

**JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT**

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20 September 2017

On 6 April 2016, the Judicial Council approved the Eleventh Circuit Pattern Jury Instructions, Criminal Cases, 2016 revision. On 9 December 2016, the Judicial Council approved the first set of revised and new instructions. On 7 September 2017, the Judicial Council approved the following new Offense Instruction:

Offense Instruction

NEW

O92.3 Attempted Coercion and Enticement of a Minor to Engage in Sexual Activity

All other instructions in the 2016 Pattern Jury Instructions for Criminal Cases remain in effect. The 6 April 2016 resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2016 pattern jury instructions. Those limitations and conditions also apply to the instruction above.

The Pattern Jury Instruction Builder found on the public website for the Eleventh Circuit Court of Appeals at <http://pji.ca11.uscourts.gov> has been updated to reflect these changes.

FOR THE JUDICIAL COUNCIL:



James P. Gerstenlauer
Secretary to the Judicial Council

O92.3
Attempted Coercion and Enticement of a Minor
to Engage in Sexual Activity
18 U.S.C. § 2422(b)

It is a Federal crime for anyone, using [the mail] [or] any facility [or means] of interstate or foreign commerce [including a cellular telephone or the Internet], to attempt to [persuade] [induce] [entice] [coerce] a minor to engage in [prostitution] [any sexual activity for which any person could be charged with a criminal offense], even if the attempt fails.

The Defendant is charged in [Count(s)] with attempting to commit the offense of enticement of a minor.

The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly intended to persuade, induce, entice, or coerce [individual named in the indictment] to engage in [prostitution] [sexual activity], as charged;
- (2) the Defendant used [the mail] [the Internet] [a cellular telephone] [describe other facility of interstate or foreign commerce as alleged in indictment] to do so;
- (3) at the time, the Defendant believed that [individual named in the indictment] was less than 18 years old;
- (4) if the sexual activity had occurred, one or more of the individual(s) engaging in sexual activity could have been charged with a criminal offense under the law of [identify the state or specify the

United States] [If only prostitution is charged, delete this element.]; and

(5) the Defendant took a substantial step towards committing the offense.

It is not necessary for the Government to prove that the intended victim was in fact less than 18 years of age; but it is necessary for the Government to prove that Defendant believed such individual to be under that age.

Also, it is not necessary for the Government to prove that the individual was actually [persuaded] [or induced] [or enticed] [or coerced] to engage in [prostitution or] sexual activity; but it is necessary for the Government to prove that the Defendant intended to engage in [prostitution or] some form of unlawful sexual activity with the individual and knowingly took some action that was a substantial step toward bringing about or engaging in that [prostitution or] sexual activity. A “substantial step” is an important action leading up to committing an offense – not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in the persuasion, inducement, enticement, or coercion.

So, the Government must prove that if the intended sexual activity had occurred, one or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the laws of [state] [the United States]. As a matter of law, the following acts are crimes under [state] [federal] law. [Describe the applicable state or federal law]. [If only prostitution is charged, delete this paragraph.]

[As used in this instruction, “induce” means to stimulate the occurrence of or to cause.]

[As used in this instruction, the term “prostitution” means engaging in or agreeing or offering to engage in any lewd act with or for another person in exchange for money or other consideration.]

[[A telephone] [A cellular telephone] [The Internet] is a facility of interstate commerce.]

ANNOTATIONS AND COMMENTS

18 USC § 2422(b) provides:

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

Maximum Penalty: Life imprisonment and applicable fine. Minimum sentence is ten (10) years of imprisonment and applicable fine. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children. This offense also carries a minimum of five years of supervised release up to a maximum of lifetime supervised release.

United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004) (“Combining the definition of attempt with the plain language of § 2422(b), the government must first prove that [the defendant], using the internet, acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex. The underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself. That is, if a person persuaded a minor to engage in sexual conduct (e.g. with himself or a third party), without then actually committing any

sex act himself, he would nevertheless violate § 2422(b).”) (internal footnotes omitted).

United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002) (superseded by statute on other grounds); *United States v. Farley*, 607 F.3d 1294 (11th Cir. 2010). An actual minor is not required for an attempt conviction under 18 U.S.C. § 2422(b), it is sufficient that the defendant believed that a minor was involved.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The defendant need not communicate directly with the minor; it is sufficient if the defendant induces (or attempts to induce) the minor via an adult intermediary. *United States v. Hornaday*, 392 F.3d 1306, 1310-11 (11th Cir. 2004); *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004). In *Murrell*, the Eleventh Circuit also approved “to stimulate the occurrence of; cause” as the definition of “induce.”

The Internet is an instrumentality of interstate commerce. *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004). Telephones and cellular telephones are instrumentalities of interstate commerce, even when they are used intrastate. *United States v. Evans*, 476 F.3d 1176, 1180-81 (11th Cir. 2007).

The term “prostitution” is not defined in Title 18. The Supreme Court has defined the term as the “offering of the body to indiscriminate lewdness for hire.” *Cleveland v. United States*, 329 U.S. 14, 17 (1946). The term should not be defined by reference to state law, as doing so would make the term superfluous, since the statute already punishes “any sexual activity for which any person can be charged with a criminal offense.”

The term “sexual activity for which any person can be charged with a criminal offense” includes the production of child pornography, as defined in 18 U.S.C. § 2256(8). 18 U.S.C. § 2427.