say, anything I let you hear from any witness, including Mr. McKenzie, you can believe it, you can credit it. But equally, you can disbelieve it and disregard it. It makes no difference where the evidence comes from, what makes a difference is what you make of that evidence. But remember always though, Mr. McKenzie doesn't have to prove anything to you. Nothing. It's the government that has to prove the case beyond a reasonable doubt.

Now what do we mean by "proof"? Evidence under the law comes in two types, direct evidence and circumstantial evidence. Direct evidence is evidence

from a witness who can be cross-examined who says that he or she actually observed, saw, touched, tasted, heard something, a person who was there, or if not there, because one of them dealt with real evidence, the phone here, and says, "I dealt with this and used these techniques and learned this or that from the phone or a piece of evidence." That's direct evidence.

Circumstantial evidence is evidence of a circumstance, evidence of something that -- well we have photographs here, that's a circumstance about how things looked and the like. The government can satisfy its burden of proof on any combination of direct and circumstantial evidence. A case can be proved entirely on direct evidence, on a combination of direct and circumstantial evidence, it could be proved entirely on circumstantial evidence. But the proof must be proof beyond a reasonable doubt. And by "proof" we simply mean the jury comes to believe its truth, that that's actually what happened.

Here the sources of proof are twofold. We have the testimony of the witnesses. Now there's been four witnesses. And it makes no difference if one side calls more witnesses than the other, what makes a difference is what you believe about it, what weight do you give to it? You have the broadest possible power with respect

to the testimony of any of these witnesses. You can believe it all. You can disbelieve it all as though the witness never got on the stand. Or you can believe parts of it and disbelieve other parts.

How do you do it? You're entitled to use everything you know, everything you know about the witness testifying from the witness stand. How did that witness appear to you? How did that witness react to questions both on direct and on cross-examination? What was the ability of that witness to know the matters about which the witness testified, accurately to recall those matters and relate them to you?

What was the interest in the witness? Did the witness have an interest in the outcome of this case in having you find one way or the other? Did that interest in the outcome, that hope that you would find one way or the other, did that affect the witness's testimony?

Is the testimony of the witness, is it corroborated, that is, is it backed up, does it make it ring more truthful from the other evidence in the case? Does that back up a witness's testimony or does it detract from it, does it take away from it, make the testimony of the witness less believable in your mind? Does the testimony of the witness have the ring of truth? Is it how people behave? Is this what you would

expect under the circumstances? It's up to you what you believe, it's entirely up to you what you believe from the testimony of the witnesses.

Likewise you're going to have evidence here, and on evidence really your analysis is twofold. There's been very few objections to the evidence that's been proffered. Don't, from the lack of objections, assume therefore that everything's admitted when there was no objection. What the lawyers have done is they haven't wasted your time, as officers of the court, and I -- I'm going to compliment them for that. Your time is not wasted. But now when you get to the evidence, it's up to you, and it's a twofold examination as to each bit of evidence.

First of all, is it what it purports to be, what a witness said it was? Is it the actual thing, the actual phone, the actual photograph? Are these accurate text messages from people who are, in one way or another, involved in this case? And then if it is, or if they are, what does it tell you about the case? What does it add? How does it back up, make more likely what the witnesses have testified to or make less likely what the witnesses have testified to, or what a witness concluded from something that a witness says that he or she observed? Now those are the sources of evidence in this

case.

Now from that evidence you may draw what are known as, um, logical inferences, logical deductions, common sense. You don't check your common sense at the door to the jury room, just the reverse. I charge you to apply your common sense to the evidence in this case to the ends that justice may be done. But remember, the burden of proof is not some sort of what's common sense, the burden of proof is proof beyond a reasonable doubt.

Let me give you an example. It has nothing to do with this case. I use it in every case. I'm going to give you an example of a reasonable inference, both to teach you what you can do and what you must not do.

Suppose we have a case and we have a witness and, um, she's out in the country somewhere and she's walking along a road and she looks out at a field of barley. Barley is what they make scotch from. And there she sees the field and there's the green chutes up there with their gray tassels. And then she notices that through the field, in an irregular course, the plants are lying down. And that's the testimony. And now let's suppose you believe that testimony.

Now from that testimony alone, you can infer she didn't see it. She's testified to what she saw and you believe her. But you can infer something went through

there, because if it had been a hale storm, it would have knocked the whole field down. So something went through that field. But if that's all you have, you don't know what it is. An animal? A human? Somebody on a dirt bike? An off-the-road vehicle? Big? Small? There would have to be other circumstances, other evidence.

So here you've got direct testimony, you've got circumstantial evidence, you may draw reasonable inferences, but you cannot speculate. You cannot guess. You cannot say "Well maybe this, perhaps that, possibly or even probably this or that." The burden on the government is proof beyond a reasonable doubt.

Now let me just pause for a moment and say a few things that are not evidence in this case. And while I'm doing that, Ms. Smith -- Ms. Gaudet, excuse me, will pass out the verdict slips. They're very straightforward in this case, but it's good for you to have them in front of you.

Now first let me say, and I say this sincerely and to all counsel, you have ably discharged your function to your clients as distinguished officers of the court, I don't say it in every case and you know that, and I appreciate how this case has be tried. Having said that, you disregard that. That's not evidence. Though

it's sincere. You're not judging this case on how you react to the lawyers. If the lawyers have made things understandable, if they've been good teachers, all well and good. But if you have any personal reaction to an attorney, favorable or unfavorable, that's not evidence. Don't hold it against the client if you somehow, something a lawyer did grates on you. It's simply not evidence.

And you know equally important, if you think that I think anything at all about this case, I most earnestly instruct you to disregard it. I do not discuss this case with Ms. Gaudet, Mr. Romanow, or any of the court staff. We may talk about the law, but we don't talk about the witnesses in any way, because you're the judges of the evidence. And the truth is, as I know my own heart, I have no idea, and I don't talk about it, how this case is going to come out. But I do have this bias, and unashamed of it, I believe passionately in the jury system. I believe that you will do justice in this case.

Now let me talk for a moment, pause for a moment before I focus on this case, and I've said this during the course of the trial, on something that is evidence, but it's evidence for a limited purpose. And that is the, um, evidence here that we have of this man,

Mr. McKenzie, violating state law in searching out adult sex workers and engaging in that conduct, which state law forbids.

Now in order to -- and both sides have argued it and argued conclusions that you can draw from it, and therefore it's evidence, and you could draw those conclusions about this case, which is the attempted sex trafficking of a minor, but not that his conduct, as it pertains to the law of the Commonwealth regulating and forbidding prostitution both on the part of the sex workers and on those who engage sex workers. And I don't mean to emphasize that, but it just would violate your oath if you have problems with what's charged in this case and have a reasonable doubt, but you certainly don't like that conduct, say "Well he's a bad guy, so we'll convict him." That would be an abuse, that would -- it's not what the law is about. So it was appropriate to let you hear those things and consider them in a manner that the lawyers have properly argued you could consider them, as you might, but it's not appropriate to convict him because he was doing those things, if you believe he was.

So now let's get to this case, this case, and what it is the government has to prove beyond a reasonable doubt in this particular case.

Well for starters this is -- was what's commonly known as a sting operation. There wasn't a Brie . There wasn't a person in a hotel room. And I want to be very clear that that's all legitimate law enforcement. Law enforcement can go undercover, set up operations such as this.

To mention something which has nothing to do with this case. Back in the day when child obscenity videos of children being abused were not so much on the computer, they were on videotapes, the biggest collection of illegal videotapes was maintained by the United States Postal Service, they collected them and they would sell them under a false name and they would take the money and send the items, and shortly thereafter would come a Postal Inspector with a search warrant once the item got in the hands of a recipient. Perfectly legal. Perfectly legal to apprehend people who were enabling and violating the law which prohibits the receipt or distribution of child obscenity. This operation was akin to that, it was a lawful law enforcement exercise.

What the government may not do, however -- it's perfectly lawful to catch those who are disposed to commit such a crime, sex trafficking of a minor, someone under 18 years of age, but the government simply cannot

-- they can provide the opportunity to commit the crime, but they can't engage in persuading people who otherwise wouldn't commit the crime to commit crimes. That would violate due process. And so there's been significant evidence here that the government wasn't doing that. So keep in mind, they're not permitted to do that. The government can't induce, persuade someone to commit a crime that they otherwise wouldn't commit.

Now what is it that the government has to prove beyond a reasonable doubt? They have to prove five things. I said them at the outset and I'll repeat them.

First, that Mr. McKenzie intended to entice, obtain, patronize, or solicit a person to engage in a commercial sex act, that means sex for money. Now let's pause on that, because, um, Mr. McKenzie, in his testimony, he has denied that, in effect. I mean if you believe that testimony, and you're entitled to, then the government has failed to prove that point, because he's testified that wasn't his intention to engage in a commercial sex act, sex for money.

Let's -- I'm going to give you a full picture, I'm going to say but let's say you don't believe it -- and that doesn't mean that I have any position about it, it's just let's say you don't believe that, that still doesn't mean the government has proved the contrary,

it's just that you don't believe Mr. McKenzie's account. So what they've got to prove beyond a reasonable doubt is that Mr. McKenzie, not what he testified to, but he intended to entice, obtain, patronize, or solicit a person to engage in a commercial sex act.

Second, Mr. McKenzie knew that the object of the commercial sex act was a child who had not obtained the age of 18 years or that he was acting in reckless disregard of whether that person was 18 or not. And so you have in mind -- first of all, he has to have intended sex for money. Now this is only an attempt, because there really wasn't a person here in the room. An attempt to do that. And then the second point is he has got to know or at least genuinely believe that the person who is being offered for the commercial sex act is a minor under the age of 18 years or he was acting in reckless disregard, he didn't care whether the person was or was not.

And then third, that Mr. McKenzie engaged in a purposeful act that, under the circumstances as he believed them to be, amounted to a substantial step towards the commission of that crime and corroborates his specific intent to complete the commercial sex act. And now that's been argued to you, did he engage in a substantial step?

I substantial step is not just thinking about it, a substantial step is not even planning it, a substantial step is, as the word implies, taking those steps necessary in the ordinary course to accomplish the crime, to do that crime, commit a sex act, commercial sex for money, with a minor. But the substantial step has got to be, or whatever steps you think constitute the substantial step, they have to corroborate and demonstrate that Mr. McKenzie had such an interest.

Now fourth, that his intent -- now have in mind he's denied it, but the government has to prove beyond a reasonable doubt that his actual intent was to complete the commercial sex act with the minor.

And then fifth, that the acts affected interstate commerce. Let me pause a moment on that.

The effect need not be a major effect. The way the law has developed the, um, that fifth step is just as important as the other ones, because Congress can only regulate interstate commerce. Their Congressional power under the Constitution gives Congress the act to say that engaging in commercial sex acts with minors is a crime, to define that crime. And so part of that crime has got to be to affect interstate commerce, something that Congress has the right to regulate. And the effect can simply be to use the means of interstate

commerce, one of which is the internet.

So those are the five elements they have to prove beyond a reasonable doubt.

Let me finish with just a few words about how you deliberate together.

Now Madam Forelady, as forelady, it doesn't mean you do all the talking, nor does it mean you keep your mouth shut, and really I am speaking to all of you. Set things up in there so that -- and you'll see, it's the only place in the courthouse we have the lovely conference rooms, the tables where you can all see each other. You all ought to deliberate together. Now is the time to talk about this case.

There used to be someone over at Vertex who had a great big -- well the Sesame Street frog, and I've forgotten his name, the frog, and I would always say, "Well don't be looking out the window at the frog, the Vertex frog." You ought to be deliberating together. And that's really what I'm asking. You ought to set things up where you can all talk together.

It's probably not a good idea -- I've only asked one question, to start out by saying "Well how many think this and how many think that?" And the reason you really ought not do that is you may think that then, because you're all under oath, the juror's oath to

render justice here, that you're duty-bound to stick with that. If you have a strong view about any aspect of this case, by all means stick to it. We ask you for your verdict, we do not demand your verdict.

But jury deliberations are just that, they're deliberations. You listen to your fellow jurors who are under the same oath as you, who have heard and seen the same evidence, listen to the other jurors' views, and if that affects your view, if that changes your view, either way, that's fine, so long as that is a sincere change, it's not just going along.

Let me just go over some logistical things. We've ordered lunch for you --

THE CLERK: 1:00.

THE COURT: At 1:00, cafeteria food, it will be delivered, and no one will bother you. What's going to happen is Ms. Gaudet, well she's under an obligation to leave, but her co-clerk, and one of my law clerks, Dan Hohler, will take her place sometime during the afternoon. She'll go over or he will go over all the exhibits to make sure you have all the exhibits in the jury room. Once I send you to the jury room, you can start deliberating right away.

If you have any questions about anything that I -- about the law or any aspect of the law, by all means ask

them, write them out, we'll have the Court Security Officer outside the courtroom, just give the written question to the officer. And this will prove to you I work in the afternoon. This is the most important thing I'm doing. And we'll need to get the lawyers in the courtroom and then I'll consult them and answer your question and send you back. But don't have any hesitancy in asking any questions.

Mr. Romanow is an outstanding Court Reporter and jurors frequently say "Well now can we have the charge in writing?" Yes, but not until tomorrow, because he has to take down the work we're doing this afternoon, and I will be holding court this afternoon in another case.

If we get on to about 10 minutes of 5:00, Dan will come in and say, "Are you close to a verdict?" No one can ask you anything about your deliberations. And if you are, um, I'll think of what to do, but if you say no, we'll bring you into the courtroom, and that's perfectly appropriate, and it happens routinely, and I will give you instructions what will happen once you've started deliberating. And then we'll come back at 9:00 tomorrow and you'll go right on with the deliberations.

If you're deliberating and you reach some sort of snag and you all decide that you want to sleep on it,

come back tomorrow. Send out "We'd like to stop deliberations." Fine, we'll stop right then. Whenever I get that message, I'll send you all home, you'll come back tomorrow, with appropriate instructions.

Take your notebooks with you. Feel free to use your notebooks. Only the forelady answers the questions and the forelady signs it, but you each have a slip so you can see the actual language in front of you.

And here's how we take a verdict. When you've reached a unanimous verdict, tell the Court Security Officer you have a verdict. Don't give her the verdict slip, just tell her. We'll set things up, bring you all in, and then Mr. Hohler I guess will say, "Ladies and gentlemen, have you agreed upon a unanimous verdict?" If you're back with a verdict, I imagine you'll say "Yes." And we'll say, "Pass the paper." And everyone is watching you, of course, and they'll pass it to me. I look at it. And I look at it only to see that it's logical.

If it's blank, I won't know what to do. If you've checked both possible outcomes, I won't know what to do. But so long as you've checked one or the other outcome, that's a logical verdict on this evidence. And I will hand it to him and I'll say, "The verdict may be recorded." He'll ask you all to stand up. It's the

only time in the whole proceeding where you stand up in the courtroom and we all look at you. And then he'll read it out, because it reads out like a natural English sentence or a sentence in English. And then he'll say, "Madam Forelady, is that your verdict? Ladies and gentlemen of the jury, is that your verdict?"

If as you stand there each one of you is satisfied with the consciousness of your duty faithfully performed, you will have done what's required of you. The word "verdict" comes from two Latin words, they mean "To speak the truth," and that is what is asked of you at this time, to speak the truth about these matters.

Now I may have left something out, I may have misstated something, and the lawyers get a chance to bring that to my attention now.

Counsel.

AT THE SIDEBAR

THE COURT: I thought that was pretty good. We'll start with the government.

MS. CUMMINGS: We're satisfied, your Honor.

MS. HACKETT: The defendant wishes to renew the objections it made in writing earlier today and I --

THE COURT: Well I want to be sure -- and this is really to protect you under the First Circuit precedent,

I have read all of that, but I'm not so sure that that protects your rights. So just briefly articulate it.

MS. HACKETT: Sure. Let me be specific. The defendant objects to the, um, attempted sex-trafficking instruction, um, we believe that the appropriate instruction is the one that we filed with the Court.

THE COURT: And that is that I added in the "reckless disregard"?

MS. HACKETT: Yes, that you added the "reckless disregard."

THE COURT: I'm satisfied.

Go ahead.

MS. HACKETT: And we've also asked for an additional instruction about the substantial steps "strongly corroborating" if it's the only evidence of intent.

THE COURT: Well I think I gave it in substance, but I concede to you I did not use the word "strongly." I'm satisfied with the instruction. Your rights are saved.

Is that it?

MS. HACKETT: The defendant also believes that any entrapment instruction would have been appropriate under the facts of this case.

THE COURT: Oh, my heavens, I bent over backwards.

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA
v.
DIMITRI McKENZIE

JUDGMENT IN A CRIMINAL CASE

Case Number: **1 22 cr 10312 - 001 - WGY**

USM Number: 29876-510

Alyssa Thrasher Hackett and Jennfer Sunderland
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) 1
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1591(a)(1), (b)(2) and 18 USC § 1594(a)	Attempted Sex Trafficking of a Child	11/02/22	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the 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, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/9/2024
Date of Imposition of Judgment

/s/ William G. Young
Signature of Judge

The Honorable William G. Young
Judge, U.S. District Court
Name and Title of Judge

11/18/2024
Date

DEFENDANT: DIMITRI McKENZIE
CASE NUMBER: **1 22 cr 10312 - 001 - WGY**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 126 month(s)

Defendant shall receive credit for time served from 11/2/2022 - 11/10/2022 and 6/10/2024 to the present.

☑ The court makes the following recommendations to the Bureau of Prisons:

The defendant be designated to Devens.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DIMITRI McKENZIE
CASE NUMBER: **1 22 cr 10312 - 001 - WGY**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 60 month(s)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DIMITRI McKENZIE
CASE NUMBER: 1 22 cr 10312 - 001 - WGY

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must 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. You must 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.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must 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. You must answer truthfully the questions asked by your probation officer.
5. You must 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), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must 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 you must 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), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must 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, you must notify the probation officer within 72 hours.
10. You must 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. You must 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 you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must 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 _____

DEFENDANT: DIMITRI McKENZIE
CASE NUMBER: 1 22 cr 10312 - 001 - WGY

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a mental health treatment program as directed by the Probation Office.

2. Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, you shall register as a sex offender not later than three business days (from release or sentencing, if granted probation). You will keep the registration current, in each jurisdiction where you reside, are employed or are a student. You must, not later than three business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which you are registered and inform that jurisdiction of all changes in the information. Failure to do so may not only be a violation of this condition but also a new federal offense punishable by up to 10 years' imprisonment. In addition, you must read and sign the Offender Notice and Acknowledgment of Duty to Register as a Sex Offender per the Adam Walsh Child Protection and Safety Act of 2006 form.

3. You must participate in a sexual specific evaluation or sex offender specific treatment, conducted by a sex offender treatment provider, as directed and approved by the Probation Office. The treatment provider shall be trained and experienced in the treatment of sexual deviancy and follow the guideline practices established by the Association for the Treatment of Sexual Abusers (ATSA). The sexual specific evaluation may include psychological and physiological testing which may include polygraph testing and the Visual Reaction Time Assessment (e.g. ABEL screen). You must disclose all previous sex offender or mental health evaluations to the treatment provider.

4. You must submit to periodic polygraph testing as a means to ensure that you are in compliance with the requirements of your supervision or treatment program. When submitting to a polygraph exam, you do not waive your Fifth Amendment rights, and your exercise of such rights will not give rise to a violation proceeding. The results of the polygraph examinations may not be used as evidence in Court to prove that a violation of community supervision has occurred but may be considered in a hearing to modify release conditions and/or could initiate a separate investigation.

5. You must allow the installation of computer internet monitoring software on approved internet capable devices but may still use a computer for work purposes that has been previously approved by the Probation Office. The program(s) used will be designed to identify, for the Probation Office, the viewing, downloading, uploading, transmitting, or otherwise using any images or content of a sexual or otherwise inappropriate nature. You must not attempt to remove or otherwise defeat such systems and must allow the Probation Office to examine such computer and receive data from it at any reasonable time.

6. You must advise anyone using the monitored internet capable devices that those devices are being monitored by the Probation Office.

7. You must not possess or use any computer or internet-capable device without prior approval from the Probation Office. Any such device should not be used to knowingly access or view sexually explicit materials as defined in 18 U.S.C. §2256 (2)(A).

8. You must disclose all account information relative to internet access, social networking, and email, including user-names and passwords, to the Probation Office. You must also, if requested, provide a list of all software/hardware on your computer, as well as telephone, cable, or internet service provider billing records and any other information deemed necessary by the Probation Office to monitor your computer usage.

9. You must provide the probation officer with access to any requested financial information for purposes of monitoring compliance with the imposed computer access/monitoring conditions, including, but not limited to, credit card bills, telephone bills, and cable/satellite television bills.

DEFENDANT: DIMITRI McKENZIE
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SPECIAL CONDITIONS OF SUPERVISION

10. You must not knowingly have direct contact, or contact through a third party, with children under the age of 18, unless previously approved by the Probation Office, or in the presence of a responsible adult who has been approved by the Probation Office, and who is aware of the nature of your background and current offense.

11. You must consent to third party disclosure to any employer or potential employer concerning any computer-related restrictions that are imposed upon you, unless excused by the probation officer. You are prohibited from being employed in any capacity that may cause you to come in direct contact with children, except under circumstances approved in advance by the supervising probation officer. In addition, you must not participate in any volunteer activity that may cause you to come into direct contact with children, except under circumstances approved in advance by the probation officer. Contact is defined as any transaction occurring face to face, over the telephone, via mail, over the internet, and any third-party communication.

12. Prior to accepting any form of employment, you must seek the approval of the Probation Office, in order to allow the Probation Office the opportunity to assess the level of risk to the community you may pose if employed in a particular capacity.

13. You shall be required to contribute to the costs of evaluation, treatment, programming, and/or monitoring (see Special Conditions 1 and 3-5), based on the ability to pay or availability of third-party payment.
For All Cases in Which Monetary Penalties are Imposed (impose all 3)

14. You must pay the balance of any fine or restitution imposed according to a court-ordered repayment schedule.

15. You are prohibited from incurring new credit charges or opening additional lines of credit without the approval of the Probation Office while any financial obligations remain outstanding.

16. You must provide the Probation Office access to any requested financial information, which may be shared with the Asset Recovery Unit of the U.S. Attorney's Office.

DEFENDANT: DIMITRI McKENZIE
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

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

If the 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 before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DIMITRI McKENZIE
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SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is 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.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

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1:22-cr-10312-WGY-1 Notice will not be electronically mailed to: