**20.29 Using or Attempting to Use the Mail or a Means of Interstate**

Commerce to Persuade or Coerce a Minor to Engage

**in Prostitution or Criminal Sexual Activity** **(18 U.S.C. § 2422(b))**

The defendant is charged in [Count \_\_\_\_ of] the indictment with Coercion and Enticement of a Minor in violation of Section 2422(b) of Title 18 of the United States Code. For the defendant to be found guilty of that charge the government must prove beyond a reasonable doubt:

First, that [on][between] [*insert dates alleged*] the defendant used [the mail] [*describe other means or facility of interstate or foreign commerce*], to knowingly [persuade] [induce] [entice] [coerce] an individual to engage in [prostitution][*describe proposed sexual activity*]; and

Second, the [individual was under the age of 18 and the defendant knew the person was under the age of 18] [defendant believed that the individual was under the age of 18];

Third that [if the sexual activity had occurred] [based upon the sexual activity that occurred], any person could have been charged with a criminal offense under the laws of [the United States] [*insert the state or territory*]. [In [*state or territory*], it is a criminal offense to [*describe proposed sexual activity*]; [and]

Fourth, the defendant did something that was a substantial step toward committing the crime.

A “substantial step” is conduct that strongly corroborated the defendant’s intent to commit the crime. To constitute a substantial step, a defendant’s act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances. Mere preparation is not a substantial step toward committing the crime.

Jurors do not need to agree unanimously as to which particular act or actions constituted

a substantial step toward the commission of a crime.]

**Comment**

Concerning the elements of the crime, *see, e.g.*, *United States v. Eller*, 57 F.4th 1117, 1119 (9th Cir. 2023) (citing *United States v. McCarron*, 30 F.4th 1157, 1162 (9th Cir. 2022)).

Both 18 U.S.C. § 2422(a) and (b) use the common terms “persuade,” “induce,” and

“entice.” Those terms “have plain and ordinary meanings within the statute, and [a] court [has]

no obligation to provide further definitions.” *United States v. Dhingra*, 371 F.3d 557, 567

(9th Cir. 2004).

A minor’s willingness to engage in sexual activity is irrelevant to the elements of § 2422(b). *United States v. Macapagal*, 56 F.4th 742, 747 (9th Cir. 2022) (rejecting challenge to jury instruction stating “‘[a] minor’s willingness to engage in sexual activity . . . is irrelevant to the elements of Title 18, United States Code, Section 2422(b)’”); *see Eller*, 57 F.4th 1117 at 1120-21. Under § 2422(b), “the relevant inquiry is the conduct of the defendant, not the minor.” *Macapagal*, 56 F.4th at 747 (citing *Dhingra*, 371 F.3d at 567)); *see also* *United States v. Rashkovski*, 301 F.3d 1133, 1137 (9th Cir. 2002) (“[I]t is the defendant’s intent that forms the basis for his criminal liability, not the victims’.”).

“Where a federal prosecution hinges on an interpretation or application of state law, it is the district court’s function to explain the relevant state law to the jury.” *United States v. Lopez*, 4 F.4th 706, 730(9th Cir. 2021) (quoting *United States v. Davila-Nieves*, 670 F.3d 1, 8 (1st Cir. 2012)). For instance, in *Lopez*, the district courterred in failing to instruct the jury on the applicable criminal laws of Guam against which the defendant’s proposed sexual conduct was to be evaluated. *Id.* at 730-31; *see also* *United States v. Guerrero*, 89 F.4th 694, 696 (9th Cir. 2023) (affirming defendant’s § 2422(b) conviction by identifying on appeal “another predicate offense, not specified in the indictment, with which defendant could have been charged”).

The bracketed language regarding an “attempt” or “substantial step” applies only when the charge is an attempt. *See* Comment to Instruction 4.4 (Attempt). In attempt cases, the crime at issue is “attempting to persuade, induce, entice, or coerce [a minor] to engage in sexual activity with him—not . . . attempting to engage in sexual activity with [a minor].” *McCarron*, 30 F.4th at 1163.

“‘[A]n actual minor victim is not required for an attempt conviction under 18 U.S.C. § 2422(b).’” *McCarron*, 30 F.4th at 1165 (quoting *United States v. Meek*, 366 F.3d 705, 717 (9th Cir. 2004)); *see* *Eller*, 57 F.4th 1117 at 1121 (“The statute applies whether the minors are real or fictional . . . .”). If the charge is an attempt and the object of the defendant’s inducement is an adult, use the bracketed language for the second element providing that the “defendant believed that the individual was under the age of 18.” In addition, “the requisite intent to entice a minor is not defeated by use of an adult intermediary.” *Macapagal*, 56 F.4th at 744; *see Eller*, 57 F.4th 1117 at 1121 (“[A]n attempt through an intermediary or an undercover officer still leads to criminal liability.”). Section 2422(b) does not require the government to prove direct communication with someone the defendant believes to be a minor. *Macapagal*, 56 F.4that 746.

The Ninth Circuit has not defined the term “sexual activity” for purposes of 18 U.S.C. § 2422(b). Moreover, there is a circuit split as to whether “sexual activity” requires “physical contact.” *See United States v. Taylor*, 640 F.3d 255, 259-60 (7th Cir. 2011) (holding that “sexual activity” requires “physical contact”); *United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012) (“The primary evil that Congress meant to avert by enacting § 2422(b) was the psychological sexualization of children, and this evil can surely obtain in situations where the contemplated conduct does not involve interpersonal physical contact.”); *United States v. Dominguez*, 997 F.3d 1121, 1123 (11th Cir. 2021) (no interpersonal contact required).

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